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Should some direct sex discrimination claims under section 13 of the Equality Act 2010 be re-classified as "sex related discrimination" claims?

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Declaration

I confirm that this thesis has been composed by me, that the work contained in this thesis is my own and has not been submitted for any other degree or professional qualification.

Alan H Glazer

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9 January 2026

Abstract

Sex discrimination has been and continues to be, an endemic social ill in the UK. To tackle it, a multifactorial approach is required involving pressure group action, collective bargaining and litigation, to name but a few approaches. This thesis focuses on the litigation option, with a focus on how the system of sex discrimination law can be strengthened.

Section 13 of the Equality Act 2010 (2010 Act or Act) defines direct sex discrimination as less favourable treatment of an individual because of sex. There is no defence to a direct sex discrimination claim. Indirect sex discrimination occurs, under section 19 of the 2010 Act, where a neutral provision, criterion or practice has a disproportionately adverse impact on a group of people of the same sex. The claimant must be of the same sex as the group which is disadvantaged and share the disadvantage with the group. Indirect discrimination can be justified by the employer using a proportionality defence. Direct and indirect sex discrimination claims are mutually exclusive: a claimant can plead either in the alternative, but the same discriminatory conduct cannot be both direct and indirect discrimination at the same time.

The thesis takes the position that this strictly dichotomous approach is problematic for sex discrimination litigants and judges who must adjudicate such cases. In particular, I argue, with reference to case-law, that there is a subcategory of sex discrimination claims which cannot be accurately described as either direct or indirect sex discrimination. Instead, these cases fall within a conceptual "gap" between the two. At present, there is no legal claim to fill this "gap." The central question posed by the thesis is: how should the legislature close this "gap?"

Having identified the problem, the thesis goes on to exemplify it by critically evaluating the House of Lords decision in *James v Eastleigh Borough Council* ("*James*"). The result of this analysis is two-fold:

(1) *James*, like the other cases analysed in the thesis, is neither an example of direct nor indirect discrimination. Instead, the potentially adverse treatment is “related” to sex.

(2) The law on direct sex discrimination has been emptied of its moral and legal content by the *James* case in light of the fact that the Law Lords had to try and squeeze the facts of the case within the strictly dichotomous headings of direct or indirect discrimination.

Given this impasse, the thesis engages in a critical review of the existing literature, which tries to solve these problems, but these pre-existing theories are found wanting. As a result, I move on to construct a “sex related discrimination” model which can be applied to *James*, and cases like it. The application of the model to the *James* case demonstrates the utility of this intermediate head of claim. Indeed, it is argued that the law should include the “sex related discrimination” claim to make the system of UK sex discrimination laws more cohesive and robust. This will provide claimants with a broader range of potential sex discrimination claims. It will also re-align the respective claims with their philosophical underpinnings and promote judicial transparency.

Lay Summary

Sex discrimination has been, and continues to be, a major social problem in UK society. It can be tackled in many ways, such as social campaigning, political involvement and bringing sex discrimination claims in Employment Tribunals and courts. This thesis only concerns itself with the sex discrimination claim as a way of bringing about social change in this area. My position is that the current law is not well equipped to deal with the challenges raised by the phenomenon of sex discrimination. As a result, I argue for the introduction of a more robust, yet more flexible, system of sex discrimination laws. To do this, my claim is that it is necessary for new legislation to be introduced into this area. This legislation should include a new category of claim - the “sex related discrimination” claim – which would complement the other legal remedies which are currently available. This new claim would allow people who bring sex discrimination claims a greater range of legal options. In addition, it would make the law easier to understand for laypersons, legal practitioners and judges.

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Thanks also go to my wonderful wife, Anne, for being my best friend and providing me with moral support over the last four years. Thank you to my father, Henry Glazer, for helping me to believe in myself and for being a constant source of inspiration to me.

This thesis is dedicated to my late mother, Marie Glazer, and to my beautiful daughters, Sophia and Emilia Glazer.

List of abbreviations

Law Reports / court and tribunal citations

Administrative Court Digest	ACD
All England Law Reports	All ER
Court of Appeal	CA
Common Market Law Reports	CMLR
Court of Appeal (Civil Court)	EWCA
Employment Appeals Tribunal	EAT
European Human Rights Reports	EHRR
Industrial Cases Reports	ICR
Industrial Relations Law Reports	IRLR
Law Reports, Appeal Cases	AC
Scots Law Times	SLT
South African Law Reports	SA
Supreme Court Reports, Canada	SCR
United Kingdom House of Lords	UKHL
United Kingdom Supreme Court	UKSC
Weekly Law Reports	WLR

Journals

Cambridge Law Journal	CLJ
Employment Law Bulletin	Emp LB
European Human Rights Law Review	EHRLR

European Journal of International Law	EJIL
IDS Employment Law Brief	IDS Emp L Brief
Industrial Law Journal	ILJ
International Journal of Discrimination and the Law	IJDL
Law Quarterly Review	LQR
Legal Studies	LS
Legal Theory	LEG
Modern Law Review	MLR
New Law Journal	NLJ
Oxford Journal of Legal Studies	OJLS
Pensions Law Review	Pens LR
Public Law	PL

Words and phrases used in footnotes

Advocate General	AG
Edition	edn
Editor(s)	ed(s)
Equal Opportunities Commission	EOC
Footnote internal to thesis	n
House of Commons	HC
House of Lords	HL / UKHL

Incomes Data Services	IDS
Lord Justice	LJ
President	P
Regulation	reg
Section(s)	s / ss
South Africa	SA
UK Supreme Court	UKSC

Table of cases

UK cases

Ahmed v Amnesty International [2009] UKEAT/447/08, [2009] ICR 1450

Aitken v Commissioner of Police of the Metropolis [2011] EWCA Civ 582, [2012] ICR 78

Aster Communities Limited v Akerman-Livingstone (Equality and Human Rights Commission intervening) [2015] UKSC 15, [2015] AC 1399

Autoclenz v Belcher [2011] UKSC 41, [2011] ICR 1157

Barry v Midland Bank Plc [1999] 1 WLR 1465 (HL)

Basildon and Thurrock NHS Foundation v Weerasinghe [2015] UKEAT/397/14, [2016] ICR 305

Bull v Hall [2013] UKSC 73, [2013] 1 WLR 3741

Charlesworth v Dransfields Engineering Services Ltd [2017] UKEAT/0197/16/JOJ (EAT)

Chief Constable of West Yorkshire Police v Homer [2012] UKSC 15, [2012] ICR 704

City of York Council v Grosset [2018] EWCA Civ 1105, [2018] ICR 1492

Clark v Novacold [1999] ICR 951 (CA)

Clarke v Eley (IMI) Kynoch [1983] ICR 165

Department for Work and Pensions v Boyers EA-2020-001050-OO

Donoghue v Stevenson [1932] AC 562 (HL)

English v Thomas Sanderson Blinds [2008] EWCA Civ 1421, [2009] 2 CMLR. 18

Essop and others v Home Office (UK Border Agency) [2017] UKSC 27, [2017] 1 WLR 1343

Ghaidan v Godin-Mendoza [2004] UKHL 30, [2004] 2 AC 557

Gill v El Vino Co [1983] 2 WLR 155

GMB v Allen [2008] EWCA Civ 810, [2008] ICR 1407

Gray v University of Portsmouth UKEAT/0242/20/OO

Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265, [2017] ICR 160

Hall v Chief Constable of West Yorkshire Police UKEAT/0057/15/LA, [2015] IRLR 893

Hampson v Department for Education and Science [1991] 1 AC 171 (HL)

Hardy & Hansons Plc v Lax [2005] EWCA Civ 846, [2005] ICR 1565

Health and Safety Executive v Cadman [2004] EWCA Civ 1317, [2005] ICR 1546

High Quality Lifestyles Ltd v Watts [2006] UKEAT/0671/05/ZT, [2006] IRLR 850

H.J. Heinz Co. Ltd. v Kenrick [1999] EAT/1082/98, [2000] ICR 491

Interserve FM Limited v Tuliekyte 2017 UKEAT/0267/16/JOJ, [2017] IRLR 615

James v Eastleigh Borough Council [1990] 2 AC 751 (HL)

Land Registry v Houghton [2015] UKEAT/0149/14/BA

Lee v Ashers Baking Company [2018] UKSC 49, [2020] AC 413

Lewisham London Borough Council v Malcolm [2008] UKHL 43, [2008] 1 AC 1399

London Underground Limited v. Edwards (No.2) [1999] ICR 494 (CA)

Nagarajan v LRT [2000] 1 AC 501 (HL)

Ojutiku v Manpower Services Commission [1982] ICR 661 (CA)

Owen & Briggs v James [1982] ICR 618 (CA)

Pnaiser v NHS England [2015] UKEAT/0137/15/LA, [2016] IRLR 170

Post Office v Jones [2001] EWCA Civ 558, [2001] ICR 805

Price v Civil Services Commission [1977] EAT1/77, [1977] 1 WLR 1417

R v Birmingham CC ex p EOC [1989] AC 1155 (HL)

R v Immigration Officer at Prague Airport [2004] UKHL 55, [2005] 2 AC 1

R v Secretary of State for Employment ex parte EOC [1995] 1 AC 1 (HL)

R (Carson) v Secretary of State for Work and Pensions [2005] UKHL 37; 2006 1 AC 173

R (E) v Governing Body of JFS [2009] UKSC 15, [2010] 2 AC 728

R (on the application of Elias) v Secretary of State for Defence [2005] EWHC 1435 (Admin), [2006] ACD 10

R (Z and another) v Hackney London Borough Council and another [2020] UKSC 40, [2020] 1 WLR 4327

Risby v London Borough of Waltham Forest [2016] UKEAT/0318/15/DM

S v HM Advocate (1989) SLT (JC) 469

Seldon v Clarkson Wright & Jakes [2012] UKSC 16, [2012] ICR 716

Shamoon v Chief Constable of the Royal Ulster Constabulary (Northern Ireland) [2003] UKHL 11, [2003] ICR 337

Steel v Union of Post Office Workers [1978] 1 WLR 64 (EAT)

Strathclyde Regional Council v. Wallace [1998] 1 WLR 259 (HL)

Taylor v OCS Group Ltd [2006] EWCA Civ 702, [2006] ICR 1602

Trustees of Swansea University Pension and Assurance Scheme and another v Williams [2015] ICR 1197

Webb v EMO Air Cargo (UK) Limited [1993] 1 WLR 49 (HL)

Williams v The Trustees of Swansea University Pension & Assurance Scheme [2018] UKSC 65, [2019] 1 WLR 93

European Cases

Achbita and another v G4S Security Solutions NV (Case C-157/15) [2017] 3 CMLR 21

Bilka-Kaufhaus GmbH v Karin Weber Von Hartz (Case 170 / 84) [1986] 2 CMLR 701

Birds Eye Walls Limited v Roberts (Case 132 / 92) [1993] 3 CMLR 822

Bougnaoui v Micropole SA (Case C-180 / 95) [2017] 3 CMLR 22

Coleman v Attridge Law (Case C-303/06) [2008] 3 CMLR 27

Enderby v Frenchay Health Authority and Another (Case C-127/92) [1994] 1 CMLR 8

J.P. Jenkins v Kingsgate (Case C-96/80) [1981] CMLR 24

Pretty v United Kingdom (2002) 35 EHRR 1

Smith v Avdel Systems Ltd (Case C-408/92) [1995] 3 CMLR 543

Cases from other jurisdictions

British Columbia (Public Service Employee Relations Commission) v. BCGEU [1999] 3 SCR 3

Harksen v Lane 1998 (1) SA 300 (CC)

Law v Canada [1991] 1 SCR 497

R v Kapp [2008] 2 SCR 483

Table of Legislation

Disability Discrimination Act 1995

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Race Relations Act 1976

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Representation of the People Act of 1918

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Representation of the People (Equal Franchise) Act 1928

s 1 (1)

Sex Discrimination Act 1975

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UK statutory instruments

Disability Discrimination Act 1995 (Amendment) Regulations 2003 (SI 2003/1673)

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Reg 3A (5)

Employment Equality (Age) Regulations 2006 (SI 2006 / 1031)

reg 3(1)(b)

Employment Equality (Religion or Belief) Regulations 2003 (SI 2003 / 1660)

reg 3(1)(b)

Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003 / 1661)
reg 3(1)(b)

Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000 / 1551)

Other jurisdictions

Canadian Charter of Rights and Freedoms (April 17,1982)

Art 15

Constitution of the Republic of South Africa (4 February 1997)

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Art 37 (5)

Convention for the Protection of Human rights and Fundamental Freedoms (ECHR – 3 September 1953)

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Council Directive 2000/78/EC of 27 November 2008 establishing a general framework for equal treatment in employment and occupation

Art 2(2)(a)

Art 2(2)(b)

Art 4(1)

Charter of Fundamental Rights of the European Union (7 December 2000)

Art 1

Art 10

United Nations Charter paragraph 1 (Preamble)

Chapter 1 – Introduction

Section 1 - Sex discrimination in the UK

1.1 Overview

Women in the UK have been subjected, over many centuries, to political and socio-economic disadvantages when compared with men. Moreover, these constraints on women's freedoms are not confined to the "dark and distant" past. Much of the pervasive and entrenched societal barriers faced by women were and are widespread in the 20th and 21st centuries, as the following sections will demonstrate. Indeed, sex discrimination has been, and continues to be, an endemic social ill which must be overcome. The thesis will begin by showing that, whilst conditions may have improved somewhat for women, there is still a long way to travel before we might see something approaching substantive equality between the sexes.[1]

We must do battle against sex discrimination on many different fronts, such as pressure group movements, social campaigns and by bringing legal action against putative discriminators. This thesis will only focus on the law, and litigation, relating to sex discrimination. The problems claimants have encountered when enforcing discrimination claims in the Employment Tribunal will not be considered by this thesis, nor will the enforcement problems faced by the Equality and Human Rights Commission ("EHRC") in its role as regulator of the Equality Act 2010 ("2010 Act). These topics are omitted due to space constraints.

My position is that the law should be changed to include a new species of claim, "sex related discrimination." It will be argued that this change will make

[1] When I refer to substantive equality, I mean that unequal (as opposed to symmetrical) treatment may be required to achieve equality in outcomes for each person. This demand for unequal treatment stems from the need to rectify the unequal distribution of power across different groups of people in society. For more detail, see Sandra Fredman, *Discrimination Law* (3rd edn. Oxford University Press, 2022) 2-3.

the law on sex discrimination more robust, and logically consistent, and that this will help to strengthen the fight against sex discrimination. However, before I explore my proposed solution in detail, I will provide more context on the problem.

1.1.1 Political disadvantage

Women were unable to vote in the UK until 1918.[2] Even when the right was afforded to some women, it was a qualified right: women had to be at least 30 years old and meet certain property requirements to vote.[3] By contrast, men at that time could vote from the age of 21 and were not subject to the same property conditions as women. So, the 1918 Act cannot be seen as having conferred equivalent voting status on men and women respectively. It is also suggested that the timing of the 1918 Act, and its extension of the vote to some women, was no accident. Indeed, one of its primary purposes was likely to increase the number of total potential voters in the immediate post-war years given that many UK-born men died in the First World War. Nevertheless, the more stringent voting requirements for women signalled that they were still less capable than men when it came to exercising their right to vote. As a result, women who did not meet the qualifications under the 1918 Act would have to wait another 10 years until they were able to vote on the same conditions as men.[4]

It is, therefore, unsurprising that women were unable to stand for election as Members of Parliament until 1918. In November 1918, the Parliament (Qualification of Women) Act 1918 was introduced,[5] thereby allowing women aged 21 or over to stand as candidates for a seat in the House of Commons. However, women did not gain the right to sit as a life-peer in the House of Lords until 1958.[6]

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[2] Representation of the People Act 1918, s4 ("1918 Act").
[3] *Ibid*, s.4.
[4] Representation of the People (Equal Franchise) Act 1928, s 1.
[5] s.1 (1)
[6] Life Peerages Act 1958, s 1.

Whilst the legislation cited has improved women's political rights, they are still significantly under-represented in UK politics. Even today, women only make up approximately one-third of the Members of the House of Commons (a record high) and just over one-quarter of the House of Lords.[7] This disparity in representation between the sexes raises a strong presumption that the UK legislature remains a predominantly patriarchal institution. So long as such representational discrepancies continue, there remains a significant risk that political issues which have particular significance to females will remain on the margins of legislative agendas.

1.1.2 Socio-economic disadvantage

Women have historically lacked the same educational opportunities as men in the UK. Oxford and Cambridge did not award degrees to women until 1920 and 1948 respectively.[8] The first University in the UK to offer degrees to women was the University of London and that was not until 1878.[9]

It was inevitable, then, that women were blocked from accessing the professions. Even when they could access the relevant professions, they often experienced less favourable terms and conditions than their male counterparts. This trend was immediately apparent in the teaching profession. After World War I ended, teachers took significant pay cuts across the board.[10] The hardest hit, so far as reductions in salary were concerned, were female teachers.[11] In addition, female teachers in some geographical areas in the UK

[7] House of Commons Library, 'Female Members of Parliament' 23 October 2023 <https://commonslibrary.parliament.uk/research-briefings/sn06652/#:~:text=There%20are%20currently%20225%20MPs,elected%20was%20Constance%2C%20Countess%20Markievicz> accessed 4 March 2024

[8] Oxford Open Education, 'Women's Education in Britain: A Brief History' <https://www.ool.co.uk/blog/womens-education-in-britain-a-brief-history/> accessed 15 January 2024

[9] *Ibid*, 1.

[10] University College London Historical Archives, 'Women and Education' <https://www.ucl.ac.uk/library/collections/special-collections/our-collections/archives-and-manuscripts/ioe-archives/women-and> Accessed 15 January 2024

[11] *Ibid*, 1

were forced to resign once married.[12] Whilst the Burham Salaries Scale assisted some women in the teaching profession in the 1920s, they were still only earning around 80 percent of their male colleagues' salaries.[13] Consequently, it was not until the enactment of the Sex Discrimination Act 1975 ("1975 Act") and Equal Pay Act 1970 ("1970 Act") that female teachers could begin to claim parity of treatment, pay, and contractual terms and conditions, with their male counterparts.

Nevertheless, the position in law and finance was even more retrograde than the teaching profession. Indeed, women were not entitled to enter the legal profession until 1919,[14] and were prohibited from the trading floors of the London Stock Exchange until 1973.[15]

Returning to the present day, the gender pay gap among full-time employees, sitting in favour of men, was 9.0 percent in April 2019, 7.7 percent in April 2021 and 8.3 percent in April 2022.[16] Moreover, the difference widens considerably after women reach 40 years of age.[17] The pensions pay differential gives even more cause for concern. The UK Government's latest statistics (2018-20) reveal a pensions pay gap, in favour of men, of 35 percent.[18]

The statistics cited above, in relation to the gender pay gap, only focus on full-time working. If part-time workers are included within these figures, the gender

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[12] *Ibid*, 1.
[13] *Ibid*, 1.
[14] Sex Disqualification Removal Act 1919, s 2
[15] 'Celebrating the 50th anniversary of women's admittance to the London Stock Exchange trading floor' <https://www.londonstockexchange.com/discover/news-and-insights/celebrating-50th-anniversary-womens-admittance-london-stock-exchange-trading-floor> accessed 15 January 2024
[16] Office of National Statistics 'Gender Pay Gap in the UK: 2022' (https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/genderpaygapintheuk/2022) accessed 27 December 2023
[17] *Ibid*, accessed 27 December 2023
[18] Department for Work and Pensions, 'The Gender Pensions Gap in Private Pensions' June 2023 <https://www.gov.uk/government/statistics/gender-pensions-gap-in-private-pensions/the-gender-pensions-gap-in-private-pensions#:~:text=The%20Gender%20Pensions%20Gap%20is,men%20and%20women%20around%20NMPA%20> accessed on 15 January 2024

pay gap rose from 9.0 percent to 17.3 percent in 2019.[19] This is a stark difference, and an alarming one.[20] As Fredman observes, there are more women than men in lower paid, part-time work and this is likely due in large part to a cultural acceptance that women have greater childcare responsibilities than men.[21] As such, Fredman argues that the solution to this problem lies in a societal shift in our attitudes towards parenting:

> "To regard parenting as unique to those who give birth is to reinforce stereotypes about women as primary childcarers and to entrench their resultant disadvantage in the labour market. Both parents should therefore be regarded as similarly situated in relation to parenting. However, the reintroduction of a male comparator should not be an opportunity for levelling down, either by settling for parenting rights at a low level or removing women's existing rights."[22]

Whilst some people may regard Fredman's proposed solution as unrealistic, perhaps even unduly idealistic, her view that women are disproportionately disadvantaged in the labour market is certainly backed up by relevant statistics.

The Solicitors' Regulation Authority ("SRA") monitors diversity and inclusion in legal practice in England and Wales. Their most recent statistics (updated in January 2024) were collated from information obtained from the vast majority of law firms in England and Wales.[23] These figures show that whilst women constitute 53 percent of solicitors in England and Wales, only 32 percent are working at equity partner level.[24]

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[19] Fredman, n.1, 71.
[20] *Ibid*, 71.
[21] *Ibid*, 343.
[22] *Ibid*, 323.
[23] 99 percent of law firms in England and Wales contributed to the pool of statistics, comprising 203,000 people working in 9,276 firms - SRA, 'Diversity in Law Firms' Workforce' Updated January 2024. <https://www.sra.org.uk/sra/equality-diversity/diversity-profession/diverse-legal-profession/>.
[24] *Ibid*, 1.

Meanwhile, statistics from Cranfield School of Management show that, as of 2022, women are underrepresented at senior levels on FTSE 100 boards (39.6 percent women, 60.4 men)[25] and FTSE 250 boards (38.9 percent women, 61.1 percent men).[26] In addition, only 36 of the 413 FTSE 100 female directors held executive directorships, whilst a mere 9 percent were Chief Executive Officers.[27] Meanwhile, in FTSE 250 companies, only 47 of the 752 female directors were executive directors.[28]

It is difficult to gauge whether this underrepresentation of women in senior legal and commercial positions in the UK is solely due to a cultural expectation that women are primary childcarers, or because of a more complex interaction of factors (of which responsibility for childcare may play a part). That question is beyond the scope of this thesis. It is sufficient for present purposes to observe that women *are* underrepresented at senior levels of management and that this is caused by one, or more, societal barriers to their career progression.

Women have also been historically disadvantaged in various social and cultural settings. Again, this disadvantage is not restricted to the distant past. It may come as a surprise that women were barred from ordering drinks at a bar (unlike men who could do so) in some establishments as late as the early 1980s.[29] Moreover, it is shocking to consider that a man could not be held criminally liable for raping his wife in Scots law until the late 1980s.[30] In 2016, a famous Scottish golf club, Muirfield, was effectively forced into admitting female members if it wished to continue to host major golfing events.[31] Even

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[25] Michelle Tessaro, Susan Vinnicombe 'Cranfield School of Management - Female FTSE Board Report 2022' 10 <https://www.cranfield.ac.uk/femaleftseboardreport> accessed 4 March 2024
[26] *Ibid*, 23.
[27] *Ibid*, 6 - 7.
[28] *Ibid*, 6.
[29] *Gill v El Vino* [1983] 2 WLR 155 (CA)
[30] *S v HMA* 1989 SLT 469
[31] Zak, Sean, 'At Muirfield, the most symbolic major in years, things are still complicated' <https://golf.com/news/muirfield-womens-open-still-complicated/> accessed 27 December 2023

more recently, the Garrick Club in London has recently voted to include female members within its ranks after nearly 200 years of male-only membership.[32]

My view, therefore, is that women in the UK continue to experience socio-economic and political disadvantages when compared with men. Whilst sex discrimination may not be as overt as it once was, it is hoped that the cited statistics, and examples, demonstrate that sex discrimination is still very much a part of life for women in the UK. That then begs the question: are our sex discrimination laws maximising protection for women (and of course, men) or can they be improved upon?

1.1.3 The direct / indirect discrimination divide

My position is that the strictly dichotomous approach between direct and indirect sex discrimination often exacerbates pre-existing inequalities between men and women that are woven into the fabric of our society. I shall expand on this argument as the thesis progresses. For now, a few observations should suffice.

In the case of direct sex discrimination, section 13 of the 2010 Act adopts a formal equality model. This means that, for a woman to show that she has been directly discriminated against, she must prove that she has been treated less favourably than a male comparator.[33] However, this male "norm" is an unhelpful starting point because a woman must show that she has characteristics which comply with this norm to win her claim for direct sex discrimination. This requirement ignores the fact that there are numerous differences between men and women, and the ways in which they are

[32] Simon Jenkins, 'I'm a Garrick member. The exclusion of women is the opposite of liberal. It is out of date and wrong.' *The Guardian* (London, 27 March 2024).

[33] Section 13(1). An exception to this requirement for a comparator in direct discrimination cases can be found in the "unfavourable treatment" provisions of section 18 of the 2010 Act. Section 18 protects women against discrimination because of pregnancy and / or maternity. The unfavourable treatment criterion in section 18 removes the need for a comparator because of the recognition that pregnant women are in a unique situation which does not apply to men. There is also no defence in section 18 which can be used by discriminators to justify their discriminatory conduct. These separate provisions of the 2010 Act will not be covered in the thesis.

respectively treated in our society, which make such a comparison exercise very difficult, if not impossible.

The indirect discrimination model moves away from the moral foundation of formal equality towards a substantive account of equality. It does so by focusing on whether the employer's neutral provision, criterion or practice (PCP) has a disadvantageous *impact* on women vis-à-vis men situated in the same or similar circumstances. A common example of this in the field of employment is an employer's PCP which requires all employees to work-full time.[34] Whilst this is a neutral PCP, in the sense that it applies to everyone in the relevant pool (men and women) equally, it tends to have a disproportionately adverse impact on women. Indeed, women will generally have greater childcare commitments than men. As such, it will often be more difficult for female employees to comply with this full-time requirement than it will be for their male colleagues.

Whilst the attempt to level the playing field is a welcome one, it ignores the fact that there is a subset of cases which neither exemplify the structural features of direct or indirect sex discrimination. This brings me on to the overarching purpose of my thesis.

Section 2 - the overarching purpose of this thesis

The central aim of this thesis is to strengthen the law on sex discrimination in the UK by introducing a new statutory claim: "sex related discrimination." I shall argue that this new claim can be forged by transposing section 15 of the 2010 Act or (the now repealed) section 3A of the Disability Discrimination Act 1995 ("1995 Act") or perhaps a combination of components from both statutory provisions, to the protected characteristic of sex.

My position is that this hypothetical statutory provision should apply to a sub-set of so-called "direct" sex discrimination cases which fall within a conceptual

[34] This example PCP will be used throughout the thesis to act as a consistent point of reference.

chasm between the direct and indirect discrimination paradigms. These cases are those where the discrimination is "related" to, or "arises from," the protected characteristic of sex. I shall focus my attention on the direct sex discrimination claim as my test case, *James* v *Eastleigh Borough Council* ("*James*")[35] was held to be an example of direct sex discrimination by the House of Lords.

My analysis will show that this new legal provision would strengthen the law on sex discrimination by introducing a more flexible spectrum of legal options to a claimant who engages in sex discrimination litigation. It would also promote judicial consistency and transparency. Indeed, as the thesis will go on to demonstrate, judges are, at present, forced into the intellectually precarious position where they are having to engage in strained, and sometimes fallacious, reasoning to squeeze these examples of "related discrimination" into the strictly binary headings of direct and indirect sex discrimination. I shall also argue that, by bringing such clarity and accountability to this area of the law, the concepts of direct and indirect discrimination would also be sharpened in the process.

The thesis represents original territory. To my knowledge, no other studies have sought to demonstrate how the "related discrimination" model could be transposed from disability discrimination law to any of the other protected characteristics in the 2010 Act. Moreover, there are no theories within the existing literature which provide detailed arguments as to how or why such a transposition could or would strengthen areas of anti-discrimination law other than disability discrimination. As a result, the thesis is a novel contribution to the existing literature.

To build a strong case for my overarching purpose, I need to answer a series of sub-questions and address several sub-arguments. The next section will summarise these.

[35] [1990] 2 AC 751 (HL).

Section 3 The research questions in the thesis

1.3.1 A summary of the research questions in the thesis

To determine whether a "related discrimination" model should be transposed to sex discrimination, the first research question I need to answer is whether "sex related discrimination" exists on a *conceptual* plane. I stress the "conceptual" aspect as it clearly does not exist as a *legal* head of claim. To achieve this, I must first identify the main problems with direct sex discrimination law in the UK. This is important to the mandate of this thesis as the problems with this head of claim stem from the law's inability to distinguish between direct and "related" claims of sex discrimination. As such, I query whether any of the theories, or models, in the existing literature can resolve the problems associated with direct sex discrimination.

I also need to specify which of the definitional components (from section 15 of the 2010 Act or section 3A of the 1995 Act) should be included in my proposed model of "sex related discrimination." In addition, I must respond to the question as to whether my model can be applied to real cases. If so, I then need to determine whether the "sex related discrimination" model can generate the "right" legal outcome in such cases when the binary approach fails to do so.

These research questions require some unpacking before I move on to describe the methodologies I shall employ in the thesis.

1.3.2 Research question 1 - does "related discrimination" exist outwith the protected characteristic of disability?

To achieve the central aim of my thesis, I need to provide proof of the conceptual existence of this sub-set of discrimination cases. Accordingly, the thesis identifies this subcategory of cases, within the protected characteristic

of sex (and religion or belief and race discrimination) which do not fall within the direct or indirect discrimination categories.

I shall use 3 case examples, from the Employment Appeals Tribunal ("EAT"), the House of Lords and the UK Supreme Court ("UKSC"), to show how "related discrimination" cases have been misclassified by the judiciary (perhaps through no fault of their own) as direct discrimination claims.[36]

It will be argued that all these cases have a common denominator – the discrimination is "related to" or "arises from" the protected characteristic. Indeed, the discrimination in these cases is not because of the protected characteristic itself (direct discrimination) or the application of a neutral PCP (indirect discrimination). However, at present, save in the context of disability discrimination,[37] UK anti-discrimination law does not have a statutory provision which applies to these "related discrimination" cases. I shall contend that this is an untenable gap in sex discrimination law which requires a legislative "fix."

1.3.3 Research question 2 - what are the main problems with direct sex discrimination law in the UK?

Before I can explain the utility of my legislative "fix," I need to provide more detail on how and why the current legal position is unsustainable. In doing so, I contend that the substance (and judicial interpretation) of section 13 of the 2010 Act does not accurately capture the moral and legal wrongs which underlie direct sex discrimination.

The moral wrongs, which emanate from a pluralist account of equality, are far removed from the comparative egalitarianism found in the section 13 model. Instead, the moral wrongs of direct sex discrimination are rooted in dignitarian and autonomy-based concerns. Indeed, my conception of equality, which is also a substantive account, posits that direct sex discrimination breaches the

[36] *James* - see n.35; *Ahmed v Amnesty International* UKEAT/447/08, [2009] ICR 1450 ("*Amnesty*"); *R (E) v Governing Body of JFS and another (United Synagogue and others intervening)* [2009] UKSC 15, [2010] 2 AC 728 ("*JFS*").
[37] 2010 Act, s 15

victim's dignity because it demeans the victim on the grounds of her sex. Moreover, it violates autonomy because it deprives the injured party of a life-opportunity based on a personal attribute or characteristic which has been historically associated with socio-economic, political and cultural disadvantages. I argue that sex is such a personal characteristic.

I then move on to consider the legal position as far as direct sex discrimination is concerned. I do so by critically examining the *James* case. This exercise will show that the senior UK judiciary have had little option but to extinguish the law's moral content in such cases.

From a legal perspective, I shall also argue that, in *James*, the Council's decision to charge Mr James an admissions fee for access to its recreational facilities was not because of his sex. Instead, the real reason for the charge was that Mr James had not reached pensionable age. As such, in *James*, the Council was operating a policy of free entry to those of pensionable age to recompense them for the loss of income that retirement normally entails. Accordingly, my position is that the Council's policy in *James* had both benign motives and *reasons*. Yet the House of Lords held that this policy constituted direct sex discrimination. To make matters worse, the Law Lords failed to even apply the existing legal definition of direct sex discrimination when making their decision in *James*. Instead, they ignored the reason for the treatment by simply holding that the policy or criterion was "inherently discriminatory."

As a result, I shall go on to argue, as the thesis progresses, that the *James* decision was wrong, both on moral and legal grounds, but perhaps inevitable given the absence of a "related discrimination" model in our sex discrimination laws.

1.3.4 Research question 3 – can any of the pre-existing theories in the literature solve the main problems with direct sex discrimination law?

Having established, with reference to the *James* decision, that the law on direct sex discrimination is highly problematic and in need of significant reform, I

critically evaluate those existing theories in the literature which purport to resolve these problems. I identify 3 relevant theories, plus Fredman's brief suggestion (in her earlier writing) to transpose section 15 to protected characteristics other than disability.[38]

I analyse Bowers and Moran's arguments that the introduction of a general defence to direct sex discrimination claims would ease the tensions and inconsistencies in this area of the law.[39] Smith and Campbell's "reasoning-oriented" approach, which constitutes a model of direct discrimination which allows the judge to dissect all aspects of the putative discriminator's thought-processes and reasoning, is also evaluated.[40] In addition, I critically review Pilgerstorfer and Forshaw's argument that the law in this area needs an "intermediate" head of claim. They identify what they believe to be a new form of discrimination which they term "quasi-direct discrimination."[41]

Having reviewed the existing literature, I observe that none of the theories are able to solve the problems I associate with direct sex discrimination law in the UK. That then leaves Fredman's brief suggestion to transpose section 15 of the 2010 Act to protected characteristics other than disability. The remainder of the thesis will focus on this potential solution.

1.3.5 Research question 4 – what definitional components should be included in my "sex-related discrimination" model and is this model a head of claim that is distinct from direct and indirect discrimination?

If I am to achieve my overarching purpose, I also need to construct a theoretically robust, but practically useful, model of "sex related discrimination" that is accessible to lay litigants, legal practitioners and adjudicators.

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[38] Sandra Fredman, *Discrimination Law* (2nd ed. Oxford University Press 2011) 213.
[39] John Bowers, Elena Moran, 'Justification in direct sex discrimination law: breaking the taboo' (2002) 31(4) ILJ 307; John Bowers, Simon Honeyball, Elena Moran 'Justification in direct sex discrimination: a reply' (2003) 32(3) ILJ 185.
[40] Colin Campbell, Dale Smith, 'The grounding requirement for direct discrimination' (2020) 136(Apr) LQR 258.
[41] Simon Forshaw, Marcus Pilgerstorfer, 'Direct and indirect discrimination: is there something in between?' (2008) 37(4) ILJ 347.

I do so by critically dissecting the existing components of section 3A of the 1995 Act and section 15 of the 2010 Act. This exercise begins by contrasting the comparator-driven approach, with its emphasis on "less favourable treatment," with the "unfavourable treatment" model found in section 15. I then move on to differentiate the causation requirements in section 3A with those found in section 15. In addition, I compare the section 3A "material and substantial defence" with the "proportionality" defence in section 15, and the EU "objective justification" defence which was laid down by the European Court of Justice (ECJ as it then was) in the case of *Bilka-Kaufhaus GmbH v Karin Weber Von Hartz*.[42]

By doing this, I intend to extract the "best parts" from the respective provisions and to then merge them together to form a workable definition of "sex related discrimination." When I refer to the "best parts" of each source of law, I mean the legal component which best represents the purposes of the "sex related discrimination" claim. These purposes will be expanded upon in the thesis. Having constructed a workable definition of "sex related discrimination" I then assess whether it can be considered as a head of claim that can be differentiated, in a moral sense, from direct and indirect sex discrimination.

1.3.6 Research questions 5 and 6 – can my "sex-related discrimination" model be applied to real cases? Can this application generate the "right outcome" in such cases?

To achieve my overarching objective, which is to strengthen the law on sex discrimination by including a "sex related discrimination" claim, I also need to show that the model is capable of being applied to real legal cases. Indeed, my model must have practical utility as well as theoretical consistency.

As a result, having constructed a statutory formulation of "sex related discrimination" I shall then apply it to the facts of the *James* case. I chose the

42 Case C-170 / 84 [1986] 2 CMLR 701 ("Bilka").

James case because it is a purported case of direct sex discrimination which turns out, on closer analysis, to be a "sex related discrimination" claim. Moreover, it clearly typifies the problems with the law on direct sex discrimination which I identify earlier in the thesis, and how they might be overcome by applying the "sex related discrimination" model.

Section 4 - the methodological approaches adopted in the thesis

To respond to the above research questions, I employ three methodologies in the thesis: the doctrinal, theoretical and comparative approaches. I shall outline my understanding of each methodology then describe how they apply to each research question.

1.4.1 The doctrinal methodology

There is no consensus amongst legal academics as to what doctrinal legal methodology does, and does not, demand.[43] Set against this backdrop, scholars have different ideas regarding the content of this methodology.

Dobinson and Johns view the doctrinal method as a way for the legal researcher to identify what the relevant law is (from looking at primary and secondary sources) and, in some instances, to critically evaluate a particular area of the law.[44] However, when the field of enquiry enters the arena of critical analysis, it then moves on to a normative or theoretical method of research.[45] By contrast, Hutchinson views the analytical component as a necessary part of doctrinal research.[46] This critical analysis, according to Hutchinson, is necessary for the legal researcher "to determine a meaning and pattern so as

[43] Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed.) *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?* (Bloomsbury 2013).
[44] Ian Dobinson, Francis Johns, 'Legal Research as Qualitative Research' in Wing Hong Chui, Mike McConville (eds.) *Research Methods in Law* (2nd edn. Edinburgh University Press 2017).
[45] *Ibid*, 20 - 1.
[46] Terry Hutchinson, 'Doctrinal Research – Researching the Jury' in Mandy Burton, Dawn Watkins, (eds.) *Research Methods in Law* (2nd edn Routledge 2018).

to condense the writing to its essence."[47] As a result, he views the doctrinal approach as a method of identifying, critically evaluating and conceptually amalgamating a body of laws into a coherent whole.[48] Pendleton goes even further than Hutchinson, arguing that critical analysis, which he refers to as "reflection," is the most important part of the doctrinal process:

> "Traditional legal doctrinal criticism of course requires identifying, reading and digesting the area of concern to the author – cases or statutes, preparatory material and subsequent commentary, for example – but this is relatively straightforward and involves a minor proportion of time devoted to the whole enterprise. Most of the time is devoted to reflection on the law and applying one's imagination to gain new insights. Without imagination, reflection in any area of human knowledge may render technical skills yet will be sterile – it will create nothing new."[49]

I disagree with Dobinson and Johns' view that critical evaluation, by itself, takes the legal scholar into the field of theoretical territory. Indeed, my view is that, to confine the doctrinal process to a method of identifying and synthesising the law is to take too narrow an approach to its limits. It sounds more akin to the "descriptive methodology" described by Kestemont which prioritises the identification of the law solely *as it is*, and can be distinguished from the doctrinal method on such grounds.[50]

By contrast, Pendleton's approach on the analytical function of doctrinal methodology is too wide. My position is that he downplays the considerable task of collating, identifying and synthesising the relevant law (which is often voluminous). In doing so, his exposition of the doctrinal method, with its

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[47] *Ibid*, 18.
[48] *Ibid*, 12.
[49] Michael Pendleton, 'Rejecting the Dominance of Empirical Legal Scholarship: A Better Way of Choosing, Researching and Writing a Scholarly Article' in Hong Chui H, McConville, M, n.44, 235.
[50] Lina Kestemont, *Handbook on Legal Methodology: From Objective to Method* (Cambridge University Press 2022) 9

emphasis on theoretical reflection, crosses into the territory of interdisciplinary approaches which are distinct from the doctrinal method and more akin to approaches found in legal theory, jurisprudence and legal philosophy.

My view is that the process of identifying, amalgamating and critically examining the law, using predominantly legal methods of analysis (rather than an interdisciplinary approach) represents a more accurate understanding of the doctrinal method. In this respect, my approach aligns most closely with Hutchinson's conception of doctrinal research.

Bearing this definition of the doctrinal method in mind, this method is employed when answering many of the research questions posed by the thesis. I answer research question 1, concerning whether a subset of direct sex discrimination cases can be re-classified on a conceptual level as "related discrimination," by critically examining the relevant case-law. This then leads me on to the conclusion that direct discrimination claims can come in two different forms: "reason why" or "criterion-based" cases. The latter category of case is then identified as the type of case which is most amenable to this re-classification process. Indeed, a common denominator arises from this doctrinal examination: that "related discrimination" claims do exist within protected characteristics other than disability (including sex) and that, in such cases, the adverse treatment is "related" to or "arises from" the protected characteristic.

The doctrinal approach also assists me when answering part of research question 2. It should be borne in mind that this question asks what the main problems are with direct sex discrimination law. I engage in the doctrinal analysis by critically analysing the *James* case. This analysis culminates with the observations that the legal tests, set down by the Law Lords in *James*, failed to apply the statutory definition of direct sex discrimination when reaching their majority findings.

Research question 3 seeks an answer to the question as to whether any of the pre-existing theories in the literature can resolve the problems associated with

direct sex discrimination. I employ the doctrinal method when critically examining these theories.

I also answer research questions 5 and 6, which concern the applicability of the "sex related discrimination" model to real cases, by adopting a largely (but not wholly) doctrinal approach. I re-iterate the problems with direct sex discrimination which were identified earlier in the thesis. I then condense these problems as they overlap at legal and conceptual levels. In addition, I apply my "sex related discrimination" model to the *James* case, arguing that it yields (what I argue is) the correct legal outcome.

In doing so, I adopt a fictionalised judicial role. I chose the judicial lens because it brings sharply into focus how the *James* case *could* have been decided in the present day if the "sex related discrimination" model was given legislative effect. . This also helps to demonstrate how my model of "sex related discrimination" resolves the general problems with direct sex discrimination law and how the model can be applied to real-life cases.

1.4.2 The theoretical methodology

A theoretical methodology can also be used to describe a variety of different approaches to legal research. One interpretation can be found in Roberts' analysis of interdisciplinarity in legal theory.[51] Roberts portrays the interdisciplinary approach as involving interactions between the legal method and other external autonomous disciplines, such as philosophy, economics, sociology, politics, literature and the humanities.[52] Roberts' approach, in this respect, is echoed by Taekema who states that a theoretical approach will often rest on interdisciplinary foundations and, in this respect, can be distinguished from the traditional doctrinal mindset:

> "It does make sense...to make a basic distinction between research that focuses primarily on studying positive law and research that

[51] Roberts, P, 'Interdisciplinarity in Legal Research' in Hong Chui M, McConville, M, n.44, 90.
[52] *Ibid*, 93.

> has a broad, "law and," orientation...such as law and economics, socio-legal studies, legal philosophy or law and literature."[53]

I take a theoretical approach, based on an interdisciplinary method, to help extrapolate the normative foundations of the direct sex discrimination claim (part of research question 2). Whilst the doctrinal approach helped me to uncover the legal problems with direct sex discrimination law, the theoretical method allows me to determine the moral wrongs which underpin the direct sex discrimination claim. In turn, I am then able to demonstrate that the legal position is not consonant with the moral foundations of the direct sex discrimination claim.

In addition, the theoretical method helps me to identify the moral wrongs associated with the "sex related discrimination" claim. To argue these points, I must embark on a philosophical examination which transcends the doctrinal method and analyses principles, standards and values such as egalitarianism, dignitarianism and autonomy. As I shall go on to describe in section 1.4.3, the theoretical approach is also combined with the comparative method to give a full answer to research question 2.

I also engage in what Kestemont describes as a "theory-building" methodology.[54] She describes this process as creating a new theory, replacing an old one, or assimilating multiple theories into one overarching theory.[55] Kestemont also stresses the need for the theory to be logically coherent. To do so, it is necessary for the theorist "to uncover the essentials of legal constructs, including their effects and consequences."[56] Moreover, the legal

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[53] Sanne Taekema, 'Theoretical and Normative Frameworks for Legal Research for Legal Research: Putting Theory into Practice, Law and Method' 7 March 2018 <https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2018/02/lawandmethod-D-17-00010> accessed 15 January 2024

[54] Kestemont, n.50, 14 - 5.
[55] *Ibid*, 14.
[56] *Ibid*, 15.

theory should also be capable of being a pragmatic tool in the everyday reality of legal systems.[57]

I engage in a theory-building exercise when assembling the components of the "sex related discrimination" model (part of research question 4). To do this, I compare the different comparator and causation requirements in section 15 of the 2010 Act as against those found in section 3A of the 1995 Act. That analysis helps me to identify various definitional components which build a substantial part of my "sex related discrimination" model. Moreover, the theory is shown to have practical utility when applied to the *James* case in the latter part of the thesis.

1.4.3 The comparative law methodology

Much like the doctrinal method, there is no generally agreed method for comparative legal methodology.[58] Each comparativist has his or her own conception of what the method should, and should not, entail. As Zweigert and Kotz note, this lack of agreement on an appropriate methodology is probably due, at least in part, to the relatively recent roots of the comparative discipline.[59] Bearing this in mind, I shall develop my own understanding of the comparative function. Where a specific point is contentious, I defend its inclusion in my outline of the comparative method with reasoned argumentation.

Siems is correct to observe that, although scholars might disagree on how to formulate a comparative method, they generally agree that comparative methodology should not be used to compare laws which are in the same country.[60] Given that the broad purpose of comparative law is to achieve a better understanding of a particular legal, or interdisciplinary legal, topic by

[57] *Ibid*, 15.
[58] Sabrina Ragone, Guido Smorto, *Comparative Law: A Very Short Introduction* (Oxford University Press 2023).
[59] K Zweigert and H Kotz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn. Oxford University Press 1998) 33.
[60] Mathias Siems, *Comparative Law* (3rd edn. Cambridge University Press 2022) 15.

comparing the domestic jurisdiction‘s position with that of a foreign jurisdiction, or jurisdictions, this is a sensible place to start.[61]

As Zweigert and Kotz observe, the need to critically examine other jurisdictions often arises from an inherent dissatisfaction with the state of the law in one’s ”own” jurisdiction.[62] So, comparative law can pave the way for the comparativist to achieve a better understanding of the legal issue, or a more satisfactory solution to a legal problem, by looking at the issues and / or solutions adopted by other countries. As a result, by adopting a basic and relatively uncontroversial approach to the comparative discipline, it can be seen as an exercise where the researcher attempts to gain further insight into a legal or interdisciplinary issue by comparing the law on that issue in two or more national legal jurisdictions.

However, that basic definition leaves several questions unanswered. If national laws can be compared under the banner of a comparative method, it remains to be seen whether that also applies to supranational laws. Siems’ position is that supranational laws should not be contrasted using the comparative method.[63] However, his justification for discounting supranational law is to simply state that comparative law is about comparing national, rather than supranational, laws.[64] On the other hand, Ragone and Smorto argue that excluding supranational laws leads to an unjustifiable simplification of the comparative discipline.[65]

My own position lies somewhere between these two arguments. Whilst I can see the advantages of comparing national jurisdictions (which I shall come on to describe shortly) my view is that to exclude supranational organisations completely from the field of comparative law would be to do a disservice to the methodology as a whole. Indeed, my position is that, *in some contexts*, it is

[61] Maurice Adams, ’Doing What Doesn’t Come Naturally. On the Distinctiveness of Comparative Law‘ in Van Hoecke, n.43, 233.
[62] Zweigert and Kotz, n.59, 34.
[63] Siems, n.60, 16.
[64] *Ibid*, 16.
[65] Ragone and Smorto, n.58, 26.

more appropriate to restrict the comparison solely to national jurisdictions whilst in others supranational organisations should be included within the comparison exercise.

As I will come on to demonstrate, my comparison exercises, which include comparing national and supranational legal systems, benefit from this eclectic mix. Hence, my definition of a comparative method should also allow for comparisons between national and supranational jurisdictions. Moreover, it will also be appropriate in some contexts to compare different supranational legal systems with each other.

However, another question that needs to be answered is whether the comparativist should simply identify the differences between legal systems or identify and then try to explain why these differences arise. Zweigert and Kotz advocate an approach which departs from mere identification of differences.[66] Indeed, their argument is that if there are differences, the comparativist should attempt to explain why those differences exist.[67] Adams has termed the identification practice as a descriptive method of comparative law whilst he calls the latter an explanatory model of comparative legal methodology.[68] I adopt an explanatory method in the examples which follow, albeit a cursory one due to space constraints, as it helps to deepen the reader's understanding of why UK law stands in stark contrast to other jurisdictions in certain domains which are relevant to the thesis.

Whilst I disagree with Siems' position on the systems, or jurisdictions, of law which should be contrasted, I agree with him on other aspects of the comparative methodology. Indeed, his position that the comparative researcher should examine both positive law and its conceptual bases,[69] strikes me as a reasonable position to take. My agreement stems from my observation that, to understand the intricacies of a legal system, one should

[66] Zweigert and Kotz, n.59, 43
[67] *Ibid*, 44.
[68] Adams, n.61, 237.
[69] Siems, n.60, 22.

look beyond the positive law to its normative foundations. Otherwise, one is only “scratching the surface” of the legal jurisdiction in question.

To sum up, then, my definition of the comparative method is for the legal researcher to compare the positive law, and normative foundations, of national and supranational legal systems, with a view to identifying and explaining the differences between them.

I apply this methodological definition to parts of research questions 2 and 4.

It will be recalled that research question 2 focuses on the problems with direct sex discrimination law. As previously mentioned, I argue that the legal “wrongs” in direct sex discrimination do not match up with the moral wrongs. To make this argument, I identify what the moral wrongs are using a theoretical methodology. To summarise, they consist of dignitarian and autonomy-based harms to the victim.

However, dignity seems to play a small role in the UK’s legal system.[70] Indeed, this apparently minor role could lead to the counterargument that dignity is a relatively alien concept in UK law and should not therefore be seen as a normative foundation for direct sex discrimination law in this country. In anticipation of such an argument, I compare the UK’s legal system with the South African and Canadian Constitutions.[71] The South African and Canadian systems regard human dignity as a foundational cornerstone of their Constitutions. I suspect the South African emphasis on human dignity is an institutional response to the atrocities committed during the Apartheid era. I also surmise that older parts of the UK legal system make little mention of human dignity because prominent common law scholars, such as Bentham, who helped to shape the law, had little time for laws which promoted human rights and concepts such as human dignity.

[70] Benedict Douglas, ’Undignified rights: the importance of a basis in dignity for the possession of human rights in the United Kingdom‘ (2015) 2(2) PL 241, 241.
[71] See Chapter 3.2.3.

Nevertheless, this apparent absence of human dignity in the UK legal system is conspicuous given that human dignity has a central role to play in the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"),[72][73] and the first paragraph of the Preamble to the United Nations Charter ("UN Charter"). These are all recent 20th Century legal incarnations prompted by the human rights abuses of the First and Second World Wars.

In addition, the South African and (the most recent version of the) Canadian Constitution are also 20th Century systems.[74] This is highly relevant because anti-discrimination law is also a recent (20th Century) legal development. Moreover, dignity has a significant role to play in sexdiscrimination law. The Sex Discrimination Act 1975 ("1975 Act") enacted after the Convention and the UN Charter, outlawed direct sex discrimination against women and men for the first time in Great Britain.[75] The moral bedrock which underpins this duty arises from the fact that direct sex discrimination violates the dignity of the individual.[76] More recently,, section 26 of the 2010 Act, which prohibits harassment on the grounds of sex, does so where the discriminator violates the victim's dignity.[77]

To sum up, then, the comparative approach is useful because it highlights that, even if dignity was not a prime consideration for domestic legal scholars in the 17th – 19th Centuries, global events seem to have elevated its "status" amongst more recent national and supranational legal orders. Given that anti-discrimination law shares its recent historical birth with such legal orders, and positively identifies human dignity as a key component of discrimination law, it

[72] 4 November 1950, Rome.
[73] (2000/C 364/01).
[74] Constitution Act 1982 (Canada); The Constitution of the Republic of South Africa (1996).
[75] Sections 1(1)(a) and 2(1) respectively
[76] Karen Monaghan and Tess Gill 'Justification in Direct Sex Discrimination Claims: Taboo Upheld (2003) 32(2) ILJ 116
[77] 2010 Act, s 26(1)(a)

becomes more credible to argue that human dignity should be a normative bedrock for the direct sex discrimination claim.

I also use the comparative method, albeit relatively briefly, to help answer research question 4. This research question, it will be recalled, asks which definitional components should be used in my "sex-related discrimination" model. I take the position that the model should have a defence. I identified 3 potential defences: the (now repealed) "reasonable and substantial" test under section 3A of the 1995 Act, the proportionality defence under section 15 of the 2010 Act and the strict "necessity" test, as laid down in the *Bilka* judgement of the ECJ. I then engage in a comparative analysis of these three defences to determine which is the best "fit" for my "sex related discrimination" model.

Section 5 - Structure of the thesis

Chapter 2 argues that the senior UK judiciary has struggled to grasp the conceptual and legal distinctions between direct and indirect discrimination. As a result, some scholars, most notably Sophie Moreau, have argued that there are no conceptual or moral distinctions between the two heads of claim.[78] I critically analyse and reject Moreau's theory.

I then engage in an examination of indirect sex discrimination law which leads me to the finding that the moral base of the indirect sex discrimination claim focuses on redistributive justice. I also evaluate the *JFS* and *Amnesty* cases to show that senior judges in the UK have misconstrued "race related discrimination" and "religious related discrimination" cases as direct race discrimination.

Chapter 3 highlights the problems with sex discrimination in the UK and why it needs to change. A moral and legal analysis of the direct sex discrimination claim is carried out. The moral assessment argues that the principal moral

[78] Sophie Moreau, 'The moral seriousness of indirect discrimination' in Hugh Collins, Tarunabh Khaitan (eds) *Foundations of Indirect Discrimination Law* (Hart Publishing 2018) 123, 143 – 4.

wrongs underlying direct sex discrimination are based on dignitarian and autonomy-based considerations. The legal criticisms are based on a critical examination of the *James* case which contends that the case was an example of "sex related discrimination" rather than direct sex discrimination.

Chapter 4 involves a comprehensive review of the existing literature which purports to solve the problems raised in Chapter 3. Having completed the review, I then consider Fredman's brief suggestion to transpose section 15 of the 2010 Act to protected characteristics other than disability.

Chapter 5 then moves on to construct an accessible and robust statutory formulation for the "sex related discrimination" model. I analyse various legal issues, including whether the "unfavourable treatment" provisions, found in section 15, are preferable in the context of "sex related discrimination" than the "less favourable" criterion currently found in section 13 of the 2010 Act. I also compare the causation requirements in section 3A of the 1995 Act with those found in section 15 of the 2010 Act to assess which is a better "fit" for my "sex-related discrimination" model.

Thereafter, I move on to assess the general defences in sections 3A and 15, together with the *Bilka* "objective justification" test devised by the ECJ. This exercise is conducted to determine which defence aligns best with the other statutory components I have assembled.

In addition, I critically examine the philosophical underpinnings of the "sex related discrimination" claim to determine whether it can be distinguished, at moral and conceptual levels, from the direct and indirect sex discrimination claims. This is necessary to support my argument that "sex related discrimination" should exist as a distinct legal claim from the direct and indirect approaches. Moreover, I distinguish "sex related discrimination" from the positive action measures found in section 158 of the 2010 Act.

Having constructed my statutory definition of "sex-related discrimination," I then apply it to the *James* case in Chapter 6. This is done to highlight the

practical utility of my model and to evaluate whether it can clear up the problematic aspects of sex discrimination law which were raised in Chapter 3. I also anticipate potential objections to my model in this chapter and respond to them accordingly.

Chapter 7 will then conclude the thesis by recommending that the “sex related discrimination” model should be given legislative effect. The chapter will also introduce further areas for research which stem from the main findings in this thesis.

Chapter 2 - The legal limits of the sections 13 and 19 models

2.1 Introduction

This chapter will outline the definitions of direct and indirect discrimination. Thereafter, these definitions will be broken down and analysed from legal and conceptual perspectives. The aim of this exercise is to gain a deeper insight into the breadth and scope of the respective claims.

A comparative exercise will then follow whereby the legal and philosophical components of each claim will be contrasted. This analysis will argue that direct and indirect discrimination are discrete and distinguishable heads of claim with different moral foundations. This analysis will continue into Chapter 3. Indeed, this is an important issue as I shall argue that "sex related discrimination" lies somewhere in a conceptual gap between the distinct claims of direct and indirect discrimination.

The chapter will then move on to critically examine some of the leading UK cases of apparent direct and indirect discrimination. This will show that direct discrimination claims generally come in one of two forms: either "reason why"[79] or criterion-based cases.[80]

The latter category of cases has proved problematic for the senior judiciary at both the UK level. These criterion-based claims have been frequently misclassified as examples of direct discrimination by senior judges when they are actually examples of "related discrimination."

The chapter moves on to observe certain common traits with these problem cases. The main characteristic which they share is that the discrimination is "related" to (or arising from) the protected characteristic, rather than being a result of the protected characteristic itself or a neutral PCP. This, it will be

[79] Perhaps the most prominent example is *Nagarajan v LRT* [2000] 1 AC 501 (HL) *("Nagarajan").*
[80] Examples include *R v Birmingham CC ex p EOC* [1989] AC 1155 (HL) ("Birmingham Schools"); *James* - see n.35*; Amnesty* - see n.36*; JFS* - see n.36.

suggested, is the primary reason why judges have found it difficult to compress the facts of these cases within the strictly dichotomous headings of direct and indirect discrimination.

Indeed, these problems stem from the fact that, at a structural level, a significant sub-set of so-called direct discrimination cases are neither examples of direct nor indirect discrimination, as these claims are properly understood. Instead, these cases linger in an uncomfortable conceptual "no-man's land" somewhere between direct and indirect discrimination. They will be re-labelled as "related discrimination" cases to distinguish them from genuine cases of direct or indirect discrimination.

Consequently, the main problem in this area of the law is that, save for the protected characteristic of disability, there is no legal claim or remedy to apply to these "related discrimination" cases. Given this problem, the chapter concludes with a suggested solution. It is suggested that section 15 of the 2010 Act (where the discrimination "arises" from a protected characteristic) or section 3A of the 1995 Act, where the discrimination "relates" to the protected characteristic, could be transposed to other protected characteristics, such as sex. Perhaps a combination of the statutory models could be formulated and amended to deal with the problem. In concluding, this chapter suggests some of the potential benefits of transforming one of these statutory models (or perhaps a combination of both) to related-discrimination cases.

2.2 The definitions of direct and indirect discrimination

2.2.1 *Direct Discrimination*

Direct and indirect discrimination are statutory forms of tort.[81] The main purpose of tort law is to restore the claimant to the position she would have been in but for the tortfeasor's act or omission.[82]

[81] 2010 Act, ss. 119(2)(a) and 124(6).
[82] Sarah Green and Jodi Gardner, *Tort Law* (Red Globe Press 2021) 2.

Section 13(1) of the 2010 Act states:

> "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

As far as the definition in section 13(1) is concerned, B does not have to possess the protected characteristic; she only needs to be the victim of less favourable treatment based on the protected characteristic. Accordingly, direct discrimination can be based on B's association with someone who possesses the protected characteristic,[83] or because she is perceived as having the protected characteristic.[84]

Section 13 is an example of "formal" equality. As touched upon in Chapter 1,[85] formal equality requires symmetrical treatment between the alleged victim and a comparator. Of course, this says nothing as to the actual content of the treatment, leading to risks of "levelling down" in the treatment between the victim and comparator. This is clearly an unacceptable conception of equality as it can lead to gross human rights abuses. Consequently, it will be necessary to subject this idea of "equality" to critical scrutiny in Chapter 3 of the thesis. This analysis will show that, when reference is made to equality, it should mean something more than merely symmetrical treatment.

The search for formal equality can also involve the risk of engaging in complex enquiries into the identity of a comparator, thereby steering the court or tribunal away from the central issue of whether the protected characteristic is a significant reason for the treatment meted out by the putative discriminator. Indeed, the strictly comparative approach has been criticised by the UKSC. The UKSC described it as involving "arid and confusing disputes about the identification of the appropriate comparator" then went on to recommend a more general approach which focuses on the reason why the alleged victim of

[83] *Coleman* v *Attridge Law* (C-303/06) [2008] 3 CMLR 27
[84] *English* v *Thomas Sanderson Blinds* [2008] EWCA Civ 1421, [2009] 2 CMLR 18.
[85] See section 1.1.3

discrimination was treated in the way she was.[86] So long as the less favourable treatment is established, identifying a comparator should be a relatively easy exercise.[87]

Section 13(1) requires that the less favourable treatment be "because" of a protected characteristic. This replaced the wording "on the grounds of" in the predecessor legislation. However, as stated in the Explanatory Notes to the 2010 Act, this change in wording made no substantive difference to the meaning of the legislation.[88] As such, cases on direct discrimination which pre-date the 2010 Act continue, all other things being equal, to be good and binding law.

There has been a divergence of opinion on whether courts and tribunals, when interpreting section 13, should focus on the actions of the putative discriminator or place more emphasis on the effects of the alleged discrimination on the victim. Finnis favours the former view, noting that the words "A treats" (as stated above in section 13(1)) keeps the focus on the act or omission which is alleged to constitute direct discrimination.[89] On the other hand, Khaitan has argued that the definition in section 13 should focus on the consequences for the victim, rather than the actions of the putative discriminator.[90]

My firm view is that Finnis' argument is superior. The plain meaning of section 13 clearly focuses on the actions of the putative discriminator, with its stress on how "A treats B." Khaitan does not produce any compelling arguments to point away from the plain meaning interpretation of the statutory wording in favour of a more teleological or purposive interpretation. Moreover, as will be

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[86] *Shamoon v Chief Constable of the Royal Ulster Constabulary (Northern Ireland)* [2003] UKHL 11, [2003] ICR 337, [11].
[87] *Ibid*, [9].
[88] Paragraph 61. This has also been confirmed by the UKSC in *Essop and others* v *Home Office (UK Border Agency)* [2017] UKSC 27, [2017] 1 WLR 1343.
[89] John Finnis, 'Directly discriminatory decisions: a missed opportunity' (2010) 126 LQR 491, 494.
[90] Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press 2015) 160.

argued in this chapter and Chapter 3, the victim-oriented approach tends to lead to highly counterintuitive legal decisions.

The definition in section 13(1) also clearly stipulates, with its focus on the reason for the less favourable treatment, that there should be a causal link between the treatment complained of and the protected characteristic itself. The protected characteristic does not have to be the sole reason for the treatment so long as it is a significant reason.[91] The dominant view is that there does not need to be an intention or motive to discriminate for a finding of direct discrimination to be established. This rule was established in the *Birmingham Schools* case, principally by Lord Goff in a persuasive "slippery slope" argument, who stated that:

> "The intention or motive of the defendant to discriminate...is not a necessary condition of liability... [Otherwise] it would be a good defence for an employer to show that he discriminated against women not because he intended to do so but (for example) because of customer preference, or to save money, or even to avoid controversy."[92]

This rule has been consistently applied by the House of Lords (as it then was)[93] and latterly by the UKSC.[94] Consequently, there is no "benign motive" or "benign intention" defence in UK direct discrimination cases. This chapter will highlight cases which demonstrate the proper role of motive in direct discrimination cases. In the meantime, it should be noted that there is also no *general* defence to a direct discrimination claim under section 13 of the 2010 Act. This general rule is subject to some very narrow exceptions, such as the need for Genuine Occupational Requirements,[95] and direct age discrimination.[96] EU law takes a very similar approach: there is no general

[91] *Owen & Briggs* v *James* [1982] ICR 618 (CA).
[92] *Birmingham Schools,* n.80, 1194
[93] *James* - n.35*, Nagarajan* - n.79
[94] *JFS* - n.36
[95] 2010 Act, Schedule 9, Part 1
[96] 2010 Act, s 13(2)

defence to a direct discrimination claim and this prohibition is subject to very specific exceptions such as direct age discrimination.[97] Both UK and EU law also limit the protection offered by direct discrimination to a fixed list of protected characteristics. By contrast, the European Convention on Human Rights and Fundamental Freedoms ("ECHR") allows a general defence to direct discrimination claims and the list of characteristics protected under the direct discrimination rubric can be extended by the Strasbourg courts.[98]

Past Presidents of the UKSC, notably Lord Phillips and Lady Hale, have highlighted some of the difficulties associated with the lack of a general section 13 defence. The absence of such a defence led Lord Philips to comment that "there may well be a defect in our law of discrimination."[99] Lady Hale has gone even further,[100] stating that the ECHR approach is preferable to the EU and UK models.[101] She has described the absence of a general section 13 defence as a problem for domestic courts and tribunals in the UK, particularly given the increasing conflict between competing protected characteristics such as sexual orientation and religion or belief.[102]

As a result, she has proposed the introduction of a general section 13 defence which, she believes, would remove the need for convoluted judicial reasoning in discrimination cases and thereby allow the court or tribunal to focus on key issues such as legitimate aim and proportionality.[103] A critical analysis of a general defence to sex discrimination claims will be undertaken in Chapter 4. For now, it is sufficient to note that the UK direct discrimination interplay combines the lack of a general defence with the absence of a benign motives or benign intentions justification.

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[97] *Achbita and another v G4S Security Solutions NV* (Case C-157/15) [2017] 3 CMLR 21
[98] ECHR Article 14.
[99] *JFS*, n.36, [9].
[100] Albeit extra-judicially – in a speech - Lady Hale, 'Religion and Sexual Orientation: The clash of equality rights' (Speech at the Comparative and Administrative Law Conference, Yale Law School, 7 March 2014) (https://www.supremecourt.uk/docs/speech-140307.pdf) accessed 18 August 2023.
[101] *Ibid,* 5.
[102] *Ibid*, 6.
[103] *Ibid*, 6.

2.2.2 *Indirect Discrimination*

Indirect discrimination is defined in the 2010 Act, where sections 19(1) and (2) state:

> "19 (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice (PCP) is discriminatory in relation to a relevant protected characteristic of B's if— (a) A applies, or would apply, it to persons with whom B does not share the characteristic, (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, (c)it puts, or would put, B at that disadvantage, and (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

The effect of section 19 was to repeal pre-existing definitions of indirect discrimination which were scattered across various statutes and statutory instruments.[104] In doing so, section 19 replicated the EU model of indirect discrimination and introduced a uniform standard of protection across all the protected characteristics in the 2010 Act.[105]

As far as remedies for indirect discrimination are concerned, sections 124(4) and (5) of the 2010 Act state that, if the tribunal is satisfied that the indirect discrimination was not intentional, it must not consider the issue of financial compensation to the claimant until it has contemplated the possibilities of making a declaration of the rights of the claimant and / or a recommendation.[106]

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[104] Race Relations Act 1976 s.1(1)(b); Sex Discrimination Act 1975 s.1(1)(b); Employment Equality (Religion or Belief) Regulations 2003 reg 3(1)(b); Employment Equality (Sexual Orientation) Regulations 2003 reg 3(1)(b); Employment Equality (Age) Regulations 2006 reg 3(1)(b).
[105] Explanatory Notes to the 2010 Act, paragraph 81
[106] s. 124(2)(a)

The recommendation might be that the respondent changes the indirectly discriminatory provision to remove the discriminatory element or achieve a more proportionate balance in pursuit of its legitimate aim.[107]

Equal treatment may still lead to inequality in results for certain groups of people.[108] So, for example, a PCP requiring full-time working hours, whilst facially neutral and applicable to everyone, is likely to have a disproportionately adverse effect on women, who tend to bear greater childcare responsibilities than men.

The concept of indirect discrimination was first recognised, at a judicial level, by the United States Supreme Court in the seminal case of *Griggs* v. *Duke Power*.[109] In this case, the employer, Dukes Power, prohibited black people from taking up jobs within the organisation. When this became unlawful in the US, Dukes Power introduced job selection criteria which included specific educational qualifications and aptitudes. Given that black people generally had lower standards of education than white people, they continued to be excluded from the jobs in question.[110]

So, whilst the rule regarding educational qualifications and aptitudes arguably looked neutral on its face, the effect of it was much the same as directly prohibiting black people from taking up the jobs in question. In effect, educational qualifications and aptitude were proxies for race. The US Supreme Court recognised that and went on to hold that the new rule was discriminatory, in an indirect sense. Hence, the legal concept of indirect discrimination was born.

Indirect discrimination therefore centres on substantive, rather than formal equality. Substantive equality is not concerned with symmetry of treatment. Instead, the concept recognises that, given pre-existing disadvantages

[107] s.124(2)(c)
[108] Fredman, n.1, 279.
[109] 401 US 424, 91 S Ct 849 (1971).
[110] *Ibid*, 431

amongst different groups in society, unequal treatment may be necessary to achieve equality of results amongst these different groups of people. Lady Hale neatly captured the essence of the substantive equality principle in a relatively recent judicial decision of the UKSC:

> "Indirect discrimination assumes equality of treatment—the PCP is applied indiscriminately to all—but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot."[111]

So long as the causal connection between the PCP and the particular disadvantage is established, there is no need to make further enquiries as to why the PCP disadvantaged the group and / or the claimant.[112] Such further enquiries are the proper province of direct, rather than indirect, discrimination. The "particular disadvantage" wording, which was first introduced in the 2010 Act in relation to indirect discrimination, was designed to simplify the law by removing the need to make complex statistical comparisons between different groups of people to establish a *prima facie* claim of indirect discrimination.[113] Moreover, the recently enacted s.19A of the 2010 Act makes "indirect discrimination by association" a distinct head of claim.

Indirect discrimination can be justified, under section 19(2)(d), provided that the putative discriminator can show that the PCP is a proportionate means of achieving a legitimate aim. The proportionality test will be critically examined in Chapter 5. For now, it is sufficient to note that, in general, the UK variant of

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[111] *Essop* - see n.88.
[112] *Ibid*, [24] - [25].
[113] *Chief Constable of West Yorkshire Police v Homer* [2012] UKSC 15; [2012] ICR 704, [14].

the proportionality test will be satisfied so long as the putative discriminator, usually an employer, can demonstrate that the PCP was a reasonably necessary and balanced means to achieve a legitimate aim. That aim might be based on the employer's commercial goals or to allow the employer to fulfil its legal duties in a non-commercial context, such as complying with health and safety obligations.[114]

Scholars have identified different understandings of what indirect discrimination actually means. As Doyle has observed, there are two dominant models of indirect discrimination, one focusing on the discriminatory motive and the other on the discriminatory effect of the PCP in question.[115] The motive-based paradigm focuses on apparently neutral PCPs whose underlying purpose is still to discriminate. The effects-oriented model also adopts a neutral PCP, the difference being that there is no intention to discriminate. Instead, the effects of the PCP tend to have a disproportionately adverse impact on certain groups of people. The latter interpretation is embodied by UK law: the motive or "reason why" the employer adopts the PCP is irrelevant in indirect discrimination claims.[116]

2.3 Distinguishing direct and indirect discrimination

2.3.1 *The legal distinctions*

This section will highlight the key legal differences between direct and indirect discrimination and then move on to analyse the philosophical distinctions between each head of claim.

The law in the UK is clear on the distinctions: direct and indirect discrimination are mutually exclusive heads of claim.[117] They must therefore be pleaded on individual grounds and adjudicated separately when pleaded in the

[114] Bowers and Moran, n.39, 312-3.
[115] Oran Doyle, 'Direct Discrimination, Indirect Discrimination and Autonomy' (2007) 27 OJLS 537, 538.
[116] *Essop,* n.88, [23] - [30]
[117] *R (on the application of Elias) v Secretary of State for Defence* [2006] IRLR 934 (CA) ("Elias") [117] - [118]

alternative.[118] Crucially, indirect discrimination can be defended whilst direct discrimination cannot, in general, be justified.[119]

Even though the law is clear on the main distinctions between direct and indirect discrimination, senior members of the UK judiciary have struggled to apply the distinctions. By way of example, in the *JFS* case, the UKSC's finding of direct race discrimination was based on a fractious 5:4 majority, with two judges in the minority holding that the discrimination was indirect. A few years later, in *Bull* v *Hall* the UKSC was again split, this time on a 3:2 basis, on the question of whether the case involved a claim for direct or indirect discrimination.[120]

Similar difficulties have led the Canadian Supreme Court to abandon the dichotomous approach altogether, instead adopting a justification defence for both direct and indirect discrimination.[121]

2.3.2 *A distinction without a difference?*

The difficulty that senior judges have had when trying to distinguish between direct and indirect discrimination might prompt the reader to question whether there are significant differences between the two heads of claim. Indeed, there is some scholarly support for the position that there is no meaningful moral distinction between direct and indirect discrimination claims. For example, Sophie Moreau has argued, in some depth, that there is no clear moral distinction,[122] and that perpetrators of indirect discrimination are often as blameworthy as those who directly discriminate.[123] Given the importance of this issue to the thesis, it is necessary to critically analyse Moreau's theory.

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[118] *JFS*, n.36, [57]
[119] *Ibid*, [57].
[120] [2013] UKSC 73, [2013] 1 WLR 3741 ("*Bull*").
[121] *British Columbia (Public Service Employee Relations Commission)* v. *BCGEU* [1999] 3 SCR 3.
[122] Sophie Moreau, *Faces of Inequality*: *A Theory of Wrongful Discrimination* (Oxford University Press 2020).
[123] Moreau, n.78, 143 – 4.

Moreau views both direct and indirect discrimination as involving:

> "a certain kind of failure to give other people and their interests the kind of moral significance that they should be given in the agent's deliberations. In that sense, it [i]s a failure to think of others as one's equal, and a concomitant failure to treat others as equals through one's actions. I think we can see this as a form of negligence. This sort of negligence mirrors the kind of negligence we recognise as culpable in tort law..."[124]

Moreau has developed this line of argument in her more recent work.[125] In *Faces of Inequality,* she argues that direct and indirect discrimination are both forms of negligence and, given this common negligence standard, both claims lie on the same moral plane.[126]

She goes on to argue that both direct and indirect discrimination are morally indistinguishable because both forms of discrimination treat certain groups as inferior to others. Direct discrimination does so by "constituting an act of censure or lesser consideration of a certain group"[127] (which Moreau seems to mean treating one group less favourably than another) and indirect discrimination does so by "rendering a certain social group invisible and thereby creating real barriers to their participation in certain social institutions."[128]

Moreau's views on direct discrimination are less controversial than her arguments on indirect discrimination. Indeed, there will be a significant cross-section of employers who directly discriminate who view one social group (e.g., black people) as inferior to another (e.g., whites). As such, there is some merit in this argument.

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[124] *Ibid*,142
[125] See n.122.
[126] *Ibid*, 37.
[127] *Ibid*, 37.
[128] *Ibid*, 37.

However, a focus on group-based dynamics is, in itself, straying into the terrain of indirect discrimination. The focus of direct discrimination is, and should be, on the individual rather than on groups of people, whilst indirect discrimination is and should be group-focused. My exposition of the "wrongs" inherent in direct sex discrimination will be fleshed out in Chapter 3.

In the meantime, by way of summary, it is my position that direct discrimination, properly understood, is always an attack on *individual* human dignity. Each human being has dignity simply as a result of being a human being. Hence, one often refers to *human* dignity. No human being has more, or less, dignity, than another. It is an equalising moral trait amongst all humans. When an individual perpetrates an act of direct discrimination against another, he must therefore be doing one of two things. Either he fails to recognise the dignity of the victim, or he recognises it but chooses to violate it, nonetheless.

Direct discrimination, by my account, is also an assault on the autonomy of another human being. My position centres on the fact that direct discrimination generally involves an act, or omission, which deprives the victim of a life opportunity (e.g., a job). In Chapter 3, the thesis will return to these ideas, in more depth. In the meantime, the present chapter will move on to critically examine Moreau's views of the "wrongs" inherent in indirect discrimination.

Moreau describes her theory as "pluralist" as she claims to provide multiple reasons why discrimination is wrong (as opposed to "monist" theories which provide one underlying moral factor which makes discrimination "wrong").[129]She cites three wrongs inherent in discrimination: that it unfairly subordinates, that it refuses people access to basic goods to which they are entitled and that it violates the "deliberative freedoms" of others.[130]

[129] Sophia Moreau, 'A Reply to Critics' (2021) 12(4) Jurisprudence 598, 608. For 'monist' theories, see also Philip Sales and Frederick Wilmot-Smith, 'Justice for Foxes' (2022) 138 Law Quarterly Review 583, 583–84 and Guy Davidov, 'The Capability Approach and Labour Law: Identifying the Areas of Fit' in Langille (ed), *The Capability Approach to Labour Law* (Oxford University Press, 2019) 42, 47.
[130] Moreau, n.122, 148.

Of course, these three “wrongs” represent different conceptions of equality, and how it can be breached. Boiled down to their essence, they centre on the same theme which is whether the putative discriminator is treating the other person as an equal. This is noted by Hellman who observes that these three conceptions ultimately come round to the same question – does the law or practice in question fail to treat human beings as equals?[131] Unsurprisingly, therefore, Lippert-Rasmussen has commented that Moreau’s pluralist theory of equality may not be so different from monist theories as she thinks.[132]

Certainly, Moreau, in her reply to these critics, does not deny that the obligation to treat others “as equals” lies at the core of her theory. In fact, she views the obligation to treat others as equals as both critical to her overall theory and consonant with a duty to refrain from negligent acts or omissions towards others. It is this aspect of Moreau’s theory which is directly relevant to her opinion on the underlying wrong of indirect discrimination, and so attention will now be drawn to it.

Moreau views indirect discrimination as a form of negligence which, in turn, constitutes a failure to treat others as equals. In doing so, she is equating two very different legal standards: equality and negligence. Tort law or delict, as it relates to negligence, cannot be simply mapped on to the legal framework of “equality” or “anti-discrimination law” as a branch of the same legal system. They are discrete and distinguishable areas of law.

At its core, equality, or anti-discrimination, law is concerned with a broad duty to treat other human beings as equals. In effect, this comprises a duty on an individual, or an institution, not to inflict, or perpetuate, detrimental treatment on any human beings based on certain personal characteristics. The moral

[131] Deborah Hellman, ’Three ways of failing to treat others as equals: comments on Sophie Moreau’s *Faces of Inequality‘* (2021) 12(4) Jurisprudence 562, 569.
[132] Kasper Lippert-Rasmussen, ’Moreau on discrimination: pluralism, equality, and the experience of discrimination’ (2021) 12(4) Jurisprudence 579, 580.

foundations of this duty rest on respect for the inherent dignity and autonomy of other human beings, as will be expanded upon in the next chapter.

By contrast, the law of negligence imposes a much narrower duty. This duty places an obligation on actors to take reasonable care to steer clear of acts (or omissions) which can reasonably be anticipated to potentially cause harm to others who are directly affected by the act or omission in question.[133] The harm, or damage, to another may be physical, financial or psychological. However, not all harms of this nature will be negligent. The law of negligence circumscribes liability by reference to standards such as proximity, reliance and reasonable foreseeability. It is, therefore, a system of law which imposes temporal and operational parameters on a legal actor's duty to take reasonable care not to harm others.

Moreau states that a major component of the harm inherent in indirect discrimination is that it renders certain groups "invisible" in society. By this, she seems to mean that the apparently neutral PCP reinforces wrongs against historically disadvantaged groups. If this is what she means, then she cannot, at the same time, maintain that the system of indirect discrimination should properly reside within the tort framework.

Indeed, the argument based on perpetuation of historical disadvantage must generally concede that the putative discriminator has not caused the original disadvantage(s). Instead, the disadvantage emanates from historical and cultural factors, which are beyond the individual fault of the putative discriminator. Certainly, these disadvantages may be perpetuated or exacerbated by a neutral PCP. However, perpetuating or exacerbating a pre-existing state of affairs, especially when done unintentionally in the form of a neutral PCP, is not on the same moral plane as being responsible for the situation in the first place.

[133] *Donoghue* v *Stevenson* [1932] A.C. 562 (HL) ("*Donoghue*").

Indeed, the law recognises this moral distinction by providing that unintentional indirect discrimination should generally attract no financial compensation. As previously noted, when indirect discrimination is held to be unintentional under section 124 of the 2010 Act, a declaration of the rights of the claimant and / or a general recommendation to the discriminator must always be contemplated by the Employment Tribunal before any financial compensation is even considered. Similarly, the county or sheriff courts cannot make an order for compensation under sections 119(2) and (3) unless the court has first satisfied itself that there are no other ways of disposing of a successful indirect discrimination case.[134]

Moreau's position also fails to recognise the reality of the social and cultural dynamics within which discrimination often occurs. Plainly, it is more morally blameworthy for an employer to refuse a woman a job, on the grounds of sex (direct discrimination) than it is for an employer to refuse someone the job because she is unable to work full-time hours. Of course, this distinction is contingent upon the requirement for full-time hours being a genuine business necessity, rather than a proxy to mask direct discrimination on the grounds of sex. Indeed, proxy cases, insofar as they can be categorised as indirect discrimination rather than a covert form of direct discrimination, may well be the exception to the general rule that direct discrimination is more morally blameworthy than indirect discrimination. If the employer is deliberately using a facially neutral proxy to exclude women, then this seems to be as contemptible an act as the employer who refuses a woman a job because she is a woman. However, so-called proxy cases are relatively rare in the case-law and, to the extent that they exist, they are not so prevalent that they should, *as a rule*, place indirect discrimination on the same moral level of culpability as direct discrimination.

This highlights another problem with Moreau's line of argument. She relies on the carefully pre-selected *British Columbia* case,[135] where physical fitness and

[134] 2010 Act sections 119(5) and (6).
[135] See n.124.

aerobic aptitude tests had the effect of generally excluding women from becoming firefighters, to support her general position that indirect discrimination is as morally blameworthy as direct discrimination.

In doing so, she ignores the fact that the *British Columbia* case is a relatively rare proxy case. As a result, Moreau makes the mistake of taking an extreme example as evidence to support a general rule. The better view is to see *British Columbia* as an outlier case, an exception to the general rule that direct discrimination is more morally blameworthy than indirect discrimination. General rules often have exceptions, but they remain general rules, nonetheless. However, this leaves a glaring question: why is direct discrimination generally considered to be a more heinous moral wrong than indirect discrimination?

2.3.3 *Identifying the distinction between direct and indirect discrimination*

Direct discrimination involves less favourable treatment because of the protected characteristic itself. This will often involve examples of blatant prejudice, bias and / or stereotyping.[136] Clearly, these are examples of discrimination that are more morally reprehensible than cases of indirect discrimination which centre on facially neutral PCPs. This argument may be rebutted by citing cases such as *James*, *JFS* and *Amnesty* which were all held to be examples of direct discrimination even though there was no clear prejudice or stereotyping at play.

However, this is not a strong objection because these cases were not examples of direct discrimination. Instead, the point of departure for my principal claims in this thesis are that they were examples of a species of case which falls in a conceptual gap somewhere between direct and indirect discrimination. Indeed, direct discrimination, properly understood, generally carries with it a finding of moral blameworthiness on the discriminator's part.

[136] *R v Immigration Officer at Prague Airport and Another* [2004] UKHL 55, [2005] 2 AC 1.

In this respect, it is closely analogous with certain concepts in criminal law.[137] However, indirect discrimination is focused on breaking down historical barriers for disadvantaged groups which the putative discriminator did not intentionally create.[138] As a result, the discriminator is often perceived, and often rightly so, as being culpable of a less serious moral wrong in the case of indirect, as opposed to direct, discrimination.

The redistributive component to indirect discrimination focuses on a redistribution of goods and resources from historically privileged to underprivileged groups. Within the European context, Selmi has observed that:

> "...the (distributive) theory seems to have its greatest import to address gender inequities, including such things as inequities between full- and part-time work, work hours, the sort of work practices that have disadvantaged women, not just in Europe, but throughout the world."[139]

Selmi's emphasis on distributive theories manifesting as challenges to working practices is certainly borne out by the indirect sex discrimination case-law, both at the EU and UK levels.

One of the earliest indirect sex discrimination cases in the UK was *Price* v *Civil Service Commission*,[140] where the EAT held that an age cap of 28 for entry to the Civil Service amounted to indirect sex discrimination because fewer women (who often bore and cared for children during this period of their lives) than men could comply with the requirement.[141]

At the EU level, the ECJ concluded in *JP Jenkins v Kingsgate* (*Jenkins*) that it could be indirect sex discrimination where an employer pays men and women

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[137] Michael Connolly, Richard Townshend-Smith, *Townshend-Smith on Discrimination Law: Text, Cases and Materials* (2nd edn, Taylor and Francis, 2004) 237.
[138] *Ibid*, 237.
[139] Michael Selmi, 'Indirect discrimination and the anti-discrimination mandate' in Sophie Moreau, Deborah Hellman, (eds.) *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013) 266-7.
[140] [1977] EAT1/77, [1977] 1 WLR 1417.
[141] *Ibid*, 1422.

different rates of pay which, whilst not directly related to sex, have a disproportionately adverse impact on women.[142] Thereafter, the ECJ held in the *Bilka* case that less favourable contractual benefits for female part-time workers, *vis-a-vis* male full-time workers, could also constitute indirect sex discrimination.[143]

The case law in this area continued to develop in the UK, where the EAT held in *Clarke v Eley (IMI) Kynoch* that it was indirect sex discrimination for an employer to apply redundancy selection criteria which required part-time workers to be made redundant before full-time workers because considerably more women than men worked on a part-time basis.[144]

In *R* v *Secretary of State for Employment ex parte EOC* the House of Lords then gave its ruling that statutory unfair dismissal qualifying thresholds indirectly discriminated against women by excluding part-time employees, the majority of whom were women.[145]

Moreover, in *London Underground Limited* v. *Edwards* the Court of Appeal concluded that the employer's requirement that the claimant, a female train operator who was also a single mother, change her shift to new hours which made her childcare commitments impossible, had indirectly discriminated against the claimant on the grounds of sex.[146]

Subsequently, in *GMB* v *Allen and others* the Court of Appeal held that the GMB union had indirectly discriminated against some of its female members, who were employed by a local authority, by accepting a low value equal pay settlement for predominantly female occupations to leave more money available to jobs which were principally occupied by males.[147]

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[142] Case C-96/80 [1981] CMLR 24
[143] See n.42.
[144] [1983] ICR 165
[145] [1995] 1 AC 1 (HL).
[146] (No.2) [1999] ICR 494 (CA).
[147] [2008] EWCA Civ 810, [2008] ICR 1407.

As can be seen from the case-law above, the indirect discrimination claim is frequently used for redistributive purposes, particularly in relation to the protected characteristic of sex. Indeed, this long line of case-law, with its emphasis on the redistributive aspect of the indirect sex discrimination claim, makes it difficult to resist the conclusion that the claim is based on a normative bedrock of redistributive justice. Moreover, it will be recalled that it is sufficient, in the case of indirect sex discrimination, for there to be a hypothetical disadvantage to a group of people. This is a very significant development as the hypothetical nature of that aspect of section 19 allows claimants to challenge existing power structures to redistribute resources and / or goods from the dominant (usually male) to the minority (typically women) group, thereby seeking to further transformative equality between the sexes.

So, in concluding this section, my observations are that direct and indirect discrimination are morally discrete and distinguishable heads of claim. At the moral level, indirect discrimination is largely involved with redistributive goals which often arise from pre-existing socio-economic equalities which were not caused by the putative discriminator.

By contrast, direct discrimination, properly understood, involves an assault on human dignity and autonomy, particularly in cases which involve prejudice, bias and stereotyping. The “wrongs” of direct discrimination will be expanded upon in Chapter 3. In the meantime, the chapter will move on to demonstrate how direct discrimination cases can be further distinguished on the basis that there are what is commonly referred to as either “reason why” or “criterion-based” cases. This is an important distinction: as the thesis progresses, it will be demonstrated that only the “criterion-based” cases tend to be misclassified as either direct or indirect discrimination.

2.4 “Criterion” v “reason-why” cases of direct discrimination

2.4.1 *The distinctions between the two claims*

I shall distinguish between “reason why” and criterion-based examples of direct discrimination at this point. Case-law from the UK will then be critically examined. The analysis of these cases will demonstrate that some instances of criterion-based discrimination are neither examples of direct nor indirect discrimination. Instead, they lie in a conceptual gap somewhere between the direct and indirect discrimination heads of claim – they are “related discrimination” cases.

As the chapter progresses, it will be argued that the cases which comprise the “related discrimination” classification tend to exhibit common characteristics which can be attributed to their structural similarities. In particular, the discrimination tends to be “related to,” or “arising from,” the protected characteristic, rather than being because of the protected characteristic itself or because of a neutral PCP.

In the *Birmingham Schools* case, the entry criterion for single-sex grammar schools was challenged on the basis that the criteria amounted to direct sex discrimination. The problem was that more places were available in grammar schools for boys than for girls. As a result, girls had to achieve higher examination scores than boys to secure a place at a grammar school.

As mentioned earlier in this chapter, Lord Goff held in this case that there was no benign motive or intention defence in direct discrimination cases.[148] The Council had directly discriminated on the grounds of sex because the admissions criteria itself was discriminatory, even though there was no intention or motive to treat the girls less favourably than the boys. Instead, the crucial question for the court to ask was whether: “but for her sex, would a qualified girl have been given treatment and education opportunities equal to those given to a comparable boy.”[149] This case is the earliest example of the

[148] See n.92.
[149] *Ibid,* 1184, 1194.

"but-for" test being used by judges in direct discrimination cases. This test will be analysed in Chapters 3 and 4.

In the meantime, my position is that there should have been a finding of direct sex discrimination in this case. Given that fewer school places were reserved for girls than boys, this amounts to less favourable treatment on the grounds of sex. The finding of direct discrimination should stand even though there were arguably no objectively demeaning effects on the girls (there will always be “outlier” cases where direct discrimination can be established in the absence of a part, or parts, of its normative foundations).

The ”but for” test works well in this case as there is only one significant factor (less school places) which fuels the less favourable treatment. However, as will be argued in Chapters 3 and 4, the ”but for” test is less efficacious in cases where there is more than one substantial reason for the less favourable treatment.

Birmingham Schools was followed by the *James* case. In *James*, the House of Lords held that a local Council had directly discriminated on the grounds of sex because it refused Mr. James free access to use its swimming pool whilst allowing his wife, Mrs. James, free access.

The Council’s criterion, or rule, was that free access could only be granted to those of pensionable age. At the time *James* was decided, the pensionable age was 60 for women and 65 for men in the UK. Both Mr and Mrs James were 61 years of age hence the disparity in treatment. The House of Lords held that this criterion was indissociably linked to sex and was therefore inherently discriminatory on the grounds of sex.

An indissociable link was established because all women aged 60 - 64 could comply with the criterion whilst no men aged 60 - 64 could comply with it. According to the Court there was no need for it to consider or refer to the reason why the Council acted as it did in this case to determine whether direct discrimination had occurred. Indeed, the Law Lords confirmed again in *James,*

following the *Birmingham Schools* case, that there were no benign intentions or reasons (as well as no benign motives) defence in criterion-based direct discrimination claims.[150] As such, in *James* the direct discrimination occurred because the discrimination was inherent in the criterion or rule itself. The intentions, motives or reasons for the treatment were therefore irrelevant and could not be considered by the court.

As a result, the Council could not escape liability even though its motives, intentions and reasons for acting were benign in the sense that they financially assisted pensioners, particularly female pensioners, who were (at least in many cases) no longer earning a working wage. As previously stated, this case will be subjected to critical analysis in the next chapter.[151]

In the *JFS* case, Lady Hale explained the fundamental differences between criterion-based and "reason-why" cases. In the former type of case, the rule or criterion which is alleged to form the subject-matter of the discrimination is inherently linked to a protected characteristic.[152] Given that the criterion is inherently linked, there is no need in such cases for the court or tribunal to delve deeper to ascertain the reason(s) for the less favourable treatment.[153] By contrast, in "reason-why" cases, the reason for the alleged less favourable treatment is not immediately apparent. There could be multiple causes for the adverse treatment. As a result, the court or tribunal must infer, from the factual circumstances, what the reason(s) was for the treatment in question. Lady Hale stressed that the discrimination in the latter type of case could be consciously or unconsciously motivated.[154] With regard to the unconscious state of mind, Lady Hale was applying the *dicta* laid down in *Nagarajan,* particularly the leading speech of Lord Nicholls, who held that direct

[150] *James*, n.35, 765-766, 774
[151] However, an account of criterion-based cases would not be complete without at least a cursory reference to *James*.
[152] *JFS*, n.36, [64].
[153] *Ibid*, [64].
[154] *Ibid*, [64].

discrimination can be conscious or unconscious.[155] *Nagarajan* is a prominent "reason-why" case and will be examined shortly.

The Employment Tribunals have embraced the distinction between criterion-based and "reason-why" cases. Two prominent examples of this are the EAT decisions in *Amnesty* and *Interserve FM Limited* v *Tuliekyte ("Interserve")*.[156]

In the *Amnesty* case, the claimant was of Sudanese origin and worked for the Respondent, Amnesty, as a campaign officer for Sudan. She applied for a promotion as Sudan Researcher for Amnesty but did not get the job. Amnesty's reasons for failing to appoint the claimant to the role were that: (i) she was of Sudanese descent and, given that there were inter-racial tensions in Sudan, and the job would require travel there, the claimant would be at increased risk of physical harm if she had to work for periods of time there; (ii) appointing an employee of Sudanese descent to a role which concerned her country of origin could be perceived as breaching Amnesty's policy of impartiality.

The claimant resigned from her campaigner post when she learned that she had not been appointed to the research-based role and proceeded to lodge Employment Tribunal claims for constructive dismissal and (direct and indirect) race discrimination. My analysis at this stage will only concern itself with the direct race discrimination claim.

The Respondent defended the direct race discrimination claim by arguing that its health and safety obligations, under section 2(1) of the Health and Safety at Work etc Act 1974, prohibited sending the claimant to parts of Sudan and Chad. Sending the claimant there would put her personal safety at risk. It also argued that its need to preserve an appearance of impartiality prevented the appointment of the claimant to the researcher post. The Tribunal rejected Amnesty's arguments and the claimant's direct race discrimination claim was successful. The principal reasons for the claim's success were that the

[155] *Nagarajan*, n.79, 512.
[156] UKEAT/0267/16/JOJ

Tribunal was not convinced that the researcher role would require travel to Sudan and so the claimant's safety could be secured by not sending her there. Moreover, the Tribunal held that, but for the claimant's ethnic origins, she would have been appointed to the researcher post.

Amnesty then appealed this decision to the EAT. Its grounds of appeal were, *inter alia,* that the Employment Tribunal should have enquired into Amnesty's reasons for refusing the claimant the position. Indeed, it should have considered Amnesty's mindset when determining whether race discrimination had occurred. Instead, it applied an overly simplistic "but for" test. In doing so, Amnesty argued that the Tribunal failed to consider Amnesty's reasons for denying the job to the claimant. Amnesty also argued that it would be breaching its duty to protect the claimant's health and safety by sending her to parts of Sudan and Chad. Its position was that the job did require such travel. Mr. Justice Underhill, President of the EAT (as he then was) stated that, in direct discrimination cases, the relevant question was always to ask: what is the reason(s), or the ground(s) for the alleged less favourable treatment?[157] He noted that there were two ways to answer this question.

First, in cases where the criterion is indissociably linked to the protected characteristic, as it was in *James*, that is the end of the matter. In *Amnesty*, the EAT held that the criterion, which combined the claimant's ethnic origins with the requirements of the job, was inherently discriminatory and there was therefore no need for the court or tribunal to consider the intentions, motives or reasons of the putative discriminator.[158] As such, there is not a benign *reasons* defence in criterion-based cases, as differentiated from a benign motives or intentions defence. However, this is problematic as it is the reason for the less favourable treatment which is relevant when considering whether direct discrimination has occurred. Indeed, section 13 of the 2010 Act prohibits direct discrimination when the act or omission is *because* of the protected characteristic - this is the same thing as saying that it is the *reason* for the less

[157] *Amnesty*, n.36, [52].
[158] *Ibid*, [33].

favourable treatment that determines whether direct discrimination has taken place.

Moreover, Underhill' J's judgment also negates the need for an intention to discriminate in criterion-based cases of direct discrimination. He held that, given that the criterion-based approach merely involves an indissociable link between the protected characteristic and the less favourable treatment, there was no need to prove that there was an intention to discriminate in such direct discrimination cases.[159] In doing so, Underhill J followed the reasoning taken towards intention by the House of Lords, then the UKSC, in the *Birmingham Schools, James and JFS* cases, as outlined above.

Second, there will be cases like *Nagarajan* where there is no inherently discriminatory criterion, and the court or tribunal will have to examine the motives and intentions underlying the putative discriminator's behaviour to ascertain the reason(s) for the treatment in question.[160] However, even in the latter type of cases, motive is only relevant insofar as it allows the court or tribunal to ascertain the reason for the treatment.[161] Once the reason has been established, motive then becomes an irrelevant consideration for the judge. This is probably best illustrated by way of an example.

> *A pub landlord refuses to hire a black man as a bartender because he is black. However, this choice is not because of bigotry or prejudice against black people. The landlord is aware that some of his customers are racist and have abused black bartenders in the past. The landlord therefore refuses the black man the job to prevent him from being exposed to racist abuse.*

If a court or tribunal was adjudicating such a case, it could consider the motives and / or intentions of the landlord insofar as they spoke to whether the protected characteristic in question, in this case race, was a significant reason

[159] *Ibid*, [33]
[160] *Ibid*, [34].
[161] *Ibid*, [34]

for the less favourable treatment. However, the court or tribunal could not then refuse to make a finding of direct discrimination because the landlord's motives and intentions were benign. So, a benign motive or intention defence is not available in "reason-why" cases of direct discrimination either.[162]

At a surface level, the hypothetical example looks structurally similar to the *Amnesty* case. Both involve benign motives. Both also involve substantial reasons for the treatment which were grounded on a general concern for the physical and psychological welfare of the alleged victim. Indeed, before moving on to the racial aspect of the hypothetical scenario, it should be stressed that a general concern for the barman's psychological and physical welfare was clearly a significant reason for the pub landlord's decision.

One view of *Amnesty* is that the real reason for the claimant's adverse treatment was her race. This argument goes along the lines that the health and safety and impartiality concerns were motives whilst race was Amnesty's reason for denying the claimant the job. That is essentially what the EAT held in its decision. However, that is not how I interpret the facts of the case. I agree that the health and safety, welfare and impartiality considerations were motives for denying the claimant the job. Nevertheless, they were also the *reasons* for Amnesty's decision to deny the job to the claimant, along with a clear concern for her physical and psychological health. Of course, race played a part in the motivations behind the decision. However, race was merely a background contextual factor; it was not a significant reason for Amnesty's decision. This position requires some unpacking.

There are some crucial differences between criterion-based cases like *Amnesty* and the pub landlord example. In *Amnesty*, the Tribunal could not even consider concepts such as intention, motives or reasons when deciding whether direct race discrimination had occurred. The only determining factor in *Amnesty*, so far as a finding of race discrimination was concerned, was that

[162] *Interserve*, n.156, [71]

there was a criterion which involved an arguably indissociable link between race and the less favourable treatment.

As such, in *Amnesty*, there was no way of distinguishing between malign and benign reasons (as opposed to motives) for the allegedly less favourable treatment. By contrast, in the pub landlord example, which is a hypothetical example of a “reason why” case, the Tribunal could look at concepts such as reason, motive and intentions to determine whether direct race discrimination had taken place.

As a result, the pub landlord example, unlike criterion-based cases, allows the adjudicator the opportunity to extricate the reasons for the treatment by analysing the motives underlying the treatment. Indeed, this approach allows the judge the opportunity to examine all the surrounding facts to establish the reasons for the alleged less favourable treatment in a way that is prohibited by the criterion-based approach.

Consequently, in the pub landlord case the Tribunal would be able to examine the pub owner’s intentions and motives. Such an examination would be likely, it is submitted, to lead to the conclusion that even though there were benign motives and intentions, the protected characteristic of race was still at the forefront of the pub landlord’s reasoning. Moreover, this reasoning leads to the decision not to appoint the black candidate to the job. As such, race was a significant reason for his decision and a finding of direct race discrimination should ensue.

By contrast, the EAT could not look at motives or reasoning in the *Amnesty* case because it was a criterion-based case. It was this fundamental distinction which, in my opinion, led the EAT towards a finding of direct race discrimination. However, had the EAT been afforded the opportunity to evaluate the motives and intentions of the employer to ascertain the reason for the arguably less favourable treatment, my position is that they would likely have reached the conclusion that there was no direct race discrimination in *Amnesty*.

Indeed, my interpretation of *Amnesty* is that general welfare considerations, together with health and safety and impartiality concerns, were at the forefront of the employer's mind. Race, or more specifically ethnic origins, would clearly have played a part in the decision not to appoint the claimant but my view is that the claimant's race was an incidental, rather than an operative, factor in the employer's reasoning. Indeed, race was a contextual issue in *Amnesty* which was only part of the background for Amnesty's reasons for not offering the job to the claimant. As a result, race should not have been held to be a significant reason for Amnesty's decision to refuse the claimant the job. That also distinguishes *Amnesty* from the pub landlord example. Consequently, whilst the pub landlord case and the *Amnesty* case both reflect concern for the general welfare of the individual as a substantial reason for the treatment, only the former, not the latter, involves race as a substantial reason for the decision.

There are weighty moral distinctions for distinguishing between the motives underlying the reason for the adverse treatment, on the one hand, and the reason(s) for the treatment, on the other. The motive of the putative discriminator is only relevant insofar as it helps the adjudicator to ascertain the reason(s) for the treatment. The motive is the driving force which underlies the reason for the treatment. As a result, once the motive is identified, the reason should be easier to identify.

It is the reason for the treatment which is relevant when determining whether a breach of section 13 of the 2010 Act (or a breach of section 1(1)(a) of the 1975 Act) has occurred. . The distinction between motive and reason is crucial because the adjudicator must confine his decision to what the legal actor has done, and more importantly, why he has done it (reason) not the anterior question as to what his thought processes were in the lead up to the act or omission (the motive).

Of course, the thought-processes underlying the motives are usually the driving force behind the treatment. In turn, the adverse treatment itself, such as dismissal or demotion or disciplinary action, constitutes the thing being

done. As far as the reason is concerned, the thing being done must constitute adverse treatment which has a direct causal link with the protected characteristic. If it does, a finding of direct discrimination should normally ensue. Consequently, if a female employee is dismissed because of, or on the grounds of, her sex, that would be direct sex discrimination. A substantial reason for her treatment is her sex. By contrast, if there is a link between the treatment and a consequence or manifestation of a protected characteristic, such as sex, then the judge should arrive at a *prima facie* finding of "sex related discrimination."

The main reason why "sex related discrimination" cases should be morally distinguished from direct sex discrimination cases is because the latter will generally consist of malign reasons (as opposed to motives) whilst the former are generally linked with benign reasons for acting. The *James*, *JFS* and *Amnesty* cases were all concerned with benign reasons for the treatment. However, the "but for" and criterial tests prevented the judges from assessing the moral nature of the reasons for acting in these cases. The inescapable outcome of this was that cases which involved benign reasons for action were held to be direct sex and race discrimination cases and, as a result, placed on the same moral footing as the acts and / or omissions of overtly racist and sexist legal actors. That cannot be right.

The reason why the allegedly discriminatory act or omission in "sex related discrimination" cases tend to be based on morally benign reasons is because the act or omission is not directly related to the protected characteristic. Instead, it is a consequence or manifestation of the protected characteristic. Generally, these consequences or manifestations of the protected characteristic will reflect genuine social or commercial reasons. This will become clearer as the thesis progresses. Indeed, in *Amnesty*, the social needs were predominantly health, welfare and safety reasons. In *James*, the reason was to promote recreational and fitness facilities for those who had reached pensionable age. Moreover, in the *JFS* case, the reason for the treatment was to promote the continuance of Orthodox Jewish culture and heritage. It is

morally counterintuitive to hold that these practices were racist or sexist, as those terms are generally understood.

Indeed, in genuine cases of direct sex (or race) discrimination, there will be a direct causal link between the treatment and the protected characteristic of sex. As I go on to expand in Chapter 5, this often involves prejudice, bias and stereotyping. Ultimately, therefore, the direct sex discrimination case, properly understood, will be morally distinguishable from "sex related discrimination" because the former will generally constitute malign reasons for acting whilst the latter involves benign reasons. This is why I argue for a benign *reasons* defence, as opposed to a benign motives or intentions defence, in cases of "sex related discrimination."

I shall expand on my analysis of these difficulties, which are confined to the criterial approach, in my critical examination of the *James* case in Chapter 3. I shall also build on my position in the *Amnesty* case in section 2.4.2 by arguing that it was a "race-related discrimination" case, rather than a direct race discrimination case. The reasons for the moral distinctions between "sex related discrimination" and direct sex discrimination are also given a moral detailed analysis in Chapter 5.

Another significant EAT decision which distinguishes between the "reason why" and criterion-based approaches is the *Interserve* case. In this case, the claimant was absent from work on maternity leave. Her low rate of pay meant that she did not qualify for statutory maternity pay. The Respondent, Interserve, had a blanket policy of treating those who had been absent without pay for at least three months as "leavers" and erasing their employment records. Interserve therefore mistakenly marked the claimant as a leaver and issued her with a P45 Form. The claimant complained to the company and was assured that her employment records would be reinstated upon her return to work. However, she never returned as she was unable to agree new working hours with the Respondent. As a result, she lodged an Employment Tribunal claim, under section 18(4) of the 2010 Act, which claimed that she had been

treated unfavourably because she sought to exercise her right to maternity leave.

The Employment Tribunal upheld her claim. In doing so, it held that the Respondent had adopted an inherently discriminatory policy which disadvantaged women based on pregnancy or maternity. Interserve appealed the Tribunal's decision to the EAT, arguing that the blanket policy was not inherently discriminatory, that it was neutral in its effect and that the Tribunal should not have treated the case as a criterion-based example of direct discrimination.[163] Instead, it should have treated it as a "reason-why" case because it was necessary for the adjudicator to ascertain the mindset of the putative discriminator before it could make a decision as to whether direct discrimination had occurred.[164]

In *Interserve*, the EAT held that the Employment Tribunal's finding of unfavourable treatment under section 18 of the 2010 Act could not stand because the tribunal incorrectly treated the case as a "criterion" case rather than a "reason-why" type of case.[165] The EAT reiterated that, in a direct discrimination case, the basic enquiry should always be: what is the reason for the treatment?[166] Mrs. Justice Simler, President of the EAT, went on to explain that there were two routes to answering this: the criterion-based and the "reason-why" approach.[167] She then went on to cite Lady Hale's method of distinguishing the two approaches in the *JFS* case. Adopting this distinction, she held that the blanket policy was not inherently discriminatory on the grounds of pregnancy or maternity because it applied to non-pregnant women and to pregnant women who did qualify for statutory maternity pay.[168]

This distinction between "reason-why" and criterion-based cases is now firmly embedded in UK law. It has been necessary to highlight the distinction

[163] *Ibid*, [2]
[164] Ibid, [2]
[165] *Ibid*, [71].
[166] *Ibid*, [15].
[167] *Ibid*, [15].
[168] Ibid, [27].

because the thesis will, going forward, focus on criterion-based cases as they tend to be the problematic cases (as demonstrated by the *Amnesty* decision) which fall in the conceptual gap between direct and indirect discrimination. However, before moving on to the criterion-based cases, it will be useful to briefly exemplify the "reason-why" type of case as it will form part of my critical analysis of the pre-existing secondary literature in Chapter 4.

In the race discrimination case of *Nagarajan*, there was no inherently discriminatory criterion and, as a result, there were multiple potential causes of the alleged discrimination. Consequently, it was necessary for the House of Lords (as it then was) to assess the mindset of the putative discriminator to ascertain the reasons for the allegedly less favourable treatment.

Lord Nicholls, delivering the leading speech, stressed the importance of asking the question: what were the grounds, or the reasons, for the less favourable treatment? He correctly distinguished this question sharply from the motive underlying the less favourable treatment. As previously mentioned, motive was relevant to establishing the reason for the treatment but thereafter irrelevant.

When determining the reason for the treatment, Lord Nicholls stated that the judge must be aware of both the conscious and unconscious motives of the putative discriminator. The latter is still relevant because the discriminator may not even be aware that he has subconscious prejudices and, therefore, may be unaware that he is basing his decision on the grounds of a protected characteristic. Consequently, in "reason-why" cases such as *Nagarajan* the judge will have to infer, from all the surrounding background facts, whether the treatment was on the grounds of a protected characteristic.

2.4.2 *Direct discrimination cases*

The chapter will now move on to critically analyse criterion-based cases at the UK level. This will not involve an exhaustive analysis of every instance of criterion-based cases. Instead, the most prominent examples are examined. These are the *James, JFS* and *Amnesty* cases. *JFS* and *Amnesty* will be

analysed in this section. *James* will be scrutinised in Chapter 3 as it involved alleged sex discrimination and will therefore be the test-case for the thesis moving forward.

2.4.2.1 *The JFS case*

In the *JFS* case, a boy was refused entry to a Jewish faith school. The reason he was denied entry was that he was not recognised as Jewish according to the Orthodox rules of the faith. Faith schools were permitted to discriminate on grounds of religion but not on grounds of race or ethnicity.[169] The majority (5:4) of the UKSC held that, even though the school governors had acted without moral culpability and were merely exercising their religious duties, the religious reason for the boy's refused entry was a motive and therefore irrelevant. Instead, the Court went on to hold that the policy of refusing entry to non-Orthodox Jews was inherently directly discriminatory on the grounds of race because Judaism is an ethnicity as well as a faith.[170]

The majority were clearly uncomfortable with their decision. Lord Phillips stated in his judgement that the finding of direct race discrimination "should not be read as giving rise to criticism on moral grounds of the admissions policy of JFS...let alone as suggesting that these policies are racist as that word is generally understood."[171] Lord Kerr emphasised that, despite his finding of direct race discrimination, the school governors "are entirely free from moral blame," that their motives were "unimpeachable" and "based on sincerely held and conscientious beliefs."[172] Lady Hale stated that she felt bound by the existing authorities, namely the *Birmingham Schools* and *James* cases, to make a finding of direct race discrimination because the school's admissions policy was inherently discriminatory in the same way as the policies were in these earlier judgments of the House of Lords. However, she also stated in her

[169] Fredman, n.1, 266
[170] *Ibid*, 266.
[171] *JFS*, n.36, [9].
[172] *Ibid,* [124].

speech that “any suggestion or implication that they (the school governors) are “racist” in the popular sense of that term can be dismissed.”[173]

Clearly, one of the main reasons why the UKSC felt compelled to make a finding of direct race discrimination was because the UK law on direct discrimination does not, in some criterion-based cases, recognise a benign *reason* (as opposed to intention or motive) defence. As Lord Hope, for the minority, put it “the problem is that section 1(1) of the (Race Relations) 1976 Act which prescribes direct discrimination does not distinguish between discrimination which is invidious and discrimination which is benign.”[174]

Lord Hope’s assessment is certainly an important contributing factor to the counterintuitive nature of the *JFS* decision. However, my position is that the counterintuitive nature of the majority’s decision rested on more than just this one factor. Perhaps the biggest mistake made by the majority in *JFS* was that they misidentified the real reason for the treatment in question. They held that the prospective pupil was treated less favourably on racial grounds.

However, my view is that the real reason for the treatment was a religious one. When deciding whether to admit the prospective pupil, the school was merely implementing the criteria adopted by a third party, the Office of the Chief Rabbi (OCR). It was the OCR who was responsible for selecting the criteria which was relevant to determining whether a pupil was Jewish according to the Orthodox rules of the faith. The child, as a Masorti Jew, followed the teachings of a branch of Judaism which differed in its interpretation of certain aspects of the Halakhah when compared to Orthodox Jews.[175]As such, he was not an Orthodox Jew according to the rules set down by the OCR. Nevertheless, the objective of the school was not to treat non-Jews badly but to observe and preserve Jewish practice, culture and identity. The central question for the

[173] *Ibid*, [54].
[174] *Ibid*, [184].
[175] *Ibid*, [219]

OCR was what creed of Judaism was to be preferred in pursuit of these aims. Clearly, these were decisions based on religious, not racial, grounds.

As a result, given that faith schools were allowed to discriminate on the grounds of religion or belief at the point in time the case was decided, my view is that the JFS was not directly discriminating against the prospective pupil. My position accords with Lord Rodger's when he states, in his dissenting Opinion, that "to reduce the religious element in the actions of those concerned to the status of a mere motive is to misrepresent what they were doing. The reality is that the Office of the Chief Rabbi...gives its ruling on religious grounds."[176]

The UKSC ignored the real reason for the treatment in the *JFS* case which was clearly a religious reason. Fredman has also commented on this aspect of the *JFS* case, citing it as an example of one of the conceptual mistakes which the UKSC has made when trying to demarcate "motive" from the "reason" for the less favourable treatment in direct discrimination claims.[177] She correctly observes that, when trying to exclude motive in the *JFS* case, the UKSC also excluded the reason for the treatment.[178]

The UKSC managed to eliminate the religious reason for the treatment by holding that the criteria for admission was inherently discriminatory on the grounds of race. Of course, to exclude motive and intention (subject to the restrictions stated above) in direct discrimination cases is justified. However, to exclude the reason for the less favourable treatment is to render the definition of direct discrimination otiose. Indeed, the central question when determining whether direct discrimination has occurred is: what was the reason(s) or ground(s) for the allegedly less favourable treatment?

There was no evidence of indirect discrimination arising from the facts in the *JFS* case. The appropriate pool, if *JFS* is seen through the lens of indirect

[176] *JFS*, n.36, [227].
[177] Fredman, n.1, 265.
[178] *Ibid*, 265.

discrimination, would be Orthodox Jewish children who were prospective pupils (together with potential converts) versus prospective pupils belonging to other (or no) religious faiths. The OCR's criterion afforded preferential treatment to children who were Orthodox Jews or were intending to convert to Orthodox Judaism. The criterion cannot therefore be seen as neutral.

The primary argument in this chapter is that the real reason for the treatment was religious, so my position is that *JFS* was most likely a case of (albeit justified) direct discrimination on the grounds of religion or belief. My view is that the UKSC ignored the real reason for the treatment, opting to circumvent that question by holding that the criteria was inherently discriminatory. In doing so, it took its finding outwith the purview of direct discrimination as this form of discrimination must relate to the *reason* (or *grounds*) for the treatment.

Moreover, if the *JFS* case did centre on race rather than religion, it still seems absurd to place the actions of the school governors on the same moral footing as an overtly racist discriminator. Despite the protestations of the majority, that is exactly what they were doing when making a finding of direct race discrimination against the JFS. It seems equally absurd to deny the school governors the opportunity to defend this allegedly racist behaviour. From a moral point of view, the school governors' actions do not chime, even on an intuitive level, as a genuine case of direct race discrimination.

Instead, if viewed through the lens of race discrimination, the *JFS* decision can be seen as constituting a form of discrimination which resides within a conceptual gap somewhere between direct and indirect discrimination. In this scenario, it becomes more appropriate to view *JFS* as a "race related discrimination" case. The child was receiving adverse treatment, by not being admitted to the school, for reasons (religious creed) which arose from his ethnic descent.

On this note, Fredman has proposed in her earlier writing that one way to bridge the conceptual divide between direct and indirect discrimination in cases such as *JFS* may be to extend the reach of the section 15 model in the

2010 Act to protected characteristics other than disability.[179] Fredman's argument to this effect will be critically analysed, in depth, in later chapters. All that I would say for now, is that my position accords with Fredman's argument that the section 15 model, which deals with cases where the discrimination "arises" from disability, is structurally similar to the "inherently discriminatory" requirement.[180]

As such, if the courts and tribunals are going to continue with the "inherent discrimination" model and ignore the reason(s) for the less favourable treatment, it is my position that such cases may, at least in some instances, be better seen as falling somewhere between the dichotomous poles of direct and indirect discrimination and that the section 15 model (or a model similar to it) might be a more effective legal mechanism than sections 13 or 19 to deal with such cases.

In addition to its structural similarity to criterion-based cases, the section 15 model also has the added benefit of a proportionality defence (section 15(2)). This would allow the putative discriminator in cases like *JFS* to defend their (arguably benign) actions. These issues will be explored in further detail in Chapter 5. In the meantime, the chapter will move on to critically examine another criterion-based case, the EAT decision in *Amnesty*.

2.4.2.2 The *Amnesty* case

Whilst Amnesty was considered earlier in this chapter, a brief recount of the facts will be provided. In *Amnesty,* the claimant, who was of Sudanese origin, was refused a job with Amnesty as a Sudan researcher. Amnesty's reasons for not appointing her were that the post would involve travel to Sudan. Given the political instability in Sudan, Amnesty's position was that it would be physically dangerous for someone of Sudanese origin to enter the country. In addition, Amnesty had a policy of impartiality which could be perceived to be

[179] Fredman, n.38, 213.
[180] *Ibid*, 213.

breached by appointing someone of Sudanese descent to the position of Sudan researcher.

Following notice of her non-appointment to the Sudan researcher post, the claimant lodged an Employment Tribunal claim for direct race discrimination under section 1(1)(a) of the Race Relations Act 1976 (the 1976 Act). She claimed that Amnesty directly discriminated against her by refusing her the Sudan post on the grounds of her national or ethnic origins. Amnesty's defence rested on the health and safety and impartiality concerns noted above.

Pleading indirect discrimination in the alternative, the claimant's position in relation to this head of claim was that Amnesty had an impartiality or "conflict of interest" policy that made it more difficult for job applicants of a particular ethnicity or national origin to be allocated a job which directly related to the applicant's country of origin. On this basis, in the claimant's case, she claimed that it was more difficult for people of Sudanese origin, including her, to be appointed to a post which directly related to Sudan.

The Employment Tribunal found against Amnesty and held that it had directly discriminated against the claimant on the grounds of her race. The tribunal went on to hold that, had it not made a finding of direct race discrimination, it would have found in favour of the claimant in the indirect race discrimination claim.

Amnesty appealed against these findings to the EAT. In its judgment, the EAT also held that Amnesty had directly discriminated against the claimant on the grounds of race.[181] The EAT, applying the "inherently discriminatory" test in the *James* case, found that the criterion adopted by Amnesty, not to appoint people of a certain ethnic origin to a job which directly related to their country of origin, was inherently discriminatory on the grounds of race.[182] The EAT went on to state that it could take no account of Amnesty's benign motive, or

[181] *Amnesty*, n.36, [40] (Underhill J)
[182] *Ibid*, [38].

intentions, when arriving at its decision.[183] Once a policy has been held to be inherently discriminatory, a finding of direct discrimination must ensue and that is the end of the matter.[184] The EAT also stated that:

> "We feel some unease at being required to reach this conclusion, which may have implications beyond the present case...However...it seems that the law can offer no comfort. The legislature – both here and in Brussels – has deliberately set its face against allowing any defence of justification in cases of direct discrimination."[185]

I shall now build on my analysis on *Amnesty* that commenced in section 2.4.1. My position is that *Amnesty* was wrongly decided. The EAT made similar mistakes to the UKSC in *JFS*. Indeed, as argued in section 2.4.1, the EAT misidentified the real reason for the treatment in *Amnesty*. My interpretation of the case is that the decision not to appoint the claimant to the Sudan researcher post was to protect her from physical harm and safeguard her physical and psychological well-being. That was the primary reason. Amnesty's policy of impartiality also played a significant role in its decision-making process, but this was probably secondary to its health and safety considerations.

By following cases like *James* and referring to the "inherently discriminatory" model, the EAT made the mistake of ignoring the perfectly legitimate reasons for Amnesty's decision not to appoint the claimant to the role. In doing so, it also repeated the UKSC's mistake of holding that a benign policy with benign intentions, and employment practices, were on the same moral plane as overt cases of racism.

Indeed, my view is that, in *Amnesty*, there was no direct causal link between the protected characteristic of race, on the one hand, and the less favourable

[183] *Ibid*, [33]
[184] *Ibid*, [38].
[185] *Ibid*, [58].

treatment (the non-appointment to the Sudan researcher role) on the other. As a result, *Amnesty* is not an example of direct discrimination, properly understood.

In addition, it is very difficult, if not impossible, to compress the facts in *Amnesty* under the heading of indirect discrimination either. As mentioned earlier, the criterion (or PCP) in an indirect discrimination claim must be neutral; it must apply to everyone in the pool under consideration whilst still having a disproportionate and adverse impact on a certain group of people, including the claimant.[186] However, the criterion in *Amnesty*, which was the impartiality policy, was not neutral.[187] It treated those Amnesty workers who wished to work in jobs which related to their country of ethnic origin differently from those who did not. As such, the PCP in the *Amnesty* case was a criterion which imposed adverse treatment on workers for reasons which related to, or arose from, their race. It is suggested that such prima facie cases of ”related discrimination” cannot, by their inherent nature, be seen as neutral PCPs.

By way of explanation, Amnesty based its decision not to appoint the claimant to the post of Sudan researcher for reasons which *related* to her ethnicity or race, rather than being because of ethnicity or race itself. In other words, the claimant was not treated less favourably simply because she was of Sudanese origin. Instead, the treatment was based on characteristics which arose from, or were related to, her Sudanese descent. The risk of physical and psychological harm to the claimant related to her ethnic origins. The effects of the policy of impartiality also related to the claimant's country of origin. The *Amnesty* case is therefore best viewed as a case of “related discrimination,” rather than direct or indirect discrimination. As a result, my view is that

[186] The EAT stated in its Judgement that the question of the appropriate pool was a ”red herring” as it was not necessary to determine it to arrive at a finding – see [64] of the EAT's Judgement.

[187] The EAT also made some comments, per curiam, on the indirect discrimination claim submitted by the claimant. In doing so, the EAT stressed that the PCP relied upon by the claimant, Amnesty's impartiality policy, was not sufficiently explored by the first instance Tribunal. Indeed, the EAT commented that the Tribunal had reached the conclusion that Amnesty gave undue weight to the impartiality policy but, crucially, the Tribunal had not given any detailed reasons as to why it had reached that conclusion.

Amnesty is another case where the alleged discrimination falls in a conceptual chasm lying somewhere between direct and indirect discrimination.

2.5 Conclusion

This chapter has initiated my position that direct and indirect discrimination are distinguishable heads of claim. The indirect discrimination claim is based on normative foundations with redistributive roots. By contrast, the direct discrimination claim appears to lie on a moral bedrock of dignitarian and autonomy-based concerns. This latter argument will be developed in more detail in the next chapter.

Despite the differences between the two claims, judges at the UK level have often appeared to struggle to grasp the distinctions. These judicial difficulties likely arise, at least in part, from the fact that some discrimination claims do not fit neatly within the direct or indirect discrimination paradigms.

It is the criterion-based cases which can sometimes fall within a conceptual gap between direct and indirect discrimination. As such, I have only referred to “reason why” cases in a cursory manner. Indeed, section 2.4 focused on a critical analysis of the criterion-based cases. This analysis illustrated that these problematic criterion-based cases tend to have some common attributes. They tend to involve examples of discrimination, often with apparently benign reasons, as opposed to blatant cases of bias, prejudice or stereotyping. This is perplexing as such “benign” cases do not chime, at an intuitive level, as being of sufficient moral gravity to be labelled as direct discrimination cases.

The courts and tribunals have also confused the *motive* with the *reason* for the treatment in direct discrimination claims. The result is that courts and tribunals have excluded benign reasons, as well as benign motives, in some cases. When combined with a lack of a general defence in section 13, the results are cases where actors are held to be liable for direct discrimination even though the definition of direct discrimination has not been applied by the judge and

where the putative discriminator's reasons for acting were benign in nature. This was shown to be the position in cases such as *JFS* and *Amnesty*.

These criterion-based claims are also examples of cases where the less favourable treatment was based on an *attribute* which was *related* to, or *arose* from, the protected characteristic, rather than the protected characteristic itself, or because of a neutral PCP. Within the protected characteristic of sex, this concept is probably best described as "sex related discrimination."

This new concept may be able to address the main problems identified in the analysis in section 2.4. In the context of some alleged direct discrimination claims, it might be able to avoid having to categorise cases with benign reasons and motives as direct discrimination, such categorisation applying without even giving the putative discriminator the opportunity to defend their actions (as happened in *JFS* and *Amnesty*). Such claims could be justified, as they should be, by using a statutory defence. That would leave the law on direct discrimination to deal with truly malign conduct such as prejudice, bias and stereotyping, which is its proper province.

However, at this early stage of the thesis, it is recognised that transposing section 15 or section 3A (or a combination of both claims) to other protected characteristics is only one of several options which have been put forward to address some of the problems identified in section 2.4. Indeed, scholars have suggested other ways to mitigate the conceptual difficulties which the binary approach necessarily involves. These various options will be critically analysed in chapter 4.

Moving on to Chapter 3, some qualifications are required. There are nine protected characteristics in the 2010 Act, including disability. This thesis does not try to appraise whether the disability-related provisions of the 2010 Act, or its predecessor legislation, should be transposed to all these protected characteristics. Indeed, given the inherent differences between the protected characteristics themselves, coupled with the fact that they sometimes compete with each other within the factual matrix of particular claims, this would be too

lengthy a project for a single thesis. Instead, moving forward, one protected characteristic, sex, has been chosen as a focal point for the rest of the thesis. Sex discrimination has been chosen because a clear example of “related discrimination” - the *James* case – was treated by the Law Lords as a direct sex discrimination case. Consequently, the *James* case will be used, for the remainder of the thesis, as the primary case to test out the thesis’ hypotheses.

Chapter 3 – Sex Discrimination: Building the case for legal reform

3.1 Introduction

This chapter will build on the central argument of the thesis that was raised, albeit briefly, in Chapter 2: that the "related discrimination" model should be transposed to the protected characteristic of sex. Subsequent chapters will then progressively assemble a case for making this change to the law.

To build a watertight case for such legislative change, it will be necessary to continue to demonstrate how and why direct and indirect sex discrimination are morally distinct heads of claim. In doing so, I shall argue that the law on direct sex discrimination, as it currently stands, fails to accurately reflect the moral wrongs which underlie that concept. To do so requires a critical analysis of these moral wrongs.

This analysis will show that the primary moral injuries of direct sex discrimination are dignitarian and autonomy based. By contrast, the moral foundations of the indirect claim are based on redistributive concerns. Indeed, it is important, for the purposes of this thesis, to establish clear moral and legal boundaries between direct and indirect sex discrimination. This will then allow me to argue that an intermediate concept, the "sex related discrimination" claim, lies on a moral spectrum between direct and indirect discrimination.

Thereafter, I shall assess the legal position with reference to the *James* case. This assessment will demonstrate that the law does not require a breach of either autonomy or dignity-based human interests before a legal finding of direct sex discrimination can be established. Instead, direct sex discrimination in the UK can, at least in some criterion-based cases, be shown to be based on a model which has robbed the law of its necessary moral content in this area and failed to apply the legal test set down in the section 13 definition. Given these difficulties, the thesis will attempt to reconcile direct sex discrimination with its moral roots. It will be argued that introducing the "sex related discrimination" claim is the most effective way of doing that. As a result,

section 3.2 will identify the nature of the moral wrongs associated with direct sex discrimination. Section 3.3 then moves on to a legal analysis of direct sex discrimination. This analysis breaks down the reasoning adopted by the House of Lords in the *James* case into its constituent elements. *James* is the most authoritative case in the UK on the law relating to direct sex discrimination and has been consistently applied by later courts and tribunals.[188] Subsequently, a comparative analysis will highlight the stark incongruence between the moral and legal positions. The results of this comparative exercise are laid bare in section 3.3, substantiating the need for legal reform in this area. Section 3.4 briefly summarises some of the suggested "building-blocks" of the "related discrimination" model which have been deduced from the analysis in earlier sections of this chapter (these will be fleshed out in more detail in Chapter 5). Section 3.5 will then conclude the chapter.

3.2 The moral wrongs of direct sex discrimination

3.2.1 The philosophical foundations of section 13 of the 2010 Act

When one thinks about the wrong of discrimination, it can be tempting to equate the negative duty not to discriminate against other people as being equivalent to a positive duty to treat everyone the same. As previously mentioned in Chapter 2, this requirement for symmetrical treatment is referred to as "formal equality" and it falls under the broader heading of an egalitarian conception of the non-discrimination duty.

The law governing direct discrimination in the UK rests on a formal equality model, so it is a good place to start the present analysis.[189] Within the specific context of direct sex discrimination, this conception of equality is understood as treating men and women the same. Parity of treatment is the desired goal.

[188] *Nagarajan* - see n.79.; *Elias* - see n.117; *Amnesty* - see n.36; *JFS* - see n.36; Bull - see n.120.
[189] Fredman, n.1, 247.

For many people, this idea of uniformity of treatment might strike an intuitive chord; it may sound fair in the abstract.

However, when this model of formal equality is subjected to closer scrutiny, it proves to be a morally unattractive option. If the only concern of the law is to ensure uniformity of treatment between the sexes, then it becomes perfectly legitimate to achieve "sameness" by lowering the conditions for the favoured group rather than improving the conditions of the disfavoured group.

For example, if women are paid £15 per hour and men £20 per hour for work of equal value, the employer can comply with the requirements of formal equality by lowering the men's wage to £15 per hour, rather than increasing the women's pay to £20 an hour. As mentioned in chapter 2, this practice is known as "levelling down."[190] As Shin observes, the levelling down risk stems from the fact that formal equality, by focusing solely on symmetry of treatment, has nothing to say about the moral content of the rule applied to achieve sameness.[191] As a result, the model has the inherent potential to violate what must be the purpose, or at least one of the main purposes, of anti-discrimination law: to improve people's lives, rather than to worsen conditions for them.

Formal equality also fails to recognise that uniform treatment can often result in inequalities in outcomes between the sexes. Historically, women have been disadvantaged, vis-a-vis men, in various socio-economic, political and cultural contexts. Consequently, as Fredman has pointed out, treating women the same as men may reinforce such inequalities, instead of redressing them.[192] So, when the law compares men with women, it is not always, perhaps not even often, comparing "like-for-like."

Despite this, the symmetry-based test in section 13 of the 2010 Act requires a comparator-driven approach. The woman must demonstrate that she has been

[190] Case C-408/92 *Smith* v *Avdel Systems Ltd* [1995] 3 CMLR 543
[191] Patrick Shin, 'The substantive principle of equal treatment' (2009) 15 LEG 149, 151.
[192] Fredman, n.1, 1 - 2.

treated less favourably than a man in comparable circumstances. In addition to the risk of levelling down, the comparator approach adds unnecessary complexity to cases of direct discrimination and detracts from the main issues in the case, as was argued in Chapter 2.

One of the main reasons behind Fredman's rejection of this comparative approach is her astute observation that the claimant in a direct discrimination claim is usually at a default disadvantage. Indeed, the comparator model requires that the claimant compare herself with the dominant archetype.[193] In the context of direct sex discrimination, this means that the woman's claim must be brought and adjudicated through the lens of the "other," who is invariably the dominant male comparator. Furthermore, as McColgan has correctly argued, the onus of proving direct discrimination, under the comparator approach, is always firmly on the claimant, rather than requiring the respondent to justify the differential treatment.[194]

The formal legal model relied upon by the 2010 Act, with its comparative approach and the risks of "levelling down" is neither a moral nor immoralconcept. As such, I analyse whether direct sex discrimination may have moral bases which could be better reflected by a change in the laws relating to sex discrimination. These moral basescan be broadly categorised under two headings: liberal and dignitarian accounts of direct discrimination. Liberal accounts stress that the principal wrong of direct discrimination is that it violates human autonomy.[195] Dignitarians believe that the immorality of direct discrimination stems from its inevitable assault on human dignity.[196]

Some scholars have argued that direct discrimination is morally reprobate because it offends one of these values, or some variant arising from them. These theories are generally referred to as "monist" theories of

[193] *Ibid*, 279.
[194] Aileen McColgan, *Discrimination, Equality and the Law* (Hart Publishing, 2014) 197.
[195] Khaitan, n.90, 6.
[196] *Ibid*, 6.

discrimination.[197] By contrast, other theorists have stressed that there are multiple wrongs associated with direct discrimination; such theories generally being labelled "pluralist" accounts of discrimination.[198] The theory I advocate is a pluralist account. I will argue that direct sex discrimination is immoral because it violates human dignity *and* autonomy. To make this case, it is first necessary to engage with, and critically analyse, the relevant literature in this area.[199]

3.2.2 Moving beyond section 13 – autonomy-based models of equality

In this section, I shall argue that one of the moral wrongs inherent in direct sex discrimination is that it involves a breach of an individual's autonomy because of, or on the grounds of, sex. As such, the first requirement of my theory is that a breach of an individual's autonomy takes place. My position is that this breach of autonomy occurs when the discriminator deprives the victim of a life choice or opportunity because of the victim's sex. I am not arguing that sex is a life choice because it is, at least in the vast majority of cases, a biological fact.[200] Instead, my view is that an individual should, except in a narrow set of circumstances,[201] have the right to pursue life choices regardless of his or her sex. As such, putative discriminators should not generally deprive individuals of such choices because of their sex.

Such deprivation, which can occur by either an act or omission, must have a direct causal link to the victim's sex. Sex need not be the sole reason for the breach of autonomy. However, it must be a significant reason. These concepts require further unpacking. Indeed, it will be necessary to delineate the finer details of the concept of "autonomy" within the context of direct sex

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[197] An example of a prominent monist theory can be found in Deborah Hellman, *When is Discrimination Wrong?* (Harvard University Press 2011).
[198] Examples of pluralist theories can be found in Fredman - see n.1; Moreau - n.122.
[199] At this stage, a qualification is necessary. Many of the theories of what makes direct discrimination immoral focus on direct discrimination generally, rather than direct sex discrimination. Nevertheless, these general theories can still, in many cases, be applied to the protected characteristic of sex, as I shall come on to argue.
[200] *For Women Scotland* v *Scottish Ministers* [2025] UKSC 16 [266]
[201] Such as the need for Genuine Occupational Requirements – see n.96

discrimination. Accordingly, the existing literature on this concept will be analysed and shown to point in the right direction towards a workable definition of autonomy within this area of the law. Thereafter, I shall refine my own conceptualisation of autonomy.

Moreover, when considering the link between the breach of autonomy, on the one hand, and the protected characteristic, on the other, it is necessary to produce a theoretical construct which can adequately explain why some individual characteristics are "protected" by anti-discrimination law, and why some are not. My view is that sex should be a characteristic which is protected by law. This is important because it allows me to press my case for the extension of the law's protection in this area to cases of "sex related discrimination."

I have already argued that one of the main purposes, perhaps the main purpose, of anti-discrimination law is to improve peoples' lives. Of course, this is a broad statement. What it means in practice, at least as far as autonomy is concerned, is that everyone should have the right to pursue their own conceptions of what constitutes a meaningful and rewarding life, subject to some liberty-imposing constraints which I shall come on to detail shortly.

Indeed, the key point is that each person should be able to exercise control over their life choices. For example, an individual should, all other things being equal, have the right to pursue the profession they wish to enter after they have completed their education, regardless of characteristics such as their race or sex. In this way, the individual has control over her own path in life. This path should neither be determined by the individual's protected characteristics nor should the choice be determined by other people. To do so would be to breach the individual's autonomy, and to treat her as an object or as a means to an end, rather than as an end in herself.

Treating others as ends, rather than as means to ends, entails respect for their human dignity (a concept I shall expand upon later in the chapter). As such,

there is an interrelationship between the concepts of human dignity and autonomy, a point which was recognised by Joseph Raz:

> "Respecting human dignity entails treating humans as persons capable of planning and plotting their future. Thus, respecting people's dignity includes respecting their autonomy, their right to control their future."[202]

Dworkin makes a similar point in his seminal work, *Taking Rights Seriously*.[203] He introduces the idea that all individuals should be treated with "equal respect and concern" in this work.[204] This right to equal respect and concern entails that the individual should have the right to be treated as "an equal" when it comes to the distribution of opportunities.[205] Dworkin's conception of equality, in the sense it is expressed here, is particularly apt as it involves respecting the life-choices of the individual. As Shin observes:

> "(For Dworkin) treating others equally in the sense of equal respect and concern involves a certain kind of respect for the autonomy of others. This means, in his words, 'attempting, so far as it is possible, to see the situation of each person defined through the ambitions and values of that person.' "[206]

So, there is support amongst some prominent jurists for a conception of equality which embraces the value of autonomy. Specifically, they support an idea of equality which respects the preferences and life-choices of the individual. However, whilst Dworkin and Raz may help us to grasp this conceptualisation of autonomy, it must be borne in mind that a violation of autonomy, on its own, will not be sufficient to constitute an act of direct discrimination. For example, a black, female murderer may be imprisoned,

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[202] Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 221.
[203] Ronald Dworkin, *Taking Rights Seriously* (first published 1977, Bloomsbury 2013)
[204] *Ibid*, 326.
[205] *Ibid*, 327.
[206] Shin, n.195, 156 (quoting Dworkin, n.203, 357).

against her will, for her crime. This is clearly a breach of her autonomy. Nevertheless, it is not an act of discrimination because the violation of autonomy is not because the imprisoned individual is a woman or is black. Her autonomy is breached because she has committed a serious crime. So, for a violation of autonomy to potentially qualify as an act of direct discrimination, the violation must be because of a *protected characteristic*, rather than some other reason.[207]

This need for a clear connection between a violation of autonomy and one, or more, protected characteristics, is recognised by several prominent discrimination law scholars, albeit for different reasons. Moreau's position is that human beings should have deliberative freedoms, which include the capacity to make choices about the kind of lives they wish to live, and that such freedoms should not be constrained by personal characteristics such as race or gender.[208] Such personal characteristics, being morally irrelevant, should not determine which life-choices are available to the individual, and which are not.[209] So, for Moreau, it is the morally irrelevant nature of the personal characteristic which entitles it to legal protection. When referring to moral irrelevance, the upshot is that the personal characteristic or trait, whether it be race or gender, is not, by itself, a good moral reason for treating someone unfavourably. Indeed, it is a very bad moral reason for meting out adverse treatment to the individual in question.

Gardner's conception of an autonomous life, in this respect, is similar to Moreau's position as he conceives the autonomous life as one which involves the individual being able to make valuable life-enhancing decisions, from amongst a wide-ranging list of options, without interference by others.[210] Gardner's argument is that this autonomy is violated when individuals are

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[207] 2010 Act s13
[208] Sophia Moreau 'In Defence of a Liberty-based Account of Discrimination' in Hellman and Moreau (eds.), *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013) 71, 84.
[209] *Ibid*, 82.
[210] John Gardner, 'On the Ground of Her Sex(uality)' (1998) 18(1) OJLS 167.

unable to exercise their capacity to make such decisions for reasons which are immutable and when these decisions are made for them by other people.[211]

One of the main thrusts of Gardner's argument is that immutable characteristics, such as sex, should play no part in the individual's perceived ability to make choices regarding fundamental aspects of her life. On this view, then, it would be direct sex discrimination to prohibit females from studying law at university simply because they are females. Breaking this example down further, the prohibition on entry to university is the breach of autonomy. This breach is because of a biological characteristic, sex, and restricts the individual's ability to make significant life choices (regarding her education and career).

Khaitan builds on Gardner's autonomy-based arguments with his own liberty-based set of arguments. Like Gardner, his position is that the main purpose of discrimination law is to preserve individual autonomy by ensuring that individuals have a sufficient range of life-choices available to them.[212] By making these choices available, the individual can then pursue a valuable and meaningful life. This does not mean that everyone should have access to the same amount of life opportunities. Rather, Khaitan argues that the range need only be ”adequate” and this adequacy should ensure that each individual is able to pursue a flourishing life.[213] His theory therefore rests on a concern for the individual's physical and mental well-being.[214] Khaitan's theory specifies that it is only the pursuit of positive life choices which should be available to the individual as these enhance the individual's well-being in a way which negative choices do not.[215]

[211] *Ibid*, 170-1.
[212] Khaitan, n.90, 60.
[213] *Ibid*, 164
[214] *Ibid*, 129.
[215] *Ibid*, 103

My own conceptualisation of autonomy is similar to those cited in the literature. It will be recalled that my position is that autonomy entails that the individual should have control over her life choices. This control enhances the individual's autonomy and, in turn, her potential to lead a rewarding and meaningful life. However, I should like to add some further features and qualifications to this model of autonomy.

First, respect for autonomy does not require unconstrained freedom. This is an area where law and morality tend to intersect. For a sociopath, a life-opportunity may be to commit an act of murder. Of course, our shared moral values, on an individual and societal level, oblige us to try to deter the would-be murderer with the threat of significant punitive sanctions. If the threat of such sanctions fails to deter him, then the law must impose the appropriate punishment, usually a lengthy or indefinite period of imprisonment.

Society violates the murderer's autonomy, but this is a permitted, in fact a necessary, violation of his autonomy. The punishment will hopefully deter others from committing the same crime. It also protects the population-at-large from this criminal offender. It may even offer the offender the chance of rehabilitation in prison. Moreover, this individual act of autonomy-infringement has the effect of preserving the autonomy of others as a whole. To allow murderers, and rapists, and a whole series of other criminal offenders, to commit such acts without censure and imprisonment would infringe the autonomy of the general population as they will be more likely to be victims of crime.

The above example shows that there are both subjective and objective components present in a conceptualisation of autonomy which is worthy of inclusion in a model of direct discrimination. The subjective aspect arises from the individual's life-preferences. By way of example, a woman who has just graduated from school may wish to study Music at University, rather than Medicine, as her parents wish for her. To respect her autonomy on a subjective

level is to respect her value-preferences, in this case a desire to be a musician rather than a doctor, and to allow her to pursue this life-choice. There is nothing intrinsically wrong with a preference for Music over Medicine. However, if she declares that she intends to commit an act of terrorism which will cause the loss of lives, we have good reason as a society to violate her autonomy. This is an objective component to my conceptualisation of autonomy. The life choice itself must respect the autonomy of others and treat others as ends, rather than as a means to an end.

Objectively fundamental life choices relate to matters such as where an individual chooses to live, what career they choose to work in and the person to whom they wish to marry, to name just a few examples. However, subject to the comments above, the life choice itself does not otherwise need to be objectively important or fundamental to attract the protection of the laws prohibiting direct sex discrimination in this country.

This was shown to be the case in the Court of Appeal's decision in *Gill* v *El Vino* ("*Gill*") which held that a wine bar's policy of not serving females drinks at the bar was direct sex discrimination because men could order at the bar.[216] The *Gill* decision was a sensible one. The differential treatment of men and women resulted in the position that women were being treated less favourably than men. It could be argued that ordering drinks at a bar is a trivial life choice which does not deserve legal protection. However, this is an unconvincing assertion. Even though ordering drinks at a bar may be arguably classified as objectively trivial, it is clearly important to the person, or people, who do the ordering. The same argument extends to a whole range of objectively trivial behaviour, such as the right to play football, the choice as to which books to read and the type of food one wishes to eat. For many people, these objectively trivial pursuits may well enhance the contours and meaning of the lives they want to live.

[216] See n.29

Khaitan develops these arguments further. He supports the position that anti-discrimination law should protect the right to make objectively fundamental and trivial life choices. I stated earlier in this section that his position was that there should be a valuable range of opportunities open to people. These include objectively important and trivial opportunities. Important goals, for Khaitan, include education, domicile and relationships with other human beings.[217]

Khaitan stresses that the law should also protect objectively trivial life choices. In doing so, he makes an important distinction between the intrinsic and instrumental nature of trivial goals. They have an intrinsic quality because people enjoy doing them.[218] Khaitan gives the example of a person who enjoys listening to music. Whilst this may be trivial to some, it is not trivial to someone who is passionate about music.[219] The instrumental nature of the trivial goal is that it may increase the individual's capacity to achieve fundamental goals in the future.[220] Khaitan gives the example of someone learning to speak Italian (a trivial goal) so that she may retire to Italy in the future (a fundamental goal).[221]

In addition to agreeing with Khaitan's views on the importance of objectively trivial, intrinsic life choices, I also concur with him that the law should protect trivial instrumental goals because of the complex socio-economic and cultural nature of the landscapes within which we live. Given this complexity, it seems reasonable to accept that a fundamental life goal, such as retiring to a foreign country, will depend on a complex interaction of other, more trivial, choices. As such, retiring to Italy would involve trivial choices, such as to learn the language beforehand. Consequently, having considered Khaitan's position on

[217] Khaitan, n.90, 102
[218] *Ibid*, 103
[219] *Ibid*, 103
[220] *Ibid*, 103
[221] *Ibid*, 103

instrumental life goals, it makes a great deal of sense to me and, as a result, I believe that the law should also protect such goals.

This section began with an argument to the effect that one of the moral wrongs associated with direct sex discrimination is that it violates the autonomy of the individual because of, or on the grounds of, sex. So far, I have unpacked what I mean when I refer to the individual's autonomy. That constitutes the first part of my argument. However, I have not yet analysed why sex discrimination is generally considered to be sufficiently egregious to justify *legal* prohibition.

Most, if not all of us, will agree that discriminating against someone on the grounds of their sex is more morally reprobate than discriminating against someone because of their eye or hair colour, their surname or their zodiac sign.[222] This claim seems to make intuitive sense. Most of us also find it acceptable to make sex discrimination unlawful. However, we would find a law that prohibits discrimination based on eye or hair colour, surname or zodiacal sign very odd. So far, I have only touched on the intuitive rationales behind such distinctions. Nonetheless, it is necessary to assess the reason(s) why such distinctions strike an intuitive chord if I am to identify the concrete moral wrongs which underlie direct sex discrimination.

As noted earlier in this section, Moreau's theory is that personal characteristics which are morally irrelevant should be protected by discrimination law. My position is that, whilst the moral relevance criterion is superficially appealing, it breaks down on closer scrutiny. Indeed, in effect, it is a test which merely asks whether an arbitrary reason has been given for the unfavourable treatment.

There are many factors which can be morally irrelevant, or arbitrary, whilst also not deserving the protections conferred by discrimination law. Using the example above, a man could be refused a job because he has blue eyes. Or

[222] Hellman, n.197, 14. The zodiac reference is taken from Patrick Shin, 'Is there a Unitary Concept of Discrimination?' in Hellman and Moreau (eds.) - n.208.

because he has black hair. These are morally irrelevant human traits, in the sense that they are arbitrary reasons for meting out adverse treatment to the man. These should have no impact on his ability to do the job. However, it does not follow that there should be a legal rule which prohibits prospective employers from discriminating on the basis of eye or hair colour. As a result, my view is that moral relevance is not a strong ground to help one decide whether a personal attribute should be protected by discrimination law.

Gardner stresses that personal characteristics which are immutable deserve special protection. My position is that immutability is a weak ground for distinguishing between personal characteristics which should be protected by anti-discrimination law and those which should not. As Shin rightly observes, one's zodiac sign cannot be changed; it is immutable.[223] Yet it would be absurd to make discrimination on the grounds of astrological sign unlawful.

My position is that there is another justifiable rationale for distinguishing between personal traits which should and should not be protected by anti-discrimination law. I find Hellman's account of this rationale convincing. Her position is that sex discrimination is deemed to be more morally reprobate, and deserving of protection, than discriminating against someone because of her surname, because women have been historically disadvantaged when compared with men. The same cannot be said for people with a certain surname (or, for that matter, their zodiac sign or eye or hair colour).[224]

It is this historical disadvantage, and the resulting power imbalance between men and women in society, that justifies the differential treatment between sex and a historically peripheral trait such as one's eye colour. When one looks at other protected characteristics, such as race, religion and sexual orientation, this relative historical disadvantage permeates throughout them all. There is usually one dominant group, and one or more minority groups. The dominant

[223] *Ibid*, 172.
[224] Hellman, n.197, 14.

group tends to wield much more socio-economic and political power than the minorities. It is therefore the minority groups which experience the historical disadvantage. In the specific case of women, it is widely accepted in our society that they have experienced socio-economic, cultural and political disadvantages when compared with men, and continue to do so.

However, at this point, a qualification is necessary. To maximise protection for women via sex discrimination law, the law must also protect men. If it did not protect men, it could hardly be seen as worthy of the universal aims of anti-discrimination law. Yet one can concede this need for universality whilst also stressing that the principal purpose of the law is to protect historically disadvantaged minorities. Indeed, this principal purpose necessarily entails an inclusive approach for it to be a workable model. Khaitan explains this point well, albeit in the context of race discrimination:

> "Sometimes the best way to eliminate disadvantage faced by black people is to ban discrimination against black people as well as white. It should be clear that the protection of dominant groups from discrimination piggybacks on the disadvantage of protected groups."[225]

So far, I have established that direct discrimination involves a violation of personal autonomy by depriving individuals from making life choices because of their sex, a biological fact which is associated with group-based historical disadvantage. Given that women have been disadvantaged throughout history when compared with men, it is clearly morally wrong to subject them to unfavourable treatment by violating their autonomy simply because they are women.

[225] Khaitan, n.90, 178.

In effect, then, I have assembled a working definition of what constitutes one of the moral wrongs of direct sex discrimination. Autonomy is a central factor. Moreover, when one digs deeper into the conceptualisation of autonomy I advance here, it becomes clear that the autonomy-based model counteracts some of the main conceptual difficulties I associated with the formal egalitarian approach. For one thing, the focus on autonomy, or liberty, diverts attention away from the need for a comparator. The important point is that autonomy is enhanced for each individual; there is no need to view autonomy as a comparative value whereby one individual should be given symmetry of protection with another. The autonomy-based model recognises that individuals have differences. Some are more advantaged than others. Symmetrical treatment may simply serve to reinforce these differences and disadvantages.

As a result, the autonomy-based approach is able to embrace a substantive, rather than formal, model of equality which recognises that different treatment may be required to achieve equitable results for each individual. In turn, this focus on substantive equality then reduces the risks of levelling down associated with the formal egalitarian approach.

I shall now move on to the second moral wrong associated with direct sex discrimination: that it is an attack on human dignity.

3.2.3 *A dignitarian approach to sex discrimination law*

Again, I start with intuition, and surmise that most people are likely to view acts of prejudice, bias and stereotyping against an individual on the grounds of their sex as examples of discriminatory behaviour. My contention is that one of the main reasons underlying this intuition is that the act of discrimination violates the dignity of the victim. I shall begin this section by outlining the place dignity holds in domestic and international law. This exercise will help to illustrate the

basic nature of the concept of dignity, its function in domestic anti-discrimination law and how it fuels the law with normative content.

I shall then analyse Hellman's theory that direct discrimination demeans the victim.[226] Hellman's theory is perhaps the most noted example of a dignitarian theory of discrimination law in the literature.[227] My analysis will demonstrate broad agreement with Hellman's model. However, I shall then move on to develop my own conceptualisation of human dignity by building on, but departing slightly from, Hellman's position. Thereafter, I shall engage with academic criticism of the concept of human dignity; in particular its perceived inability to steer discrimination law in a clear and consistent direction. These criticisms, which will be acknowledged as sensible in principle, will help me to defend my own conception of human dignity, and its relevance to direct sex discrimination law.

The first paragraph of the Preamble to the United Nations Charter (UN Charter) refers to "the dignity and worth of the human person" as being a foundational aspect of respect for equality and universal human rights. The ECtHR has stressed that dignity lies at the very heart of the ECHR ("Convention")[228] indeed it is the "very essence" of the Convention.[229] Article 1 of the Charter of Fundamental Rights of the European Union[230] ("the EU Charter") states: "Human dignity is inviolable. It must be respected and protected."[231]

Dignity is also a central constitutional value in some national jurisdictions. For example, in Canada, the idea of dignity has significantly influenced the

[226] See n.197
[227] Hellman's work is regularly cited by leading discrimination law philosophers such as Khaitan (n.90, 254), Moreau, n.122, 22-24, 45-50 and Gardner, 'Discrimination: the good, the bad and the wrongful' Meeting of the Aristotelian Society, 30 October 2017) 78.
[228] 4 November 1950, Rome.
[229] *Pretty* v *United Kingdom* (2002) 35 EHRR 1, [65].
[230] (2000/C 364/01).
[231] The Charter ceased to be part of domestic law after Brexit - see European Union (Withdrawal) Act 2018, s 1.

judiciary's interpretation of the non-discrimination clause of Article 15(1) of the Canadian Charter of Rights and Freedoms. Article 15(1) states:

> "15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

In *Law v Canada*,[232] the Supreme Court of Canada held that the primary intention of Article 15 was:

> "To prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration."[233]

In South Africa, the law goes so far as to confer dignity the status of a right in itself. Indeed Article 10 of the South African Constitution states that "everyone has inherent dignity and the right to have their dignity respected and protected." As Feldman notes, this right is absolute, from which no derogation is admitted.[234]

Moreover, respect for human dignity can be seen to underpin the entire system of anti-discrimination law in South Africa. This is readily apparent from the legal test set out by the South African Constitutional Court ("SACC") in the leading

[232] [1991] 1 SCR 497.
[233] *Ibid*, [51].
[234] Article 37(5) of the Constitution of the Republic of South Africa (1996). See also David Feldman, 'Human Dignity as a Legal Value: Part I' (1999) Win, PL 682, 697.

case of *Harksen* v *Lane* ("*Harksen*")[235] where the SACC held that discrimination is established, *inter alia*, where the alleged act of discrimination involves "an impairment of...fundamental human dignity or constitutes an impairment of a comparably serious nature."[236]

The message from these national and international legal frameworks is clear: each human being, regardless of his or her personal characteristics or traits, possesses inherent dignity simply by reason of being human. No one human being has more or less dignity than another – it is a universal and equalising human attribute. The idea of dignity seems to stem, then, from the maxim that all human beings have equal moral worth. All things considered; these moral propositions are very difficult for a reasonable person to take issue with. As a result, the concept of human dignity appears to have significant potential as a way of providing normative support for the existence of a duty not to discriminate against another human being because of personal traits such as sex or race.

However, dignity is a relatively recent legal value in the UK.[237] Even in the field of human rights protection in the UK, dignity has played a peripheral role.[238] There is no mention of dignity, or other elementary founding values, in the Human Rights Act 1998.[239] The relative absence of dignity as a basis of rights in the English common law has been attributed to the cynicism with which human rights were viewed by prominent British scholars such as Jeremy Bentham.[240] This factor might prompt the argument that an "alien" concept such as human dignity could not therefore form a major part of the normative bedrock of direct sex discrimination claims.

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[235] 1998 (1) SA 300 (CC).
[236] *Ibid*, [50].
[237] Catherine Dupre, 'Unlocking human dignity: towards a theory for the 21st century' (2009) 2 EHRLR 190.
[238] Douglas, n.70, 241.
[239] *Ibid*, 241.
[240] *Ibid*, 241.

I do not find this argument to be a credible one. Whilst the concept of discrimination and human dignity might not have been a priority for foundational writers in the UK, it certainly holds a more prominent role in more recent national (South Africa, Canada) and supranational (Convention, UN Charter, EU Charter) legal orders. These legal systems were largely prompted by the gross human rights abuses of the World Wars and Apartheid.

In addition, the South African and (the most recent version of the) Canadian Constitution are also late 20th century systems.[241] This is highly relevant because anti-discrimination law is also a recent (20th century) legal development. Moreover, dignity has a significant role to play in anti-discrimination law. The 1975 Act was the first piece of domestic legislation to prohibit direct sex discrimination.[242] It did so because direct sex discrimination violates the dignity of the individual.[243] Moreover, section 26 of the 2010 Act, which prohibits harassment because of sex, does so in circumstances where the discriminator engages in unwanted conduct which, *inter alia*, violates the victim's dignity.[244] So, whilst dignity is a relatively recent concept in the UK, so too is anti-discrimination law.

Given that anti-discrimination law shares its recent historical birth with more modern national and supranational legal orders, and positively identifies human dignity as a key component, the argument that direct sex discrimination has its normative foundations in dignity-based concerns becomes more credible.

Perhaps in recognition of the fact that dignity is becoming a more prominent value in UK law, some senior judges, particularly Lady Hale, have tried to elevate the importance of human dignity, promoting it as a moral bedrock for wider anti-discrimination duties. By way of example, in *Ghaidan* v. *Godin-*

[241] Constitution Act 1982 (Canada); The Constitution of the Republic of South Africa (1996).
[242] See n. 75
[243] See n.76
[244] 2010 Act s 26(1)(a)

Mendoza,[245] Lady Hale used the concept of human dignity to extend tenancy rights to homosexual couples. In doing so, she stressed the importance of the equalising human trait of dignity:

> "Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being….such treatment is damaging to society as a whole."[246]

In *Sedon* v *Clarkson Wright and Jakes* ("*Seldon*"),[247] Lady Hale opined that "the philosophy underlying all the anti-discrimination laws is the dignity of each individual"[248] and, in *Aster Communities Ltd* v *Akerman-Livingstone* ("*Aster*"),[249] that the underlying aim of the 2010 Act is to ensure "equal respect for the human dignity of all people."[250] Moreover, in *R (Carson)* v *Secretary of State for Work and Pensions* ("*Carson*"),[251] Lord Walker emphasised the importance of human dignity when it comes to the need to respect human rights and equality:

> "In the field of human rights, discrimination is regarded as particularly objectionable because it disregards fundamental notions of human dignity and equality before the law. Discrimination on the ground of sex or race demeans the victim by using a sexual or racial stereotype as a sufficient ground for unfavourable

[245] [2004] UKHL 22; [2004] 2 A.C. 557.
[246] *Ibid,* [32]
[247] [2012] UKSC 16, [2012] ICR 716
[248] *Ibid*, [57].
[249] [2015] UKSC 15, [2015] AC 1399.
[250] *Ibid*, [32]. Also see Daniel Bedford, 'Human Dignity in Great Britain and Northern Ireland,' in Paolo Becchi, Klaus Mathis (eds.) *Handbook of Human Dignity in Europe* (Springer International Publishing 2020).
[251] [2005] UKHL 37; 2006 1 AC 173.

> treatment, rather than treating her as an individual to be judged on her own merits."[252]

Lord Walker's opinion strikes an intuitive chord, especially when he speaks of the demeaning effects of discriminatory treatment. My position is that this idea of discrimination as a demeaning act is a critical factor in what makes direct sex discrimination morally wrong. Acts or omissions which constitute direct sex discrimination necessarily debase the victim. In effect, they treat the victim unfavourably because of, or on the grounds of, sex. To do so is to treat a human being as a means to an end, rather than as an end in herself.

Indeed, one of two things must be happening when the discriminator treats a person less favourably on the grounds of sex. First, the discriminator may not recognise that the person has human dignity. This ignorance will not, of course, qualify as a defence to a discrimination claim. Second, if the discriminator does recognise the inherent human dignity of the victim, he decides to violate it, nonetheless. Both examples are capable of being acts of direct sex discrimination. They will usually involve instances of prejudice, stereotyping and / or bias.

As described in section 3.2.2, acts of direct sex discrimination are also particularly reprobate because sex is a historically disadvantaged human attribute. Acts or omissions which perpetuate this historical disadvantage demand particular censure. In addition, given this element of historical disadvantage, there will often be a power imbalance between the discriminator and the victim; the former generally having more power than the latter. This complex interaction of factors, particularly the merging of prejudice with an imbalance in power dynamics, makes it very difficult to resist the conclusion that acts of direct sex discrimination demean the victim.

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[252] *Ibid,* [49]

There is considerable scholarly support for the argument that acts of direct discrimination debase the victim by violating her dignity.[253] Deborah Hellman is perhaps the most prominent theorist to advocate this position.

Hellman subscribes to the precept that all human beings possess equal moral worth.[254] Moreover, she identifies two principles which underlie this precept: that each individual has inherent human dignity, and that this dignity does not depend on other human attributes, such as sex or race.[255]

Hellman's theory therefore rests on the maxim that all human beings are equal; one person is not intrinsically more or less important than another. It is our common humanity which places all of us on the same moral footing. Moreover, our humanity, regardless of personal traits or characteristics, is what confers dignity on each of us.

This powerful philosophical theory entails that one human being discriminates against another when he "demeans" her.[256] By demeaning her, he is violating her humanity and her corresponding dignity. For Hellman, there are two necessary components to this: the discriminator must "draw distinctions" between people and the distinguishing act or omission must demean the victim.[257] Usually (but not always) there will also be a third component to the discrimination which will be a power imbalance between the discriminator and the victim; the former generally being more powerful than the latter.[258] As Hellman puts it, "to demean rather than merely to insult, requires a certain degree of power."[259]

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[253] Hellman, n.197; Tess Gill and Karon Monaghan, n.76, 115. Fredman, n.1, 22 - 8.
[254] Hellman, n.197, 6.
[255] *Ibid*, 6.
[256] *Ibid*, 26
[257] *Ibid*, 29, 78.
[258] *Ibid*, 36.
[259] *Ibid*, 36.

When she refers to power, Hellman is focused on this power differential, an idea she links in with the historical disadvantage associated with certain human traits:

> "Whether the characteristic one uses to classify has the potential to demean is determined largely by how that characteristic has been used to separate people in the past and the relative social status of the group defined by the characteristic today. Race is different from the letter that begins one's last name."[260]

There will be many cases where people can, or at the very least should, agree that a practice demeans other human beings. These will tend to be clearcut cases of stereotyping, prejudice or bias. However, as Hellman rightly acknowledges, people will sometimes disagree in some less obvious cases as to whether an act or omission is demeaning.[261] This leads Hellman to the observation that there will often be room for doubt when one assesses whether certain acts or omissions are objectively demeaning.[262] However, as she correctly points out, this doubt permeates throughout many questions on moral theory and practice.[263] As such, these doubts should not prove to be an insuperable obstacle in the quest for some measure of objective validation in this area of legal philosophy.[264] She then goes on to state that the appropriate test is whether an act or omission is objectively demeaning, not on whether a person or group feels debased, therefore providing no grounds "for people to be especially sensitive."[265]

I agree with Hellman's position as it is summarised above. To determine whether a practice is demeaning, it is necessary to take an objective stance. Otherwise, a putative victim could argue that just about any act or omission is

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[260] *Ibid*, 28.
[261] *Ibid*, 78
[262] *Ibid*, 78
[263] *Ibid*, 79
[264] *Ibid*, 79
[265] *Ibid*, 81

demeaning. That would, of course, be a morally unappealing position for the law to take and be contrary to the spirit of the anti-discrimination legislation *per se*. However, this analysis then leaves open the question as to who decides what counts as demeaning conduct.

In addition to the two (sometimes three) stage test set down by Hellman, my position is that, to constitute objectively demeaning behaviour, the behaviour must be held to be demeaning by right-thinking members of society. As such, the debasing act must be one which demeans another human being to a significant extent. It will, of course, be judges who must assess whether these standards are met. Moreover, the assessment should be the product of some sort of objective “reasonable person” test. In other words, the question to be answered would be whether a reasonable person would deem the behaviour in question to be demeaning and, if so, whether the debasing act or omission is an objectively significant act of debasement.

There are obvious difficulties with this conception of objectivity. One may question whether a judge, who is not democratically elected, is well placed to substitute his or her judgement for that of the reasonable person. Moreover, another argument might be that the judge, who is often from a privileged socio-economic background, is not an appropriate decision-maker on this matter as he or she is typically representative of the dominant section of society. Such an argument might be that the dominant group will simply map their dominant social, political and moral values on to the assessment of what makes an act or omission demeaning. In doing so, he or she may omit factors which make the act or omission demeaning to a member of a minority group in society. In turn, this may reinforce the effects of demeaning behaviour, rather than ameliorating them.

At this point, however, it is apt to acknowledge that these are institutional problems which are associated with the judiciary *per se*. To extend this analysis further would be to create a different thesis entirely. The fundamental

points, as far as the present analysis is concerned, is that the objective test is the better route for the law to take and that the judiciary would be, for the foreseeable future at least, the ultimate arbiter as to what constitutes a "reasonable person" for the purposes of this objective test.

Clearly, the account I have provided of the dignitarian wrongs of direct discrimination is, so far, largely consonant with Hellman's. However, at this stage, it becomes necessary for me to depart from her theory by articulating my own conceptualisation of human dignity.

Perhaps the most important attribute of a concept of dignity, certainly one which provides a normative basis for direct sex discrimination law, is that it must be regarded as inviolable. If it is a human attribute which applies to all people, regardless of their personal traits, there can be no departure from dignity's inviolability. As Raz argued (see section 3.2.2) to live a life with dignity is also to be able to pursue life choices regardless of one's personal characteristics or traits. This right can only apply to everyone provided that dignity is an absolute, rather than a relative, value.

It is important to clarify what this does and does not mean. It means that dignity cannot be trumped by some other right, principle or value. Even though one of its principal purposes is to enhance autonomy, it also entails that human beings who lack the mental capacity to exercise choice still have inherent dignity which must be respected.[266] This point requires further examination.

As Dupre has argued, everyone has the right to have their dignity respected, regardless of whether they have mental capacity to exercise their own life choices.[267] This is a very persuasive proposition which would be hard for a reasonable person to argue against.

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[266] Lady Hale '*Dignity'* Ethel Benjamin Commemorative Address 2010, (**https://www.supremecourt.uk/docs/speech_100507.pdf**) accessed 24 November 2022

[267] Catherine Dupre, 'Human Dignity and the withdrawal of medical treatment: a missed opportunity?' (2006) 6 EHRLR 678, 693

The more difficult task is to find general legal or moral standards to guide judges through situations where different courses of action may be required to respect the dignity of the individual concerned. These tensions are particularly acute in healthcare law, especially when judges must decide whether medical treatment should be withdrawn from a patient who cannot decide for herself due to mental incapacity.

Biggs is correct to point out that the fact-sensitive nature of these cases means that they must ultimately be decided by judges based on their individual circumstances.[268] Nevertheless, there are general legal guidelines in place to assist judges with such decisions. In Scotland, the governing legislation is the Adults with Incapacity (Scotland) Act 2000 ("2000 Act"). In England and Wales, the guidance can be found in the Mental Capacity Act 2005 ("2005 Act").

Both pieces of legislation set out factors which must be taken into consideration by the judge when deciding whether to permit the withdrawal of medical treatment. The 2000 Act focuses largely on the patient's past or present wishes. If that cannot be gleaned, those closest to the family should be consulted with a view to ascertaining what the patient's choice would likely have been.[269] By contrast, the 2005 Act focuses more on the "best interests" of the patient, rather than the adoption of a patient-centred approach.[270]

Some cases involving medical treatment will be easier to determine than others. So, for example, when a patient is in a reversible coma with a realistic prospect of recovery, respect for her life, and her corresponding dignity, demands that treatment should continue. However, if the patient is in a persistent vegetative state (PVS), respect for her dignity is likely to point

[268] Hazel Biggs, 'From dispassionate law to compassionate outcomes in health care law, or not' (2017) 13(2) Int JLC 172, 173
[269] [15.9] - [15.10]. See also Adrian D Ward, 'Abolition of guardianship? "Best interests" versus "best interpretation"' (2015) 32 SLT 150, 152
[270] Sections 1(5) and 4. However, it has been argued that the judicial interpretation of the 2005 Act is moving closer to a patient-centred approach – Ward, *ibid*, 153.

towards the withdrawal of medical treatment to allow her to die with some measure of dignity.[271]

Harder cases may involve cases where the patient's consciousness lies somewhere between a reversible coma and a PVS. By way of example, a patient in a minimally conscious state (MCS) will exhibit varying degrees of consciousness, from a near-vegetative state to much higher levels of consciousness and sentience. In such cases, it is difficult to predict whether, and to what extent, treatment will be successful.[272]

In such difficult cases, the 2000 Act will guide the decision-maker to seek to understand the patient's wishes. However, this approach is not without its difficulties. The MCS may have resulted from a single and sudden event. As such, there may be no advance directive in place, nor any evidence of what the patient would have wanted if she found herself in such a position. Many people will not have given detailed thought and communicated their views to loved ones on such matters, particularly when they are in good health. In such cases, the patient's family and loved ones must try to respect her dignity by making the choice she would, in all likelihood, have made if she were able.

In England and Wales, the 2005 Act's "best interests" test would need to be applied to the circumstances of the case. Nevertheless, this test also has problems. If a judge must exercise his discretion as to what constitutes the best interests of the patient, he may simply apply the medical opinion of what is in the patient's best interests. However, there may be a disconnect between the views of the medical team and the patient's likely views and those held by her family and loved ones.[273]

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[271] John Lombard, 'Navigating the decision-making framework for patients in a minimally conscious state' (2016) 22(2) MLJI 78, 80.
[272] *Ibid*, 78
[273] Emma Keane, 'Withdrawal of life support for patients in PVS' (2011) 17(2) MLJI 83, 85

As such, there will be difficult cases which the provisions in the 2000 and 2005 Acts will struggle to adapt to. This is no doubt inevitable given the generality of statutes, coupled with the infinitesimal complexity of real-life situations which those statutory provisions must be applied to.

As a result, there is a need, when trying to safeguard the dignity of the patient, for the law to adopt an even more rudimentary test than those found in the 2000 or 2005 Acts. My position is that Mason and Laurie put forward a strong test to guide judges in hard cases involving human dignity. Their test, which is an objective one, asks the judge to consider what "right-thinking persons" would consider to be undignified in the circumstances of each case.[274] Whilst this test could be argued to be too basic, my view is that the elementary nature of this test is what makes it a strong one, especially when it is used to supplement the tests already laid out in the 2000 and 2005 Acts. Indeed, it is sufficiently malleable, due to its basic nature, to cover any case concerning the withdrawal of medical treatment.

So, respecting human dignity does not mean that everyone should be treated the same. Indeed, asymmetry of treatment may in fact be essential to ensure that the individual's human dignity is respected. This can be achieved by adopting a substantive, rather than formal, model of equality. The substantive model recognises that people are different and that, as a result, different treatment is required to ensure equality of outcomes for people. Seen in this way, substantive equality is preferable to formal equality in the sense that it respects human dignity by striving for equality of outcomes.

Moreover, if dignity is recognised as a universal human attribute, it can reduce the risks of levelling down which were alluded to earlier in this chapter. It does so by guaranteeing a minimum level of respect and concern for each human

[274] John Kenyon Mason, Graeme Laurie, 'Personal autonomy and the right to medical treatment: a note on R (on the application of Burke) v General Medical Council' (2005) 9(1) Edin LR 123, 129

being. In addition, as Moon observes, dignity reduces the need for a comparator.[275] It does so by introducing a universal standard which moves away from whether someone has been badly treated at a comparative level. Instead, the focus is on whether human dignity has been violated by the putative discriminator's act or omission.[276] As I shall come on to argue, for dignity to be a workable model which provides normative content to the law, it must have practical as well as theoretical benefits. The practical benefits of my conception of human dignity are that it eliminates unnecessary complexity, and removes unwanted anomalies, from this area of the law.

Up until this point, I have used various terms, such as a value or a concept or a standard, to describe human dignity. However, if a violation of human dignity is one of the foundational moral wrongs of direct sex discrimination, as I argue, I shall need to be more precise as to its fundamental nature. Specifically, I must consider whether dignity is a right, a principle, a value or something else.

It would be undesirable, from a teleological point of view, to treat dignity as a principle. Principles have relative weight depending on their importance in any given legal case.[277] This relativistic quality is incompatible with the need for human dignity to be, and be seen to be, an inviolable concept.

Moreover, viewing dignity as a right has similar, insuperable difficulties. Most rights also have comparative values; they must often be balanced against each other or the needs of society as a whole.[278] For example, the right of person A to manifest his religious beliefs when providing a service may conflict with his customer's, person B's, right to express her sexuality in an open and

[275] Gay Moon, 'From equal treatment to appropriate treatment: what lessons can Canadian equality law on dignity and on reasonable accommodation teach the United Kingdom?' (2006) 6 EHRLR 695, 718.
[276] *Ibid*, 718.
[277] See Dworkin, n.203, 53.
[278] Lady Hale, n.266, 20.

transparent manner. These rights will sometimes have to be balanced against each other, as exemplified in some key decisions from the UKSC.[279]

As Feldman has observed, dignity is therefore best seen as an irrebuttable and fundamental human attribute.[280] It would, as a result, be misleading to state that one has a right to dignity. Instead, the dignity inherent in the human condition is a justificatory source from which the prohibition against discrimination and the promotion of universal human rights can be extrapolated. Relying on the human attribute of dignity as a moral bedrock for such rights, and duties, is not the same thing as claiming a specific right to dignity.[281] Moreover, characterising it as a fundamental human trait allows the law to preserve the inviolability of human dignity.

So far, I have argued that acts or omissions which constitute direct sex discrimination do so by violating the dignity of the victim. By this, I mean that the discriminator, in his treatment of the victim, fails to show respect for the equal moral worth of each person. That moral worth rests upon the universal and equalising human attribute of dignity.

Dignity cannot be seen as a principle or a right in itself, but as an inviolable human trait which justifies the existence of certain human rights and a duty not to discriminate against other people on certain protected grounds. Whether the ground is protected will generally be dependent on whether it is constitutive of a group of people who have been historically disadvantaged.

Clearly, women are a historically disadvantaged group, who have suffered structural barriers to advancement, and can easily meet this threshold requirement. As such, when a discriminator violates the dignity of the victim because she is a woman, he is demeaning the woman on the grounds of sex.

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[279] *Bull* - see n.120; *Lee* v *Ashers Baking Company* [2018] UKSC 49, [2020] AC 413.
[280] Feldman, n.234, 689.
[281] *Ibid*, 689.

This idea of “discrimination-as-demeaning" not only has logical and intuitive appeal; I have also argued that it can circumvent the comparison-based and levelling down risks which are associated with a formal egalitarian approach.

However, whilst dignity has much to recommend itself as a fundamental layer in the normative bedrock of the anti-discrimination duty, it has also been at the tail-end of judicial and academic criticism. Such criticism has tended to view dignity as too vague and intangible a concept to provide specific guidance to judges in individual cases. As a result, it is necessary to consider these criticisms. In doing so, I can then assess whether dignity can withstand such criticisms and act as a sufficiently precise moral construct upon which the law of direct sex discrimination can rest.

Reaume has observed that dignity is a vague concept which does not give judges concrete guidance on how to decide specific cases.[282] There is some merit in this observation. People will inevitably have different conceptions of dignity. This element of subjectivity was recognised by the Canadian Supreme Court in *R* v *Kapp*[283] where McLachlan C.J. opined that although “the protection of all the rights guaranteed by the Charter has as its lodestar the promotion of human dignity” it (dignity) is nevertheless both “abstract and subjective” and, as a consequence, not easy to apply to the facts of individual cases.[284] Moreover, human dignity is an intangible concept, unlike broken bones.[285] Indeed, the intangible nature of human dignity serves to heighten its subjectivity.

Douglas has commented that the vague nature of the concept of human dignity carries with it the risk of judicial legislation.[286] The risk is that judges can adopt

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[282] Denise Reaume, ’Dignity, Equality and Comparison’ in Sophie Moreau and Deborah Hellman (eds.), n.139, 21.
[283] [2008] 2 SCR 483.
[284] *Ibid*, [21] - [22]. Also see McColgan, n.194, 63.
[285] Denise Reaume, 'Harm and fault in discrimination law: the transition from intentional to adverse effect discrimination' (2001) 2(1) Theoretical Inquiries in Law 13, 19.
[286] Douglas, n.70, 252.

their own interpretations of human dignity in accordance with their own moral preferences, and then fuel the law with normative content which complies with their own understanding of what human dignity involves.[287]

However, Douglas, correctly in my view, rebuts this risk with the notion of a "minimum core" of dignity, an idea he borrows from McCrudden.[288] Douglas' position is that, provided the judicial understanding of human dignity is confined to the meaning attributed to it by the UN Rights Treaties - what McCrudden refers to as a "minimum core of dignity" - then the risk of subjective (mis)interpretation by judges is eliminated.[289] McCrudden's minimum core of dignity has three components. Only the first two components relate to my argument, and they are as follows:

> "The first is that every human being possesses an intrinsic worth, merely by being human. The second is that this intrinsic worth should be recognized and respected by others, and some forms of treatment by others are inconsistent with, or required by, respect for this intrinsic worth."[290]

It is my position that it would be very difficult, if not impossible, for a reasonable person to take issue with McCrudden's general conception of human dignity. This has particular relevance to my own conceptualisation of human dignity. Indeed, I have outlined three specific elements to my understanding of human dignity in the preceding analysis: that human dignity is based on the equal moral worth of each human being, that it is a universal and equalising human trait, and that it is inviolable. Each of these elements are present in McCrudden's first component.

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[287] *Ibid*, 252.
[288] *Ibid*, 252-3.
[289] *Ibid*, 252.
[290] Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) EJIL, 655, 679.

Moreover, McCrudden's second component comprises a general duty to recognise and respect the dignity of each human being. My position is that a general non-discrimination duty is entirely consistent with this duty. And from this general duty, one can easily extrapolate the duty not to directly discriminate against others on the grounds of sex. As a result, even though dignity can be criticised, on some levels, as being an abstract concept, it can be broken down into relatively simple, uncontroversial maxims, as McCrudden does, and used as a theoretical and *practical* foundation on which a non-discrimination duty can comfortably rest. Indeed, the practical benefits of my dignitarian model are that it reduces the risks of levelling down and moves the law away from the morally unattractive comparator-based approach.

3.2.4 *Conclusion*

This section of the thesis has focused on the moral wrongs associated with direct discrimination. The formal equality model, upon which section 13 of the 2010 Act is based, was shown to be unsatisfactory from a moral point of view. The symmetrical model carries unacceptable risks of levelling down and unnecessary complications which arise from the comparator requirements. Hence, from a moral point of view, my position is that, when we talk about the wrongs of direct sex discrimination, we should be talking about something broader and deeper than mere symmetry of treatment. Instead, as has been argued in this section, the moral wrongs of direct sex discrimination centre on autonomy-based and dignitarian concerns.

As I shall move on to argue, there is a deep incongruence between the moral and legal foundations for direct sex discrimination claims. This is an important point to register as it strengthens the argument that some sex discrimination claims are being misclassified as direct discrimination. In turn, this opens theoretical space to accommodate the introduction of a new head of claim, "related discrimination," within the family of sex discrimination laws.

3.3 Direct sex discrimination – the legal position and why it needs to change

3.3.1 An analysis of the James case

The facts of the *James* case are summarised in Chapter 2. By way of a short recap, Mr. James had to pay an admissions fee to access his local Council's swimming pool. However, his wife, Mrs James, was granted free access. Mr and Mrs James were both 61 years of age at this time. The reason for the Council's differential treatment of Mr and Mrs James was that the default retirement age (at the time of the case) was 60 for women and 65 for men in the UK. The Council granted free permission to the pool for pensioners. Hence Mrs James qualified for free access whilst Mr James had to pay an admissions fee. The House of Lords held that this difference in treatment between Mr and Mrs James amounted to direct sex discrimination under section 1(1)(a) of the 1975 Act.[291]

The House of Lords held that the sex-based criterion, which differentiated between men and women, was "inherently discriminatory."[292] In addition, Lord Goff reiterated the "but for" test for cases of direct sex discrimination that had first been enunciated in the *Birmingham Schools* case: but for the claimant's sex, would (s)he have been treated the same?[293] Lord Goff's view was that this objective "but for" test avoided the court's need to assess difficult mental states, such as reason, purpose, intention and motive, when deciding whether direct discrimination had occurred.[294] Given that the majority of the Law Lords answered the "but for" question in the affirmative, the Court held that there was direct sex discrimination.

[291] *James,* n.35*,* 751.
[292] *Ibid*, 769.
[293] *Ibid*, 774 – 5.
[294] *Ibid*, 774.

Moreover, the majority also held that, even though the motive underlying the Council's admissions policy was benign (to compensate pensioners for financial losses they would not otherwise have incurred had they still been working) there was no benign motive defence to a direct sex discrimination claim.[295] Indeed, the Council had adopted an inherently discriminatory policy, by which the Law Lords meant that the reason for the treatment and the claimant's sex were indissociable, and that the Council was therefore liable for direct sex discrimination.

Lord Goff clarified that direct discrimination could involve cases where the protected characteristic was the reason for the less favourable treatment under section 1(1)(a) of the 1975 Act and also cases where the criterion was based on a protected characteristic:

> "I do not read the words "on the ground of sex" as necessarily referring only to the reason why the defendant acted as he did, but as embracing cases in which a gender-based criterion is the basis upon which the complainant has been selected for the relevant treatment".[296]

My position is that the real reason for the Council's treatment in *James* was pensionable age, not sex.[297] Indeed, the Court accepted that the reason for giving free access to pensioners was to compensate them for the loss of income they would otherwise have received had they still been working.[298] As such, in effect, the Council was acting on the basis of benign motives *and* reasons. Consequently, my position is that in *James*, the House of Lords, somewhat counterintuitively, held that a policy with a benign reason amounted to direct sex discrimination.

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[295] *Ibid*, 774.
[296] *Ibid*, 772.
[297] See also Fredman, n.1, 265
[298] *James*, n.35, 772-3.

From a moral perspective, it is implausible to hold that a policy with benign reasons should be held to constitute direct discrimination. These difficulties are compounded by the fact that there is no defence to a direct discrimination claim, under either the old section 1(1)(a) model in the 1975 Act or the definition of direct discrimination under section 13 of the 2010 Act.

The result of this unfortunate combination of legal factors is that the senior judiciary in the UK has made direct discrimination a tort in certain criterion-based cases which is devoid of moral content. The "inherently discriminatory" test, where all that is required is an indissociable, or 1:1 link, between the protected characteristic and the unfavourable treatment to establish direct discrimination, makes it impossible for the judge, in many criterion-based cases, to enquire into the reasons for the treatment which is alleged to form the subject matter of the discrimination.[299] So long as there is an indissociable link between the treatment and the protected characteristic, that is the end of the matter.

Indeed, as Fredman notes, by prohibiting the judge from ascertaining the reason for the treatment, the judiciary has robbed direct discrimination of its "moral anchor."[300] As a tort based on empty moral foundations (at least in some criterion-based cases) the legal conceptualisation of direct sex discrimination in the UK does not require either a breach of autonomy, or dignity, for a legal finding to be established.

Moreover, the result of the *James* case is that laudable attempts to assist disadvantaged groups (as the Council was trying to do in *James* by assisting pensioners) could be resisted on the grounds that such attempts constitute direct discrimination. Indeed, in his dissenting Opinion, Lord Griffiths referred to these risks:

[299] *Ibid*, 769 for more details of the "inherently discriminatory" test.
[300] Fredman, n.1, 267.

> "The result of your Lordships' decision will be that either free facilities must be withdrawn from those who can ill afford to pay for them or, alternatively, given free to those who can well afford to pay for them. I consider both alternatives regrettable. I cannot believe that Parliament intended such a result and I do not believe that the words 'on the grounds of sex' compel such a result."[301]

All things considered; it is very difficult to resist the conclusion that the Law Lords in *James* completely separated the law relating to direct sex discrimination from its moral bedrock.

Looking at the *James* case from a purely legal perspective, it is the "reason" for the treatment, or the "grounds" using the wording adopted in section 1(1)(a) of the 1975 Act (the terms are interchangeable)[302] which determines whether an act or omission constitutes direct discrimination. Consequently, from a purely legal perspective, to exclude the reason for the treatment is to fail to apply the definition of direct discrimination to the facts of the case.

Fredman therefore correctly observes that the House of Lords ignored the reason, as well as the motive for the treatment, in the *James* case.[303] In addition, she also maintains that, whilst it is fine to exclude the latter, the former should not be excluded from the definition of direct discrimination:

> "Direct discrimination is distinctive in its focus on a perpetrator's actions and the reason for those actions. A discriminates against B if A treats B less favourably because of a protected characteristic. There is a necessary link between the treatment and the reason for it: if the less favourable treatment is not "because of" the protected characteristic, there is no discrimination."[304]

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[301] *James,* n.35, 768.
[302] Explanatory Notes to the 2010 Act, paragraph 61.
[303] Fredman, n.1, 264.
[304] *Ibid*, 264.

Whilst I agree with the foregoing aspects of Fredman's analysis of the *James* case, I depart from it in other respects. In particular, I do not, as Fredman appears to, think that *James* is better viewed as an example of indirect discrimination.[305] Indeed, Fredman's position is that, in the *James* case, the Law Lords focused on the effect of the inherently discriminatory policy and, in doing so, strayed into the realm of indirect discrimination.

Whilst it is correct that the effect of the policy on a group was a key consideration for the majority in *James*, the argument that this case is better seen as indirect discrimination is not persuasive. This requires further explanation.

If *James* had been brought as an indirect discrimination claim, the appropriate pool for comparison would have been men and women in the age range 60-64. It was these groups of people who received differential treatment by the criterion in *James* because of the differing pensionable ages for men and women at that time. It is my position that the criterion in *James* was not neutral because it treated these groups differently. The application of the policy results in a situation where all the women aged 60-64 can comply with the criterion but no men aged 60-64 can comply.

This differential in treatment arose because the pensionable age of the men and women were different as they were related to sex, rather than the policy on pensionable age being "inherently discriminatory" or pensionable age being a proxy for sex. The adverse treatment was meted out to men in the age 60-64 range, Mr James included, because of pensionable age and this age-range was related to sex. Indeed, as I shall argue in my reconstruction of the *James* case in Chapter 6, the criterion amounted to a *prima facie* example of "sex-related discrimination" so it should not therefore be construed as neutral. Given

[305] *Ibid*, 264.

this absence of neutrality in the PCP, my view is that it would have been wrong to treat *James* as an indirect sex discrimination claim.

As outlined in Chapter 2, indirect discrimination claims involve the application of a PCP which is equally applicable to everyone in the relevant pool. By way of example, a facially neutral criterion is one which requires all employees to work full-time. Even though the rule applies equally to everyone in the relevant pool, it has the potential to have a disproportionately adverse impact on women as they, generally speaking, have greater childcare responsibilities than men. As such, this apparently neutral provision may amount to indirect sex discrimination.

Consequently, the inescapable conclusion of the preceding analysis is that the *James* case does not fall within the direct or indirect paradigms (in the same way as the cases I analysed in Chapter 2). This leaves the law in an intractable dilemma: there is no statutory provision within the architecture of our discrimination laws which provides a legal and moral structure within which this subset of cases can be properly adjudicated.

As a result, judges are having to perform contorted legal reasoning to compress the facts of such cases within the direct or indirect discrimination frameworks. One of the main catalysts which is fuelling this dilemma is that the law on direct discrimination does not, through a combination of the "inherently discriminatory" test and the absence of a defence to direct sex discrimination, distinguish between overt examples of discrimination which arise from prejudice, bias and / or stereotyping (which should have no legal defence) and cases where the alleged discrimination arises from an otherwise benign reason (which should be capable of being defended). The *James* case is clearly an example of the latter type of case.

Given these difficulties, chapters 5 and 6 of the thesis will aim to build a case for a new legal model, the "sex related" discrimination model, which will fill the

legal and moral gap which permeates throughout sex discrimination law. Before concluding this chapter, I shall summarise some of the key characteristics which might provide substantive and normative content to this new model. These characteristics have been deduced from the observations already versed in Chapters 2 and 3.

3.4 A model of "sex related discrimination?"

I shall come on to argue, in Chapters 5 and 6, that my "related discrimination" model solves the legal and moral problems I have identified in this chapter. In the meantime, my position is that, if *James* can be seen as an example of discrimination, it is discrimination arising from, or related to, sex, not discrimination because of sex. There was no direct causal link between Mr James' sex and his treatment by the Council. Given the absence of this causal link, the Council should have been given the opportunity to defend its policy, perhaps using the proportionality test found in section 15 of the 2010 Act. This proposition will be considered in Chapter 5.

At this stage, it is important that I make an important distinction. I shall not be advocating a "related discrimination" model to allow the law a benign motive defence. Such a defence would justify direct sex discrimination provided the motive behind the treatment was benign. Instead, what I am arguing for, as part of the "related discrimination" model, is a benign *reason* defence. If the putative discriminator has acted for reasons which are potentially benign in nature (a fact which will generally have to be established by the court or tribunal which is determining the case) then the putative discriminator should have an opportunity to defend his conduct.

The "related discrimination" legal model should also, if possible, align with the moral wrongs associated with this species of discrimination. Moreover, it should try to avoid the comparator approach, and the risks of "levelling down" associated with it. It must also be capable of accurately reflecting the (indirect,

rather than direct) causal link between the treatment and the protected characteristic of sex which one tends to find in “sex related discrimination.” This might be achievable if “related discrimination” is expressed as “arising from” or “related” to sex; rather than being “because of” sex.

3.5 Conclusion

I described what I understand to be the moral wrongs of direct sex discrimination in this chapter. I then analysed the existing law on direct sex discrimination. A comparison of the moral and legal position showed a concerning mismatch between the two.

I have advocated a pluralist theory of equality where I concluded that the moral wrongs of direct sex discrimination are dignitarian and autonomy-based harms. These moral wrongs differ considerably from the moral foundations of indirect sex discrimination which were shown to rest on redistributive concerns. These are important findings as they open the theoretical space to argue that sex discrimination law requires an intermediate head of claim which lies between direct and indirect discrimination on a moral continuum.

Having established the moral wrongs inherent in direct sex discrimination, I then moved on to a legal analysis. This analysis showed how the Law Lords turned direct sex discrimination into a morally vacuoust tort in its decision in the *James* case, at least in the context of some criterion-based cases. This highlighted the disconnect between the moral and legal positions on direct sex discrimination. In particular, in some criterion-based cases, the putative discriminator’s act or omission does not require any autonomy-based or dignitarian harms to the victim to justify a legal finding of direct sex discrimination.

I also argued that the Law Lords failed to apply the definition of direct sex discrimination to the facts in in *James*, thereby rendering the legal definition

otiose. I then demonstrated how the *James* case could not be accurately viewed as either direct or indirect sex discrimination. Instead, I argued that the species of discrimination involved in *James* fell within a conceptual chasm somewhere between direct and indirect sex discrimination. Like the cases I evaluated in Chapter 2, *James* is best seen as an example of what I have termed "related discrimination." This strengthens the argument that "sex related discrimination" should be recognised as a separate species of claim from the direct and indirect heads of claim. I shall go on to argue in later chapters that if this demarcation process is allowed to take place, then the law on direct and indirect discrimination will be reconciled with their respective moral roots.

Moving forward, I recognise that there are some pre-existing theories in the literature which have been put forward as ways of mitigating many of the problems I have identified in this chapter. Before I begin assembling a new model, I shall critically evaluate those which have been put forward by other scholars. That will be the principal purpose of Chapter 4.

Chapter 4 – Direct sex Discrimination – analysing the existing proposals for legal reform

4.1 Introduction

The purpose of this Chapter is to critically evaluate theories, found within the existing literature, which try to solve the problems associated with the law on direct sex discrimination.[306] This exercise should be conducted before I attempt a detailed exploration of the possibility of adding an entirely new model to the existing law. If one, or more, of the pre-existing theories can remove the problems found in Chapter 3 and act as a workable legislative solution, there will be no need to develop my model of "related discrimination" any further.

Before proceeding, it should be noted that there are only three theories (and a brief suggestion of another model) in the existing literature. This chapter will constitute a comprehensive review and critical analysis of the three existing theories. A short introduction to the other suggested model will be made, and this model will then be fleshed out in Chapter 5. Given that the literature is sparse, many of the observations and conclusions in this chapter are my own, unless otherwise indicated.

Bowers and Moran have argued that the introduction of a general defence to direct sex discrimination claims would counter some of the problems I identified with the law on direct sex discrimination.[307] Their arguments to this effect prompted a robust response from Gill and Monaghan who maintained that the law should not allow a general defence in cases of direct sex discrimination.[308] In turn, this provoked a further reply from Bowers and Moran (with Honeyball) which sought to rebut the points made by Gill and Monaghan

[306] Some of these theories specifically target direct sex discrimination. Others target direct discrimination in general. The latter category of theories still applies to the protected characteristic of sex, as this chapter will go on to demonstrate.
[307] Bowers and Moran, n.39, 307.
[308] Gill and Monaghan, n.76, 115.

in their article.[309] Section 4.2 will critically evaluate the proposal to introduce a general defence to direct sex discrimination claims.

Smith and Campbell have also suggested that the law on direct discrimination can be improved via their proposed statutory formulation, which they call the "reasoning-oriented" approach.[310] Smith and Campbell's model will be analysed in Section 4.3.

Section 4.4 will critically examine other attempts in the literature to introduce an "intermediate" head of claim between direct and indirect discrimination. The first to be scrutinised is Pilgerstorfer and Forshaw's theory which maintains that there is a third category of discrimination, not explicitly recognised by the law, which resides in a legal chasm between direct and indirect discrimination.[311]

In addition, I shall re-visit Fredman's (albeit brief) proposal to transpose section 15 of the 2010 Act to protected characteristics other than disability.[312] This proposal is crucial to the mandate of the thesis as it forms part of the theoretical foundation of the "related discrimination" model, which advances the idea of extending section 15 of the 2010 Act, or section 3A of the 1995 Act (or a combination of both statutory models) to the protected characteristic of sex. The analysis of Fredman's proposal, and the development of her proposal into the idea of an intermediate claim of "related discrimination," will only be given a cursory overview in this chapter. Given its importance to the overall aims of the thesis, a much more detailed analysis of this model will be reserved for the remainder of the thesis.

4.2 Should there be a general defence to direct sex discrimination claims?

[309] Bowers, Honeyball and Moran, n.39, 185.
[310] Smith and Campbell – see n.40.
[311] Forshaw and Pilgerstorfer – see n.41
[312] Fredman, n.38, 213.

4.2.1 *Introduction*

The key proponents of a general defence to direct sex discrimination are Bowers and Moran. As described in section 2.2.1, their proposal has been supported by Lady Hale. She has argued that the ECHR approach to direct discrimination, which has an open-ended list of protected characteristics and a general defence, is preferable to the UK and EU positions which have closed lists and no general defence.[313]

Nevertheless, judicial support for a general defence in the UK appears to be rare. The only other senior judges to propose the introduction of a general defence to direct discrimination were Lord Browne-Wilkinson in the case of *Strathclyde Regional Council* v. *Wallace (Wallace*)[314] and, as mentioned in section 2.1, Lord Philips in the *JFS* case.[315] Lord Browne-Wilkinson suggested the idea of a general defence in this case because he noticed the difficulties, experienced by U.S. judges, in drawing clear boundaries between direct and indirect discrimination.[316] However, his comments in the *Wallace* case were *obiter* and have not been referred to by other senior members of the UK judiciary.

At the EU level, there has also been scant support, at a judicial level, for a general defence. Whilst the European Commission put forward the possibility of a general defence in *Birds Eye Walls* v *Roberts,*[317] the ECJ did not follow up this potential avenue in its decision.

Moreover, there appears to be very little academic support for the introduction of a general defence to direct sex discrimination. Indeed, Bowers, Moran and Honeyball appear to be in a very small minority of scholars who have openly

[313] See 2.2.1 for more details of Lady Hale's argument.
[314] [1998] 1 WLR 259 (HL).
[315] See n.99
[316] *Wallace,* n.314, 213. See also Bowers and Moran, n.39, 311 for a summary of Lord Browne-Wilkinson's dicta in *Wallace*.
[317] Case 132 / 92 [1993] 3 CMLR 822. See Bowers and Moran, n.39, 308 - 9.

advocated such an approach.[318] Nonetheless, a general defence might be able to resolve some of the difficulties with the law on direct sex discrimination and, as such, will be critically analysed throughout the remainder of this section.

Moving forward, section 4.2.2 will evaluate whether a general defence has the potential to clear up the problems associated with the law on direct sex discrimination which I identified in Chapter 3. Section 4.2.3 will then move on to determine whether the supporters of a justification approach to direct sex discrimination have built a convincing case for it. Thereafter, section 4.2.4 involves an assessment as to whether the statutory model, recommended by Bowers and Moran, should be given legislative effect. Section 4.2.5 will conclude the section.

4.2.2 *Can a general defence solve some of the problems with sex discrimination law?*

The imposition of a morally vacuous standard in some direct discrimination cases has already been identified as a major problem for this area of the law. The problem tends to arise in criterion-based cases of direct discrimination. In this sub-set of cases, the courts and tribunals have consistently held that, so long as the criterion constitutes an indissociable link between the protected characteristic and the less favourable treatment, a finding of direct discrimination should automatically ensue. Chapters 2 and 3 demonstrated that the courts and tribunals have held that the criteria were "inherently discriminatory" in such cases.

This was particularly apparent in the *JFS, Amnesty* and *James* decisions. A common problem arose from these cases: a finding of "inherent discrimination" precluded the judges from enquiring into the underlying reasons for the less favourable treatment. As a result, the law in this area has developed in such a

[318] Hugh Collins also considers the utility of a general defence, albeit briefly and within the context of a socially inclusive model of direct discrimination. See Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 16 Mod L Rev 16, 34- 36.

way that cases which involved benign *reasons* for the allegedly less favourable treatment have been held to be examples of direct sex and race discrimination.

A general defence to direct sex discrimination claims has the potential to ease these problems. Even if the judiciary continues to use the "inherently discriminatory" test, a general defence could be invoked to justify what would otherwise have been held to be a case of direct sex discrimination. In this way, the defence would allow the judge to distinguish between cases with benign and malign reasons for the less favourable treatment. In doing so, it would likely reduce the need for judges to engage in complex and convoluted judicial reasoning, thereby promoting judicial transparency. So far, so good.

However, the introduction of a general defence might also have some potential drawbacks, such as justifying an act, omission or course of conduct which breaches human dignity and autonomy. These "pros" and "cons" are, of course, merely general observations at this stage. And they are observations which could lean in favour of, or against, the introduction of a general defence. To gain a more comprehensive insight as to whether a general defence should be introduced, it will be necessary to engage in a detailed critical analysis of the literature in this area.

4.2.3 *The case for a general defence*

Bowers and Moran construct a four-stage test which acts as a general justification defence to direct sex discrimination claims.[319] They then attempt to demonstrate the practical benefits of their model. They do so by applying the defence to the factual circumstances of the *James* case.[320] In addition, they weave reasoned arguments throughout their paper which support the introduction of a general defence. I shall critically evaluate the four stages of their theory. Then, I shall assess the application of the model to the *James*

[319] Bowers and Moran, n.39, 313 -17.
[320] *Ibid*, 317 - 8.

case. Thereafter, I shall engage in a critical analysis of the arguments they use in favour of a general defence.

4.2.3.1 Bowers and Moran's four stage model

The four building blocks of their model consist of a "reason" test, a "causation" test, and finally a "proportionality" test which they break down into a "means" and a "balance" test. The "reason" test states that the reason for the allegedly discriminatory rule or practice must be in tune with the genuine requirements of the putative discriminator (as they acknowledge, this will usually be an employer).[321] Of course, this is a sensible starting point for their theory. For the defence to have any credibility, it must not be arbitrary. Instead, it must correlate with the employer's genuine business needs, relating to issues such as labour costs and market forces.[322]

Bowers and Moran suggest that the idea of genuine business needs, or operational requirements, could be extended to social benefits.[323] Whilst this suggestion is, in principle, an acceptable one, they use a weak example to demonstrate what they mean by a social benefit. The example they give is that an employee at a rape crisis centre should be female. This requirement is justified to optimise the service that the centre can provide to victims of rape.

Whilst I agree that it is reasonable to maintain that such employees should be female, it is my position that this requirement would have been covered (at the time Bowers and Moran wrote the article) by the Genuine Occupational Qualification (GOQ) provisions in the 1975 Act.[324] Today, it would be covered by the equivalent Genuine Occupational Requirement (GOR) provisions of the 2010 Act.[325]

[321] *Ibid,* 313.
[322] These are examples given by Moran and Bowers - see n.39, 313.
[323] *Ibid*, 315.
[324] 1975 Act, s 7.
[325] Schedule 9, Part 1.

The rape crisis centre exception is the only example Bowers and Moran provide to exemplify the operation of the “reason” test. When providing this example, they, albeit inadvertently, support the utility of the GOQ (and later GOR) exceptions to the general prohibition on direct sex discrimination. In doing so, they unintentionally strengthen the case to maintain the *status quo* as far as the prohibition of a general defence is concerned.

The next stage of the model deals with “causation.” When describing the causation test, Bowers and Moran put forward the argument that there must be a causal link between the allegedly discriminatory conduct and the reason advanced by the employer.[326] Whilst this also seems like a sensible component of a general defence, Bowers and Moran’s argument is again weakened by the selection of an unconvincing practical scenario to exemplify the point they are trying to make. The example they give is of a dress code where men must not have long hair if that would be detrimental to the commercial needs of the employer.[327]

However, the main problem with this example is that it brings the law into a “slippery slope” situation, as was demonstrated in the “prejudiced customer" scenario I used in Chapter 2. Indeed, if the customer’s preferences on such matters are held to be paramount, where does one draw the line? What about the sexist customer? Or the racist customer? Gill and Monaghan rightly share these concerns regarding Bowers and Moran’s model:

> “The suggestion that discriminatory treatment might be justified on the basis of loss of business is particularly dangerous. It would logically follow that the more prejudiced the customer base, the more justified the discrimination; whether it be forbidding men to have long hair, requiring waitresses to wear revealing clothes, or preferring white salesmen. The further away from the cultural norm a worker is, and thus the more requiring of protection, the greater

[326] Bowers and Moran, n.39, 315.
[327] *Ibid*, 315 - 6.

the danger that prejudice and intolerance would be used to justify treatment against him or her."[328]

Bowers and Moran then move on to the "proportionality" component of their theory. The first element of the proportionality test requires the judge to assess whether the putative discriminator could have achieved his objective in a less discriminatory way.[329] By this, the authors appear to mean that the least discriminatory alternative should be adopted; and I am analysing their arguments on that assumption.[330] It is submitted that this is the correct approach for the law to take. Indeed, it would be contradictory to hold that a practice or policy was a proportionate means of achieving a legitimate aim whilst also conceding that the aim could have been reached using a less discriminatory method.

The second part of Bowers and Moran's proportionality test involves the well-worn "balancing" exercise which has been consistently used by domestic and international courts and tribunals, particularly in employment cases.[331] This involves balancing the detriment to the employee against the benefit to the employer. Bowers and Moran correctly identify that, under this balancing exercise, the employee's interests should win out if the detriment outweighs the benefit.[332] Conversely, if the benefit exceeds the detriment, the court or tribunal must then assess whether the disparity is disproportionate.[333] If there is disproportionality in this respect, the employer's interests will prevail. If there

[328] Gill and Monaghan, n.76, 120.
[329] Bowers and Moran, n.39, 316.
[330] There is some ambiguity within their paper on this issue. Whilst the authors refer to the "reasonable needs" test in *Hampson* v *DES* [1989] ICR 179, they state shortly afterwards that they are adopting the strict "necessity" test in the *Bilka* case (see p.312 of their article). As a result, I am proceeding on the assumption that they are transposing the *Bilka*, not the *Hampson*, test into their analysis. The *Bilka* test requires that the option should be the least discriminatory option for the putative discriminator. The *Hampson* test permits more leeway as the measure need only be "reasonable" rather than "necessary." As a result, under the *Hampson* test, the measure can be held to be non-discriminatory even if there are less discriminatory options available. These distinctions will receive much greater scrutiny and analysis in Chapter 5.
[331] As a result, I shall use the employer / employee context to analyse this aspect of Bowers and Moran's model.
[332] Bowers and Moran, n.39, 316.
[333] *Ibid*, 316.

is a finding of no disproportionality, then the court or tribunal should turn its attention to whether the employer, considering its resources and size, can take on the additional costs of refraining from the discriminatory measure.[334]

My view is that the balancing test described here is a useful addition to Bowers and Moran's model. Indeed, when it is combined with the means test, it provides objective parameters within which a general defence might be able to operate. Given the moral seriousness of direct sex discrimination, these limitations on the scope of a potential defence should be seen as a positive aspect of Bowers and Moran's theory.

So, to conclude my position on Bowers and Moran's model, the reason and causation requirements, whilst appearing at first blush to be theoretically sound, are poorly exemplified. Indeed, if anything, they strengthen the case for maintaining the current position and disregarding the possibility of a general defence. By contrast, their use of the proportionality test helps to design sensible constraints within which a general defence might operate.

Up to this point, my analysis of their formulation has been largely theoretical. I have not considered how their model might be applied in a practical legal setting. It would, therefore, be premature to reject their theory outright at this stage even though their case is not, as yet, convincing. Bowers and Moran also recognise the need to demonstrate the model's potential applicability to real legal cases. Consequently, their article progresses to consider how the model can be applied to the facts in the *James* case. Moving forward, I shall now turn my attention to this aspect of their article.

4.2.3.2 The application of the general defence to the *James* case

Bowers and Moran begin their assessment of the *James* case by stating that the decision of the House of Lords, whilst "unpalatable," was "clearly right given the legislative framework currently in force."[335] The point that Bowers and

[334] *Ibid*, 316.
[335] *Ibid*, 316 - 7.

Moran seem to be making is that, if a general defence had been part of the legislative framework at the time *James* was decided, the House of Lords would have been able to reach a decision that there was no direct sex discrimination.

Bowers and Moran apply the "reason" test to *James* in the first instance. Their argument, which in my view is correct, is that the "reason" test would be satisfied in *James*.[336] Indeed, one would expect a local Council to have service provisions which are designed to assist people living on a pension.[337] They also rightly conclude that the "causation" test would be satisfied because a significant proportion of people who have reached pensionable age will be living on a pension.[338] These arguments are straightforward and uncontentious.

Nevertheless, their reasoning on the application of the "means" and "balance" tests are more nuanced and complex. When assessing the former, they identify the correct question which the court or tribunal should ask itself: "is there a better way of determining whether a person is living on a pension other than relying on pensionable age?"[339] As Bowers and Moran accurately conclude, there might be a more rigorous way of determining this, such as asking each visitor to the pool whether he or she is living on a pension. However, as they astutely observe, this would be a cumbersome and unduly expensive enterprise.[340] As a result, pensionable age is, all other things considered, probably a sufficient marker to satisfy the "means" aspect of the proportionality test.

As far as the "balance" test is concerned, Bowers and Moran correctly identify the benefit of the scheme as free entry to those people who have reached pensionable age whilst the detriment is the price of admission multiplied by the

[336] *Ibid*, 317.
[337] *Ibid*, 317.
[338] *Ibid*, 317.
[339] *Ibid*, 317.
[340] *Ibid*, 317 - 8.

frequency of visits to the pool by men in the age 60 - 64 category in a specified time period.[341] They reach the sensible realisation that, unless the swimming pool is being used with unusual frequency by men in the 60 – 64 age range (and there was no evidence of this in *James*) then the benefit would considerably outweigh the detriment and the Council's interests would therefore prevail.[342]

Consequently, the application of Bowers and Moran's four-stage test yields (what I interpret to be) the correct result in the *James* case. As argued in Chapter 3, the Council did not directly discriminate against Mr James on the grounds of his sex. Furthermore, their model mitigates some of the difficulties with direct sex discrimination which were identified in Chapter 3.

However, these benefits must be weighed against the drawbacks of their position. So far, the arguments they have put forward for the introduction of a general defence have been relatively weak. Indeed, some of the examples they have used have in fact strengthened the case for rejecting the introduction of a general defence. In addition, one experiences a certain degree of moral discomfort when one considers the possibility of introducing a justification defence in respect of behaviour which breaches the human dignity and capacity for autonomy which is present in the human condition. This requires further analysis.

In the meantime, it should be noted that Bowers and Moran have woven a series of legal and philosophical arguments throughout their article which, they believe, supports the introduction of a general defence to direct sex discrimination. These arguments, hitherto unaddressed in the present analysis, will also need to be evaluated before a decision can be made on whether the law should admit a general defence. As a result, I shall now direct my attention to these arguments.

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[341] *Ibid*, 318.
[342] *Ibid*, 318.

4.2.3.3 An analysis of Bowers and Moran's arguments for a general defence

Bowers *et al* argue in their reply to Gill and Monaghan's paper that there should be a defence to direct sex discrimination claims because there is already a defence in indirect discrimination claims.[343] They go on to argue that there is no significant moral difference between direct and indirect discrimination claims in many cases.[344] However, they do not provide detailed reasoning to support this position other than to briefly argue that "there is probably very little sex discrimination that is solely direct."[345]

This contention is supported by a short practical example. In this example, Bowers *et al* argue that an employer may discriminate against a man because men are generally thought to be more aggressive and ruthless than women.[346] The authors view this is an example of direct sex discrimination.[347] They then go on to state that the same employer can indirectly discriminate against that same man by its treatment because it requires him to be subordinate and dependable (the converse qualities to aggression and ruthlessness in their opinion).[348] These latter qualities, the authors argue, are more likely to be found in women than men.[349] Bowers *et al* use this example to try and argue that a discriminatory act, or omission, can be simultaneously direct and indirect discrimination.[350] As a result, they contend, there should be a general defence available for both indirect and direct discrimination.

I disagree with Bowers *et al*'s position here. *Both* examples are forms of direct discrimination as they involve instances of stereotyping on the grounds of sex. Such stereotyping will, unless there is some strong reason to rebut this

[343] Bowers et al, n.39,186 - 7. (I shall refer to the authors as "Bowers *et al"* when referring to their reply to Gill and Monaghan's article (Bowers and Moran wrote the original paper (n.39), Gill and Monaghan submitted a reply (n.76) whilst Bowers, Moran and Honeyball replied to Gill and Monaghan (n.39)).
[344] *Ibid*, 186 - 7.
[345] *Ibid*, 186.
[346] *Ibid*, 187.
[347] *Ibid*, 187.
[348] *Ibid*, 187.
[349] *Ibid*, 187.
[350] *Ibid*, 187.

presumption, amount to direct discrimination.[351] Bowers *et al* provide no such reason to rebut the presumption of stereotyping in their example.

Bowers *et al* also try to argue that the indirect / direct distinction is an untenable one because the same ends can be achieved by both forms of discrimination.[352] As such, an employer may refuse employment to a woman because she is female (this would be direct discrimination) or because she is too short (amounting to indirect discrimination).[353]

The point that Bowers *et al* are making here is that there is no strong moral distinction between direct and indirect sex discrimination because both forms of discrimination can be used to achieve the same result. It should be recalled that Moreau employs a very similar argument to this effect.[354] My response to Bower *et al's* position is therefore on the same lines as my analysis of Moreau's argument.

Indeed, my position is that, where the putative discriminator uses a proxy in lieu of a protected characteristic (such as height rather than sex) then his actions are on the same grave moral footing as those of the direct discriminator (who imposes less favourable treatment because of sex without trying to disguise it as an apparently neutral criterion such as height).

However, the existence of such proxy cases is not, in itself, strong evidence to conclude that the categories of direct and indirect discrimination should, *in general*, be seen as equally morally blameworthy. There is no evidence to support the assertion that the use of such proxies is widespread; and certainly, no evidence to suggest that it is a uniform practice. As a result, Bowers *et al* cannot use the existence of proxy cases of indirect discrimination (which might as well be called covert direct discrimination) to justify the introduction of a general defence to direct sex discrimination.

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[351] *Prague Airport* case – see n.136
[352] Bowers et al, n.39, 186.
[353] *Ibid,* 186.
[354] See s.2.3.2 for further details of this argument.

Moreover, even if there is a blur in the line between direct and indirect discrimination in *some* cases, my view is that this will often be the case because the law has, save in the context of disability, refused to acknowledge the existence of an "intermediate" head of claim between direct and indirect discrimination. If this third head of claim was legally recognised, the distinction between direct and indirect discrimination would be sharpened. The law on direct discrimination would then be reserved for genuine cases of direct discrimination (which involve bias, stereotyping and prejudice) and the indirect discrimination laws could then focus on their true province (which involve truly neutral PCPs).[355]

To sum up my position so far, Bowers *et al* fail to make a convincing case for the introduction of a general defence to direct sex discrimination on the grounds that there are no meaningful moral distinctions between direct and indirect discrimination. Their reasoning to support this contention is weak. This is, perhaps, unsurprising when one considers that Chapter 2 identified indirect sex discrimination as a predominantly redistributive tool whilst Chapter 3 highlighted that the primary moral wrongs of direct sex discrimination were rooted in autonomy-based and dignitarian concerns. As a result, there are clear and principled distinctions between the moral wrongs of direct and indirect discrimination. Indeed, as a general rule, acts or omissions which amount to direct discrimination tend to be more morally blameworthy than those which constitute indirect discrimination.

Bowers and Moran argue that the availability of justifications for differential treatment of part time and fixed time workers might justify the introduction of a general defence to direct sex discrimination claims.[356] Gill and Monaghan rebut this argument by distinguishing between a protected characteristic (sex) and a job status (part or fixed time working). Their stance is that differential treatment of part time and fixed time workers does not violate the dignity of the

[355] See section 5.6 for a comparison of the moral underpinnings of each head of claim.
[356] Bowers and Moran, n.39, 307 - 8.

worker in the same way as less favourable treatment because of a protected characteristic.[357]

I agree with Gill and Monaghan's general position, at least in the context of the protected characteristic of sex. As I argued in Chapter 3, to treat a woman less favourably simply because she is a woman is to demean her. My view is that the same cannot be said for the adverse treatment of a woman based on her job status. There is an intuitive distinction between the two forms of adverse treatment. Whilst Gill and Monaghan touch upon this intuitive distinction, they do not try to explain why it strikes a chord.

My position is that it exists because of the historical disadvantage which is so strongly associated with protected characteristics such as sex. Women have historically been subjected to structural, societal barriers, simply because they are women, for many centuries in various socio-economic, cultural and political contexts. The same cannot be said for part-time or fixed-time workers. This is not to say that they are not vulnerable groups of workers. They clearly are. However, women have faced deeply entrenched historical disadvantage in a far more pervasive way than those who work on part-time or fixed-time contracts. I believe it is this pervasiveness which distinguishes women, as a group, from part-time or fixed-time workers in this context.

Bowers and Moran also point to the exceptions to the prohibition of a general defence as an argument to support the introduction of such a defence.[358] Indeed, they note that the general defence does not apply where there is a GOR, a (genuine) material factor defence to an equal pay claim, some positive action measures and on grounds of national security.[359] I fail to see the logic of this argument. Most general legal rules will have some common-sense exceptions. In the case of the general defence, those exceptions are narrow. They are also measured and sensible. Bowers and Moran do not deny this. It is, therefore, surprising that they have chosen to rely on some narrow

[357] Gill and Monaghan, n.76, 119.
[358] Bowers and Moran, n.39, 310-11.
[359] *Ibid,* 310-11.

exceptions to a general rule as being good argumentative grounds to dispense with the rule altogether.

Bowers and Moran state that the main point of protest against the introduction of a general defence is the “floodgates” argument.[360] By this, they mean the argument that a general defence would give tribunals too much judicial discretion and be interpreted in the employer’s favour.[361] The latter would then allow employers too much freedom to directly discriminate on the grounds of sex.[362] However, the authors do not think that these problems are realistic, stating that the general defence “would actually be fairly limited in its impact” and unlikely to allow employers more discretion to directly discriminate.[363]

My first observation on this rebuttal is that, if the introduction of a general defence is to be of such limited impact, why introduce it in the first place? The authors do not provide any detailed arguments to explain this apparent discrepancy.

Secondly, the authors’ rejection of the “floodgates” argument contradicts empirical studies in this area (albeit these were studies which were written after Bowers and Moran’s article). For example, Brodtkorb has argued that Employment Tribunals have not been able to effectively handle the broad discretion conferred on them by the “band of reasonable responses” test under section 98(4) of the Employment Rights Act 1996. His findings point towards the conclusion that Employment Tribunals have adopted an interpretation of the test which is weighed too heavily in favour of the employer.[364] This apparent pro-employer bias is not confined to first instance Employment Tribunals either. It also appears to be present at the most senior levels of the UK judiciary. Honeyball reviewed all labour law cases adjudicated in the House

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[360] *Ibid*, 319.
[361] *Ibid*, 319.
[362] *Ibid*, 319.
[363] *Ibid*, 319.
[364] Tor Brodtkorb, 'Employee misconduct and UK unfair dismissal law: does the range of reasonable responses test require reform?' (2010) 52(6) International Journal of Law and Management 429. See also Aaron Baker, ’The "range of reasonable responses" test: a poor substitution for the statutory language’ [2021] 50(2) ILJ 226.

of Lords between May 1997 and June 2004, finding that employers succeeded in 21 cases whilst employees won only 11 appeals.[365] Honeyball's findings have been echoed by Davies' study which found that the senior UK judiciary has exhibited a historical bias in favour of employers in labour law cases.[366] These later studies strongly suggest that the "floodgates" argument is a stronger objection to the introduction of a general defence than Bowers and Moran appreciated at the time of writing their article.

So far, Bowers and Moran's case for the introduction of a general defence has been unconvincing. However, they do make one reasonably strong point in favour of implementing a defence, namely judicial transparency:

> "At the moment the ECJ and UK courts are using flawed and illogical reasoning in order to avoid finding discrimination in some cases...it is surely better that the courts and tribunals should be open and transparent about what is happening rather than engaging in gymnastic contortions of reasoning in order to reach what they consider to be the right result..."[367]

As previously mentioned, Lady Hale also supports the introduction of a general defence to promote clarity in the judicial reasoning process in direct discrimination cases. Her view is that courts and tribunals have an intuitive ability to tease out direct from indirect discrimination.[368] As a result, she believes that judges will engage in strained reasoning in order to avoid a finding of direct discrimination.[369] Lady Hale goes on to argue that the introduction of a general defence would allow the courts to adopt more straightforward reasoning in such cases.[370] It would also, she adds, allow the

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[365] Simon Honeyball, 'Employment Law and the Appellate Committee of the House of Lords' (2005) 24(Jul) Civil Justice Quarterly 364, 367.
[366] ACL Davies, 'Judicial self-restraint in Labour Law' (2009) 38(3) ILJ 278, 287-8.
[367] Bowers and Moran, n.39, 319 -20.
[368] Lady Hale, n.100, 5-6.
[369] *Ibid*, 6.
[370] *Ibid*, 6.

court to look more closely at the fundamental issues at stake, such as the putative discriminator's aims and the proportionality test.[371]

I agree that the introduction of a general defence would, in all likelihood, promote judicial transparency. However, my position is based on different reasons from the ones cited by Bowers, Moran and Lady Hale. They contend that a general defence would promote clearer judicial reasoning. That much I agree with. However, they go on to argue that this would stop the artificial practice, employed by judges, of finding curious reasons to avoid a finding of direct discrimination. My position is that judges do not generally engage in such practices in discrimination cases. Indeed, Bowers, Moran and Lady Hale do not produce any case examples to substantiate this position.

Instead, my view is that courts have had to reluctantly concede that some cases are direct discrimination, despite their intuitions to the contrary. This argument is supported by the decisions in *James, JFS* and *Amnesty*, where the judges expressed discomfort with their findings of direct sex and race discrimination.[372] They certainly did not try to find reasons to avoid a finding of direct discrimination in these cases. Instead, the problems, identified in Chapter 3, forced the judges to squeeze the facts in these cases within the direct discrimination paradigm when these cases were examples of a separate species of discrimination which I have labelled "related discrimination."

So far, Bowers and Moran have not presented a strong case for introducing a general section 13 defence. As highlighted above, the reasoning and logic adopted in their argumentation is flawed in many respects. Yet their model applied well to the *James* case. They also pinpoint, albeit for the wrong reasons, that a general defence would promote transparency in judicial reasoning. It is now time for this analysis to consider whether Bowers and

[371] *Ibid*, 6.
[372] See sections 2.4.2.1 and 2.4.2.2 for respective analyses of *JFS* and *Amnesty* and section 3.3.1 for this assessment of *James*.

Moran have built a sufficiently strong case to establish that the law on direct sex discrimination should be amended to permit a general defence.

4.2.3.4 Should the law include a general defence to direct sex discrimination?

As the foregoing analysis has demonstrated, the bulk of Bowers' and Moran's arguments are weak. Moreover, the only strong substantive argument that they employ, in favour of judicial transparency, is based on flawed reasoning.

However, even if my analysis of Bowers and Moran's position is incorrect, there are still very strong grounds to argue that a general defence should not be given legislative effect. The first is that direct discrimination, properly understood, necessarily involves a violation of human dignity. In addition, it involves a breach of human autonomy. These arguments were explored, in depth, in Chapter 3 and I shall not repeat them here. It suffices to state that, even if Bowers and Moran had made a generally persuasive case for a general defence (and my position is that they have not) then that *prima facie* case would still have been outweighed by the dignitarian and autonomy-based interests which lie at the root of the law's prohibition on direct sex discrimination.

Given the moral seriousness of direct sex discrimination, it should not be capable of general justification. To do so would be to defeat the protective purposes of the legislation. Moreover, the narrow exceptions which already exist should remain in place as they are measured and allow the preservation of human dignity and autonomy.

Bowers and Moran might respond to this conclusion by arguing that their four-stage test yielded the correct result in the *James* case. However, there are two principal objections to this potential counterargument. First, judicial flexibility should not come at an unduly high price, such as breaching the dignity and autonomy of the human condition. Second, as the thesis will come on to show, there is another theory which can arrive at the correct outcome in the *James*

case without breaching human dignity and autonomy. Hence, this counterargument by Bowers and Moran would be weak if it was advanced.

Finally, they might argue that, as shown in section 4.2.2, the general defence can solve some of the problems identified in Chapter 3. This, too, would be a weak response from them. A general defence can only *mitigate* these problems. It cannot solve them. And it can only mitigate *some* of the problems; not all of them. The main reason for this is that the general defence still operates within the strictly dichotomous legal framework where direct and indirect discrimination are (save in the case of disability) the only two legal heads of claim.

4.2.4 *Conclusion*

Bowers and Moran fail to build a compelling case in favour of introducing a general defence to the law on direct sex discrimination. Two stages of their four-stage test strengthen the case for rejecting a general defence and maintaining the *status quo*. Whilst their model can generate the correct legal result in *James*, it will be argued, as the thesis progresses, that there is another model which can do so without breaching human dignity and autonomy.

In addition, the general arguments they employ in favour of a defence are weak and unconvincing. The only strong point they make, in relation to the need for judicial transparency, is argued for the wrong reasons.

Finally, their model can only be seen as a "sticking plaster" for some of the problems identified in Chapter 3, rather than a permanent solution. For these reasons, my position is that a general defence should not be introduced into direct sex discrimination law. Having rejected this option, I shall now move on to consider Smith and Campbell's "reasoning-oriented" model.

4.3 A critical analysis of Smith and Campbell's model for reform

4.3.1 *Introduction*

Smith and Campbell assess the utility of the "but for" and "criterial" tests in UK direct discrimination law. When they refer to the "criterial" approach, they mean the same thing as what I have described as a "criterion-based" test, as defined in Chapter 2.[373] Their position is that neither the "criterial" nor the "but for" tests should constitute the grounding requirement for direct discrimination. Instead, they prefer what they refer to as their "reasoning oriented" approach. This approach is a draft statutory formulation which the authors have constructed. The building blocks of their theory are largely gleaned from the perceived mistakes they have observed in the "criterial" and "but for" tests. As a result, they believe that their statutory model should be adopted by courts and tribunals when adjudicating direct discrimination claims.

Section 4.3.2 will explore Smith and Campbell's critical analysis of the "but for" and "criterial" tests. In doing so, I shall seek to determine whether their criticisms of these tests are warranted. Section 4.3.3 queries whether their model has the potential to solve the problems I identified in Chapter 3. Thereafter, section 4.3.4 will attempt to answer these queries and make a judgement as to whether the "reasoning oriented" model can act as a practical and workable legislative model for litigants, legal practitioners and the judiciary. Section 4.3.5 will conclude the section.

4.3.2 Smith and Campbell's criticisms of the "but for" and "criterial" tests

4.3.2.1 *The "but for" test*

Smith and Campbell argue that the "but for" test is not suitable where there are multiple adequate causes for the discrimination.[374] They provide an example to support this argument. Their example describes an employer's decision to refuse to promote a female employee.[375] The employer does so because the employee is female and also because she is regularly late for work. In the

[373] Smith and Campbell, n.40, 258-9.
[374] *Ibid*, 261.
[375] *Ibid*, 261.

example, Smith and Campbell provide the essential caveat that either reason would have been sufficient for the employer to refuse a promotion.[376]

When stating that either reason is sufficient, the authors are most likely referring to the need for the protected characteristic to be a significant or substantial reason for the treatment which forms the subject matter of the alleged direct discrimination. The source of that rule arose from the Court of Appeal's decision in *Owen and Briggs* v *James* ("*Briggs*").[377]

In *Briggs*, the Court of Appeal held that all that is required for a direct discrimination claim to be successful is that the characteristic, in that case race, be a "substantial" reason for the discriminatory treatment.[378] Indeed, the Court went on to hold that this would be the case even where there were multiple causes for the discriminatory treatment (the claimant's race, her relatively weak employment record and her apparent demeanour at the job interview).[379]

A transposition of the *Briggs* decision on this point should result in a finding of direct discrimination on the grounds of sex in the hypothetical example. Sex was clearly a significant or substantial reason for the employer's refusal to promote the employee.

The "but for" test ignores this fundamental aspect of the direct discrimination claim because the hypothetical claimant in Smith and Campbell's example is set to lose her direct discrimination claim as a result of the application of the "but for" test in a multi-causal environment. However, the multi-causal nature of the discriminator's actions should not preclude a finding of direct sex discrimination in their scenario. Indeed, it should be sufficient that sex was a significant or substantial reason for the less favourable treatment.

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[376] *Ibid*, 261.
[377] See n.91
[378] *Ibid*, [37]
[379] *Ibid*, [37]

This exposes a weakness in the "but for" test: it is incompatible with cases where there are multiple sufficient causes for the discrimination. It was designed to avoid the judiciary having to analyse concepts such as motive, intention and purpose. In this respect, in cases such as *Birmingham Schools*, it had its uses. However, in other cases, it can lead to counterintuitive legal decisions.[380] Lord Browne-Wilkinson managed to reconcile these tensions by stating in *Nagarajan* that the "but for" test was a "rule of convenience" rather than a "rule of law" for the judiciary.[381] So, it can be used by judges when useful but equally discarded when it is of less utility. Smith and Campbell apply the "but for" test to the factual circumstances in the *James* case. They astutely observe that the "but for" test was satisfied in *James*: but for his sex, a man in the 60-64 age bracket would have been granted free admission to the Council's swimming pool.[382] However, as they also correctly point out, all that the "but for" test establishes is that sex played a part, *at some point*, in the causal chain of events which lead to the Council's decision to charge Mr James the admission fee.[383]

My position, which accords with Smith and Campbell's albeit for different reasons,[384] is that this is not, on its own, a sufficiently strong link to warrant a finding of direct sex discrimination. To establish direct sex discrimination, the less favourable treatment must have been because of, or on the grounds of, sex. In other words, there needs to be a direct causal link between the less favourable treatment, on the one hand, and the protected characteristic of sex, on the other. There was no such direct causal link in *James*. Mr James was refused free admission because he was not of pensionable age. The direct causal link is between the less favourable treatment and pensionable age, not sex.

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[380] One example being *Martin* v *Lancehawk* UKEAT/0525/03. See M Connolly, 'Racial groups, sub groups, the demise of the but for test and the death of the benign motive defence (2010) 39(2) ILJ 183, 190.
[381] See n.79, 549
[382] Smith and Campbell, n.40, 263.
[383] *Ibid*, 264.
[384] *Ibid*, 264.

The key point, for the present analysis, is that the "but for" test does not, if satisfied, have the potential to *guarantee* a direct causal link between the adverse treatment and the protected characteristic. This is problematic for this area of the law because a direct causal link is essential to establish direct discrimination.

All things considered, the existence of "but for" the test is not an insurmountable problem for direct discrimination law in any event. Indeed, there are other legal tests which judges can refer to in direct discrimination cases when the "but for" test is not applicable to the circumstances of a particular case, such as the "reason why" test.[385] As noted earlier, this led Lord Browne-Wilkinson in *Nagarajan* to describe the "but for" test as a "rule of convenience" in direct discrimination cases.[386] Therefore, it is a test which can be used by the judiciary when it is useful but, equally, can be disregarded when it is not helpful. With this in mind, I shall now move on to consider Smith and Campbell's analysis of the criterial test.

4.3.2.2 *The "criterial" test*

Smith and Campbell associate the "criterial" test with the *JFS* case.[387] This is unsurprising: *JFS* is probably the most noted example in the case-law of the "criterial" test, no doubt because it was a highly divisive decision of the UKSC. As described in Chapter 2,[388] the UKSC held in *JFS* that the school's admissions criteria, which was based on an interpretation of what constituted orthodox Judaism by the Office of the Chief Rabbi, amounted to direct race discrimination. I shall briefly explain how my description of the criterion-based approach mirrors the "criterial" model criticised by Smith and Campbell and by referring to a short passage from the judgment of Lord Phillips in the *JFS* case.

[385] Zoe Adams, Catherine Barnard, Simon Deakin, Sarah Butlin, *Deakin and Morris' Labour Law* (7th edn, Hart Publishing 2021) 592
[386] *Nagarajan*, see n.381
[387] Smith and Campbell, n.40, 265.
[388] See section 2.4.2.1.

Under the “criterial” or “criterion-based” approach, so long as the criterion (or rule or policy) has a 1:1 link between the protected characteristic and the less favourable treatment, that is the end of the matter. There is no need to ascertain the “reason why” the putative discriminator acted in the way he did. Instead, the criterion will be held to be “inherently discriminatory.” Smith and Campbell correctly identify that the UKSC has followed the “criterial” approach in later cases, such as the *Bull* case,[389] and *Lee* v. *Ashers Baking Co.*[390]

Lord Phillips uses a hypothetical example in the *JFS* case to illustrate how the “criterial” approach works:

> “A fat black man goes into a shop to make a purchase. The shopkeeper says “I do not serve people like you”. To appraise his conduct it is necessary to know what was the fact that determined his refusal. Was it the fact that the man was fat or the fact that he was black? In the former case the ground of his refusal was not racial; in the latter it was.”[391]

As Smith and Campbell accurately observe, there are significant difficulties with Lord Phillips’ apparent reasoning. Indeed, they recognise, correctly in my view, that his scenario at least implies that people always act because of a policy or rule.[392] Of course, if this is what Lord Phillips was stating (and this is somewhat unclear from his judgment) then it is not a realistic picture of how people often think and behave. People will often weigh multiple factors in the mix when making a decision. This leads Smith and Campbell to the observation that a putative discriminator will, at least in many cases, base the decision to discriminate on a complex interaction of multiple factors, rather than on a pre-defined rule or policy.[393] I think it is safe to say that this is an

[389] See n.120
[390] [2018] UKSC 49, [2020] AC 413
[391] *JFS*, n.36, [21].
[392] Smith and Campbell, n.40, 266.
[393] *Ibid*, 266.

uncontentious point made by Smith and Campbell and I can move on to their second objection to the “criterial” approach.

The second objection concerns the inherent subjectivity of the “criterial” approach. By this, I mean that a criterion, which is based on a single set of circumstances, can often be expressed in a variety of different ways. Smith and Campbell exemplify this subjectivity with the “racist customer” scenario.

The example they give is of a café owner who is aware that a substantial proportion of his white customers are racist.[394] As a result, the café owner refuses to allow black people to enter the cafe. Smith and Campbell go on to argue that there could be many criteria which the café owner uses when prohibiting black people from entering his establishment. It might be “no black people may enter the cafe" or “no-one is permitted to enter the café if their presence will offend my regular patrons” or “no-one is permitted to enter the café if their presence would threaten the cafe's profitability.”[395]

They then go on to argue that it then becomes very difficult to identify what the *correct* criterion is.[396] Smith and Campbell observe that this is concerning because only one of the criteria involves a direct causal link between the less favourable treatment and a protected characteristic.[397]

Moreover, the authors build their case against the criterial model with the argument that the test makes it difficult for the judge to ascertain the relevant (and irrelevant) aspects of the putative discriminator’s reasoning.[398] By this, they mean that the criterial approach requires the judge to pick apart the putative discriminator’s reasoning, choose which aspects of the reasoning constituted the “criterion” upon which he acted, then disregard the rest of his

[394] *Ibid*, 268.
[395] *Ibid*, 268.
[396] *Ibid*, 268.
[397] *Ibid*, 268.
[398] *Ibid*, 272.

reasoning. Smith and Campbell view these distinctions in mental states as being artificial and awkward.

However, my position is that it is these objections to the "criterial" approach which are somewhat artificial. As far as the café example is concerned, logical analysis dictates that the practice adopted by the café owner is racist. It therefore seems very unlikely that, in such a straightforward case of racist conduct, even a strongly "pro-employer" judge would engage in complex sophisms to avoid a finding of direct discrimination.

At this stage, however, a caveat of my own is necessary. I am not advocating the use of the "criterial" test in direct discrimination cases. All I am stating here is that Smith and Campbell's analysis of the problems with the "criterial test" is not a strong one.

However, an even bigger problem for Smith and Campbell is that, when raising these objections to the criterial approach, they fail to take account of the fact that the law already provides a partial solution to the problem. The partial solution comes in the form of the "reason why" category of direct discrimination which was identified in Chapter 2. In these cases, the judge does not need to use the "but for" or "criterial" approaches.

Indeed, in the *Nagarajan* case, the House of Lords acknowledged that there were multiple potential causes for the putative discriminator's actions. As a result, the Law Lords had to infer, from all the surrounding background circumstances, what the reason(s) for the treatment complained of were.[399] This allowed the judges to assess the mindset of the putative discriminator to ascertain the reason(s) for the allegedly less favourable treatment. If the protected characteristic was a significant reason for the treatment, Lord Nicholls held in *Nagarajan* that a finding of direct discrimination could ensue even if that reason was one amongst several.[400]

[399] See section 2.4.1.
[400] See section 2.4.1.

Later, in the *JFS* case, Lady Hale distinguished between "criterion-based" and "reason why" cases, holding that the latter involved cases where there were multiple potential reasons for the treatment complained of and the court or tribunal had the task of identifying the reason(s) by assessing the mindset of the putative discriminator.[401]

As a result, my position is that the law does have a (partial) solution for the problems which Smith and Campbell associate with the "criterial" (and "but for") approach. It is my view that one of the problems in the cases I have examined, such as *James*, is that the court or tribunal is sometimes using the "criterial" (and / or "but for") test when it should be adopting the "reason why" approach. Indeed, if the "reason why" approach had been adopted in lieu of the "criterial" and "but for" approaches in *James*, then the likely (and, as I have argued, the correct) outcome would have been that the Council did not directly discriminate against Mr James on the grounds of sex. This is because the reason for the allegedly less favourable treatment in *James* was pensionable age, not sex. So, if there was discrimination in *James*, it was not direct sex discrimination. However, it may well be discrimination "arising from sex," or "sex-related" discrimination. This will be considered in Chapters 5 and 6.

4.3.3 *Can the "reasoning-oriented" approach solve the problems identified in Chapter 3?*

Smith and Campbell go on to argue that the weaknesses of the "but for" and "criterial" tests suggest the need for a model of direct discrimination which allows the judge to dissect all aspects of the putative discriminator's thought-processes and reasoning. They call this the "reasoning-oriented" approach and their initial formula for the approach is:

> "The grounding requirement is satisfied if the complainant's possession of a protected characteristic is taken into account by the alleged discriminator *at any stage* in their reasoning as to whether

[401] See section 2.4.1 for a summary of Lady Hale's Opinion.

to accord the adverse treatment to the complainant (my emphasis)."[402]

I shall assess whether this model has the potential to solve the problems associated with direct sex discrimination which were identified in Chapter 3. In particular, its application to the *James* case will be critically analysed. Moreover, I shall determine whether the test can circumvent the morally empty standard that has been established in some criterion-based cases of direct sex discrimination. There will also be an assessment of whether the "reasoning-oriented" approach might be able to recognise the dignitarian harms which form part of the moral bedrock of direct discrimination claims. Ultimately, I shall move on to consider whether the model should be given legislative effect.

4.3.4 *Should Smith and Campbell's model be given legislative effect?*

Under the "reasoning-oriented" approach, as described above, direct sex discrimination will be established if sex played any part in the putative discriminator's thought processes, regardless of whether they constituted a rule or policy, or a combination of various factors.[403] My position is that this broad coverage of the putative discriminator's thought-processes would likely have the effect of increasing the chances, rather than reducing the possibility, of introducing a test into this area of the law which rests on fragile moral standards. Indeed, under this test, liability would ensue if a protected characteristic played any part whatsoever in the putative discriminator' reasoning. This is a very low threshold to establish liability for direct discrimination.

It also fails to consider those situations where the protected characteristic is a factor which the putative discriminator considers as a reason *not* to mete out less favourable treatment. Smith and Campbell recognise the latter risk, and that the wording in the formulation in section 4.3.3 does not distinguish

[402] Smith and Campbell, n.40, 272.
[403] *Ibid*, 272 - 3.

between those situations where the discriminator takes the protected characteristic as a point in favour of less favourable treatment from those situations where the protected characteristic amounts to a reason to desist from the imposition of less favourable treatment. As they correctly observe, only the former category should feature in their definition of direct discrimination. In effect, this means that a protected characteristic, such as sex, should not be a reason for imposing adverse treatment on someone, regardless of whether the putative victim is a man or a woman. As a result, they amend the formulation as follows:

> "The grounding requirement is satisfied if:
>
> a) the complainant's possession of a protected characteristic is taken into account by the alleged discriminator at any stage in their reasoning as to whether to accord the adverse treatment to the complainant; and
>
> b) in cases where the alleged discriminator's reasoning takes the form of weighing up multiple factors, the complainant's possession of the protected characteristic features in that reasoning *as a factor in favour of (not against) according the adverse treatment* (my emphasis)."[404]

This is, in principle, a sensible amendment and I shall not comment on it any further at this stage. Instead, I shall move on to their application of the "reasoning-oriented" model to the *James* case.

The application of the test results in a clear finding of no direct sex discrimination in *James*.[405] Breaking down Smith and Campbell's reasoning, they accurately observe that the reason underlying the Council's admissions policy in *James* was to assist people living on a pension by providing free entry

[404] *Ibid*, 273.
[405] *Ibid*, 275.

to pensioners.[406] Smith and Campbell also reach the conclusion that, even if the Council was aware of the differential in pensionable ages between the sexes, this was not a factor the Council adopted in favour of meting out adverse treatment to men in the 60-64 age category.[407] Rather, it was an unintended and unwanted side-effect of a policy which was designed to help people.

My position is that this is a sensible interpretation of the facts in *James*. Indeed, Smith and Campbell rightly recognise that the Council's reasons for acting were benign and their proposed "reasoning-oriented" model takes this into account. In this way, their model is sufficiently nuanced to distinguish between alleged cases of discrimination which involve benign and malign reasons for the putative discriminator's conduct. It will be recalled that the current law's inability to make this distinction was highlighted as a key problem in some criterion-based direct sex discrimination cases. As a result, this potential to distinguish on moral grounds is a factor which points in favour of Smith and Campbell's model.

Furthermore, the "reasoning-oriented" model has the capacity to recognise the dignitarian harm inflicted in cases of direct sex discrimination in situations where the "but for" test does not. Returning to the promotion example in section 4.3.2.1, the employee was discriminated against on the grounds of sex, but liability was excluded via the operation of the "but for" test as her promotion would have been refused because of her frequent tardiness.

Smith and Campbell correctly observe that the operation of the "but for" test in such cases fails to acknowledge the dignitarian injury to the employee by exempting the putative discriminator from accountability.[408] However, their statutory template recognises the dignitarian harm because the victim's sex played a part in the employer's reasoning and operated as a reason to impose

[406] *Ibid*, 275.
[407] *Ibid*, 275.
[408] *Ibid*, 277.

adverse treatment on her.[409] Whilst Smith and Campbell do not give any detailed, substantive content to what their conception of "dignity" involves, the point is correct, at least in principle, and is another factor in favour of their model.

So far, Smith and Campbell's model demonstrates an ability to mitigate several of the key problems identified in Chapter 3. Even though their criticisms of the existing law might be misguided, that does not, by itself, detract from some of the practical benefits of the model which they propose. Having promoted some of these benefits, Smith and Campbell then go on to amend their model to cater for cases of unconscious discrimination. I agree with Smith and Campbell that discriminatory behaviour can likely operate at an unconscious or subconscious level. Accordingly, this seems, again at least in principle, to be a theoretically attractive amendment to the prototype which they advocate. To implement this amendment, Smith and Campbell alter the model so that it is sufficient that the protected characteristic "shapes" rather than "features" in the putative discriminator's reasoning process. Consequently, the amended wording is as follows:

> "The grounding requirement is satisfied if:
>
> a) the complainant's possession of a protected characteristic:
>
> i. is taken into account by the alleged discriminator at any stage in their reasoning as to whether to accord the adverse treatment to the complainant; or
>
> ii. *shapes the alleged discriminator's reasoning* as to whether to accord the adverse treatment to the complainant; and

[409] *Ibid*, 277.

b) in cases where the alleged discriminator's reasoning takes the form of weighing up multiple factors, the complainant's possession of the protected characteristic:

i. features in that reasoning as a factor in favour of (not against) according the adverse treatment; or

ii. *shapes that reasoning* in a way that favours according the adverse treatment (my emphasis)."[410]

Moreover, Smith and Campbell give an alternative formulation to take unconscious discrimination into account in their "reasoning-oriented" model. This replacement wording is designed to counter the effects of unconscious "stereotypes, assumptions or heuristics" in the putative discriminator's thought-processes:

"The grounding requirement is satisfied if:

a) it is the case that:

i. the complainant's possession of a protected characteristic is taken into account by the alleged discriminator at any stage in their reasoning as to whether to accord the adverse treatment to the complainant; and

ii. in cases where the alleged discriminator's reasoning takes the form of weighing up multiple factors, the complainant's possession of the protected characteristic features in that reasoning as a factor in favour of (not against) according the adverse treatment; or

b) *the alleged discriminator failed to take reasonable steps to safeguard against the role that unconscious stereotypes,*

[410] *Ibid*, 280.

assumptions or heuristics played in his or her decision to accord the adverse treatment to the complainant (my emphasis)."[411]

At this stage, Smith and Campbell have finalised the wording in their template statutory model. It has demonstrated a potential to mitigate some of the problems I identified in Chapter 3, albeit not all of them. I shall now turn my attention to an assessment as to whether it can work as a practical interpretative tool for the judiciary.

My position is that, despite some of its apparent advantages, the "reasoning-oriented" model should not be given legislative effect. There are several reasons for this.

First, the test leans too heavily in the claimant's favour. To establish direct discrimination, the protected characteristic need only factor in at "any stage" of the putative discriminator's reasoning. I am mindful that the primary purpose of the direct discrimination legislation is to protect people from direct discrimination on the grounds of the protected characteristics. However, this purpose needs to be balanced and circumscribed within sensible and practical limits. The law already recognises this. For a finding of direct discrimination, the protected characteristic must be a "significant" reason for the less favourable treatment.[412] Moreover, in the case of discrimination arising from disability, which sets a looser causal test than direct discrimination, the protected characteristic must still be a significant influence on the reason for the unfavourable treatment.[413] Not only do Smith and Campbell dispense with the need for such a threshold, there are no *de minimis* safeguards in the model whatsoever. By removing the need for practical parameters in their test for direct discrimination, Smith and Campbell's model becomes too heavily biased in favour of the claimant.

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[411] *Ibid*, 281.
[412] See n.91.
[413] *Hall* v *Chief Constable of West Yorkshire Police* UKEAT/0057/15/LA, [2015] IRLR 893, [42] (Laing J).

Another difficulty with the “reasoning-oriented” model is that some of the terms in the definition are too vague and subjective to act as concrete, practical guidelines for judges. A prime example is the requirement that the protected characteristic “shapes” the putative discriminator’s reasoning. It is not clear how a judge would determine whether this “shaping” exercise has taken place. It is a highly malleable concept.

Indeed, there are strong grounds to suspect that it would be logically consistent for one judge to hold that a certain set of circumstances “shaped” the putative discriminator’s reasoning whilst another judge could reasonably conclude that those circumstances did not “shape” the relevant thought-processes. Indeed, this cloudy metaphor of “shaping” gives the judge too much discretion. This, in turn, runs the risk of judicial legislation because the judge has too much room for manoeuvre in the reasoning process. As a result, the “reasoning-oriented” model has the potential to significantly impair consistency and certainty within this area of the law.

Perhaps the biggest problem, though, is that the model would not be able to operate efficiently in a practical tribunal or courtroom setting. My view is that the proposed formula would be too convoluted and technical to be correctly applied in many real-life cases. Indeed, references to the “unconscious stereotypes, assumptions or heuristics” of the putative discriminator may have intellectual appeal. However, it would be difficult for legal practitioners and judges to understand these concepts and, crucially, to apply them to the heterogenous factual circumstances of individual cases. It should also be remembered that many Employment Tribunal claimants choose, usually for financial reasons, to represent themselves. They are even less likely than legally trained professionals to be able to grasp these nuanced theoretical constructs and apply them to their own legal situations.

Consequently, if the “reasoning-oriented” model was given legislative effect, the law on direct discrimination would likely become so complex and

convoluted that it would be virtually impossible for the legal practitioner to understand, never mind the lay person.

For these reasons, my position is that the “reasoning-oriented” model should not be given legislative effect.

4.3.5 *Conclusion*

Smith and Campbell produce a nuanced and sophisticated model. They correctly highlight some of the main problems with the “but for” test. However, these problems were shown to be surmountable given the fact that the “but for” test is a rule of convenience, rather than a rule of law, for the judiciary. Whilst they put forward one strong objection to the “criterial” approach (people do not always act on the basis of a rule) some of their other objections were shown to be somewhat artificial. They also fail to recognise that the law has a partial solution for some of the problems they identified in the “but for” and “criterial” approaches. This partial solution comes in the form of the “reason why” approach in direct discrimination cases which I identified in Chapter 2. Nevertheless, their “reasoning-oriented” model yielded the right result in the *James* case and eased some of the problems identified in Chapter 3.

All things considered, whilst their model has significant intellectual appeal, it is my position that it is too heavily weighted in favour of the claimant. It also contains concepts which are too vague and subjective to act as concrete guidance for litigants, legal practitioners and judges, thereby jeopardising legal certainty and consistency. Moreover, other concepts within the model were shown to be too convoluted and complex to be applied to individual cases. As a result, I concluded that the “reasoning-oriented” theory would not serve as an effective statutory model for direct sex discrimination cases.

4.4 Pilgerstorfer and Forshaw’s “quasi-direct discrimination” model

4.4.1 *Introduction*

The proposal to transpose a "related discrimination" model to the protected characteristic of sex involves introducing an intermediate head of claim in a moral spectrum between direct and indirect discrimination. It would, therefore, be remiss to exclude an analysis of similar exercises in the existing literature.

There is one detailed model in the literature, which is Pilgerstorfer and Forshaw's theory of "quasi-direct discrimination."[414] In addition, Fredman puts forward the possibility of transposing section 15 of the 2010 Act to protected characteristics other than disability.[415] She does not present this possibility in great detail; it is a relatively brief suggestion.[416]

Section 4.4.2 will summarise, then critically evaluate, the "quasi-direct discrimination" theory. Thereafter, in section 4.4.3, Fredman's proposal will be summarised and given a very cursory assessment (which will be fleshed out in greater detail in Chapters 5 and 6). Section 4.4.4 will conclude the section.

4.4.2 *Should the "quasi-direct discrimination" model be given legislative effect?*

Pilgerstorfer and Forshaw argue that there is a distinct species of discrimination, which lies somewhere between direct and indirect discrimination, which is not explicitly recognised by the law.[417] Their position is that this form of discrimination was first enunciated, at a judicial level, by the ECJ in the *Enderby* case and they label it "quasi-direct discrimination."[418]Pilgerstorfer and Forshaw begin their analysis by dissecting the main elements of the indirect discrimination model. This is done to compare it to the "quasi-direct discrimination" category which they advocate as an alternative to indirect discrimination in some cases (they also argue, albeit very briefly, that some cases of direct discrimination should be treated as "quasi-direct discrimination").

[414] Pilgerstorfer and Forshaw, n.41, 347 - 364.
[415] Fredman, n.38, 213.
[416] *Ibid*, 213.
[417] Pilgerstorfer and Forshaw, n.41, 348.
[418] *Ibid*, 348.

Accordingly, they refer to the earliest case of indirect discrimination on record, the U.S Supreme Court decision in *Griggs*.[419] As Pilgerstorfer and Forshaw argue, the *Griggs* case established that, in an indirect discrimination claim, there must be a policy (in other words, a neutral PCP) which creates a "winning group" and a "losing group."[420] The authors call this policy a "separating rule."[421]

This "separating rule" creates a barrier between people with different protected characteristics. Those in the "winning group" are more likely to have a certain form of a protected characteristic whilst those in the "losing" group will be more likely to have another variant of the protected characteristic.[422] So, men may be more likely to be in the winning group and women more likely to be in the losing group in a particular case. The final element of this indirect form of discrimination is that it can be justified with reference to some sort of "necessity" test.[423]

As Pilgerstorfer and Forshaw argue, these are the fundamental components of an indirect discrimination claim.[424] A key point made by Pilgerstorfer and Forshaw is that the dichotomous forms of discrimination differ from (but also resemble in some ways) the "quasi-direct discrimination" claim. This requires further scrutiny. To do so requires a brief sketch of the facts in the *Enderby* case.

Mrs Enderby brought a claim for sex discrimination under the 1970 Act. She was employed as a speech therapist and complained of being paid less than her male comparators. The comparators were a pharmacist and a clinical psychologist. The reasons for the different pay structures were twofold. First, different collective bargaining structures negotiated the pay for each job. Second, there was a high market demand for pharmacists which pushed their

[419] See section 2.2.2 for a summary of the *Griggs* case.
[420] Pilgerstorfer and Forshaw, n.41, 349.
[421] *Ibid*, 349.
[422] *Ibid*, 349.
[423] *Ibid*, 349.
[424] *Ibid*, 349 - 350.

salaries upwards. The Employment Tribunal and EAT rejected Mrs Enderby's claim, both citing the genuine material factor defence as justification for the disparity in pay between the different jobs. When the appeal reached the Court of Appeal, it was referred to the ECJ.

As Forshaw and Pilgerstorfer observe, the ECJ went on to hold the following in *Enderby*:

> "Where significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men, article [141] of the Treaty requires the employer to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex."[425]

Pilgerstorfer and Forshaw then go on to argue that, by only observing the results for each group, the *Enderby* form of "quasi-direct discrimination" removes the need for a "separating rule."[426] Indeed, their contention is that this form of discrimination requires the putative discriminator to justify the discrepancy in outcomes for different groups (e.g., pharmacists and speech therapists) even though there is no "separating rule" which creates the discrepancy. As a result, they go on to make the case that "quasi-direct discrimination" is a different category of discrimination from indirect discrimination.

Their position is that, in cases of indirect discrimination, the putative discriminator has conferred a benefit on one group, but not another group, because of the application of a neutral PCP, or "separating rule."[427] By contrast, in "quasi-direct discrimination" claims, the differential treatment can be explained solely by reference to the existence of different groups and a

[425] *Ibid*, 352.
[426] *Ibid*, 352.
[427] *Ibid*, 352.

decision to confer a benefit to one group but not the other. There is therefore no need for a ”separating rule” in quasi-direct discrimination cases.[428]

It is the adverse treatment of different groups of people which likens “quasi-direct discrimination” to indirect discrimination in some respects. In addition, the authors also view “quasi-direct discrimination” as exemplifying aspects of direct discrimination. It resembles direct discrimination, they contend, because it involves less favourable treatment, albeit not because of the protected characteristic itself.[429] Consequently, Pilgerstorfer and Forshaw take the position that “the *Enderby* form of discrimination is...somewhere between the concepts of direct and indirect discrimination, exhibiting characteristics of both.”[430]

Pilgerstorfer and Forshaw maintain that the introduction of this intermediate head of claim would reduce uncertainty in this area of the law and sharpen the distinctions between direct and indirect discrimination.[431] As a result, they propose a statutory formulation for “quasi-direct discrimination” to the following effect (using the protected characteristic of sexual orientation by way of example):

> “A person (A) discriminates against another person (B) if -
>
> (a) A treats B less favourably than C, in circumstances that do not amount to less favourable treatment on grounds of sexual orientation;
>
> (b) B and C respectively are members of different groupings of individuals;

[428] *Ibid*, 352.
[429] *Ibid*, 352 - 3.
[430] *Ibid*, 352.
[431] *Ibid*, 362 - 3.

(c) the members of those respective groupings are, have been or would be similarly treated to B and C respectively on the same grounds;

(d) the grouping to which B belongs is predominantly made up of individuals having a particular sexual orientation whereas the grouping to which C belongs is part of a grouping predominantly having another sexual orientation; and

(e) A cannot justify the less favourable treatment of B as being a proportionate means of achieving a legitimate aim."[432]

My position is that Pilgerstorfer and Forshaw's model is based on flawed logic and fails to address the problems identified with sex discrimination law in Chapter 3. As a result, my view is that their model should not be enacted by way of legislation. This claim on my part requires significant unpacking.

The "quasi-direct discrimination" model shares some of the problems with the "reasoning-oriented" approach which was assessed in section 4.3. In particular, it is a convoluted and cumbersome formulation which would be difficult for legal practitioners and judges, never mind laypersons, to follow and apply to the individual circumstances of real legal cases. As was demonstrated in Chapters 2 and 3, discrimination law is a confusing and complex area. It requires clarity and simplification, not further obfuscation.

In addition, "quasi-direct discrimination" does not, as Pilgerstorfer and Forshaw contend, resemble direct discrimination. As I have already described, their argument to this effect is that quasi-direct discrimination involves less favourable treatment, albeit not on the grounds of a protected characteristic.

My position is that direct discrimination, properly understood, requires less favourable treatment, but that requirement is wholly contingent on the less favourable treatment being on the grounds of, or because of, a protected

[432] *Ibid*, 363 - 4.

characteristic. Otherwise, there is no hint of direct discrimination. I argued this position, in some detail, in Chapter 3, and will not repeat it now. The crucial point is that it is logically incompatible to state, on the one hand, that "quasi-direct discrimination" resembles direct discrimination but, on the other, that there is no direct causal link between the adverse treatment and the protected characteristic.

Moreover, my view is that "quasi-direct" discrimination cannot be conceptually disentangled from indirect discrimination. They are one and the same thing. Indeed, to argue otherwise would be to rest one's contention based on a conceptual head of claim which, in my view, does not exist.

As previously mentioned, the principal distinction, according to Pilgerstorfer and Forshaw, between indirect discrimination, on the one hand, and "quasi-direct discrimination," on the other is that the former category of discrimination involves the application of a "separating rule" whilst the latter form has no such rule. However, as Cunningham has argued, this is an artificial distinction.[433] Indeed, there was a "separating rule" in the *Enderby* case. The "winners" and "losers" were distinguishable due to their different professional statuses.[434] Hence, the winning group were the pharmacists, and the losing group were the speech therapists in *Enderby*.

As such, it is the different professional statuses which creates the separating rule in *Enderby*, and the resulting disparate impact between those statuses. Indeed, *Enderby* is an example of indirect discrimination and there is no need to re-categorise it as anything other than that.

The "quasi-direct discrimination" model has other problems in addition to those argued above. Forshaw and Pilgerstorfer are, when introducing this new head of claim, trying to restructure the architecture of discrimination law in the UK. Specifically, they are arguing that there should be three, rather than two, heads

[433] Naomi Cunningham, 'Indirect discrimination: between the wheat and the chaff' (2009) 38(2) ILJ 209, 211.
[434] *Ibid*, 211.

of claim across the protected characteristics in the 2010 Act. It is, therefore, surprising that they do not engage with, and try to solve, the problems associated with the law on direct discrimination which were identified in Chapter 3.

Indeed, Pilgerstorfer and Forshaw see the problems with the fabric of UK discrimination law predominantly through the lens of indirect discrimination law (and the authors' argument that some instances of so-called indirect discrimination should be treated as "quasi-direct discrimination.") Their failure to engage with the structural problems associated with direct discrimination is a very significant omission; and one which weakens their argument for the introduction of this intermediate head of claim.

By way of example, it is somewhat striking that, whilst they argue for a restructuring of UK discrimination law, they do not take a position, one way or another, on the crucial question as to whether there should be a general defence to direct discrimination cases. Nor do they highlight the problems associated with the criterial approach and the effects of its combination with the lack of a general defence to direct discrimination cases. In particular, they fail to acknowledge that the senior UK judiciary are classifying some cases, where the putative discriminator is acting from benign motives and benign *reasons*, as direct discrimination. Not only are these highly notable omissions given that their mandate is to restructure UK discrimination law, but it also begs the question of how their model of "quasi-direct discrimination" would interact with these inherent structural difficulties.

Having dismissed the possibility of enacting the "quasi-direct" discrimination model, I shall now go on to briefly summarise Fredman's proposal that section 15 of the 2010 Act be transposed to other protected characteristics.

4.4.3 *Fredman's proposal to transpose section 15 to other protected characteristics*

I have now arrived at the conclusion that the introduction of a general defence is not a viable option to tackle the problems with direct sex discrimination law that I identified in Chapter 3. The same applies to the "reasoning-oriented" and the "quasi-direct discrimination" models. These are the three models in the existing literature which have been put forward by scholars to attempt to reform this area of the law. Having dismissed them, the only option left is Fredman's (albeit brief) proposal to transpose section 15 to protected characteristics other than disability.

This option was first mentioned in Chapter 2.[435] By way of a short recap, Fredman has suggested that this transposition exercise may help bridge the conceptual gap between direct and indirect discrimination.[436] I suspect that she does so because she recognises that cases such as *James* and *JFS* sit in an uncomfortable "no-man's land" between direct and indirect discrimination.

In addition, Fredman also acknowledges that the operation of the "inherently discriminatory" test, when combined with the lack of a general defence to direct discrimination cases, results in a situation where the adjudicator fails to apply the definition of direct discrimination whilst also disconnecting it from its moral roots.[437] The natural outcome of this unfortunate interplay of factors is that the law on direct discrimination fails, particularly in criterion-based cases, to distinguish between alleged discrimination with benign reasons and discrimination with malign reasons. Fredman then goes on to point out that section 15 could solve this problem by allowing the putative discriminator the opportunity to defend the alleged discrimination using the section 15 proportionality test.[438]

Chapters 2 and 3 established that there is a subset of cases which are neither examples of direct nor indirect sex (and race) discrimination. Instead, the discrimination in such cases appears to *arise* from, or be *related* to, the

[435] See section 4.2.4.1.
[436] See section 2.4.2.1.
[437] See section 3.3.1.
[438] See section 2.4.2.1.

protected characteristic, rather than being because of the protected characteristic or because of the application of a neutral PCP. It is my contention that it is these “problem cases” which are largely responsible for blurring the lines between direct and indirect discrimination. To sharpen the distinctions between these two heads of claim, and to provide litigants, practitioners and judges with a broader range of legal options, I believe that it is necessary to introduce an intermediate head of claim to the protected characteristic of sex.

The proposal to transpose section 15 to the protected characteristic of sex might be able to resolve the problems with direct sex discrimination law that I identified in Chapter 3. Indeed, as Fredman correctly observes, the section 15 model is structurally similar to the "inherently discriminatory” requirement.[439] That is a good start.

Moreover, the section 15 model has been specifically designed (albeit within the context of the protected characteristic of disability) to cover cases where the discrimination *arises* from the protected characteristic. Therefore, there seems, at least at this early stage of my analysis, to be other anatomical resemblances between the section 15 head of claim and the subset of problem cases I have termed “related discrimination.” However, it is not my intention to engage in a detailed critical analysis of Fredman’s proposal at this point. That detailed exercise must be reserved for the remainder of the thesis and will have a particular focus on direct sex discrimination with *James* being used as the pilot case to test out my hypotheses.

4.4.4 *Conclusion*

Pilgerstorfer and Forshaw’s “quasi-direct discrimination” model was shown to be an unattractive one to deal with the problems with direct sex discrimination law I identified in Chapter 3. Moreover, the model itself was seen to be cumbersome and based on flawed theoretical foundations. By contrast,

[439] Fredman, n.38, 213

Fredman's proposal to transpose section 15 to the protected characteristic of sex holds significant promise. A more detailed analysis of her proposal will be developed in the next chapter.

4.5 Conclusion

My review of the existing literature on this area of the law is now complete.

I considered whether a general defence to direct sex discrimination, as argued for by Bowers and Moran, could solve the problems I identified in Chapter 3. My analysis showed that Bowers and Moran's model has the potential to mitigate, rather than solve, some of these problems. In addition, their model applied well to the *James* case. Nevertheless, they fail to build a convincing case for the introduction of a general defence. Most of the arguments they employ are weak and poorly exemplified. Moreover, some of their arguments actually strengthen the case against a general defence and the maintenance of the *status quo*.

I completed my assessment with the argument that, even if Bowers and Moran had made a convincing case via stronger argumentation, those arguments would still likely have been outweighed by the law's need to protect human dignity and autonomy. As a result of these observations, I concluded that the proposal to introduce a general defence to direct sex discrimination law should not be given legislative effect.

I then moved on to evaluate Smith and Campbell's position. They lodged a sensible set of criticisms against the "but for" test. However, these criticisms were not fatal flaws for the law as the "but for" test tends to act as a "rule of convenience" rather than a mandatory requirement for the judiciary. Their critique of the "criterial" test had some strong and some weak arguments. Whilst they correctly identified that individuals do not always act on the basis of a rule, their other arguments against the "criterial" test were somewhat artificial and unconvincing. They also fail to recognise that the law has a partial

solution, in the form of the “reason why” approach to direct discrimination, to the problems associated with the “but for” and “criterial” tests.

Their “reasoning-oriented” model applied well to the *James* case, yielding what I interpret to be the correct legal outcome in that case. The model also mitigated some of the problems identified in Chapter 3. However, despite these attractive aspects of the “reasoning-oriented” approach, it was argued that it is an unsuitable legislative tool. Indeed, it is far too heavily weighted in the claimant’s favour. Moreover, the concepts contained within the model were deemed to be too vague and subjective to act as concrete markers for the litigant, the legal practitioner and the judge. As a result, the theory was shown to involve unacceptable risks of judicial legislation and a threat to the need for consistency and certainty in this area of the law. Finally, I argued that the “reasoning-oriented” model is too convoluted and complex to act as a practical statutory guide.

I then turned my attention to previous scholars’ attempts to introduce an intermediate head of claim between direct and indirect discrimination. Pilgerstorfer and Forshaw’s “quasi-direct discrimination” model was shown to be too cumbersome and convoluted to be implemented as a pragmatic source of legislative guidance. In addition, it does not engage with the problems I identified in Chapter 3. Finally, I concluded that the concept of “quasi-direct discrimination” is, in its structure and effect, indistinguishable from indirect discrimination.

Having critically analysed the existing models in the literature, and found them to be unattractive legislative options, I briefly considered Fredman’s proposal to transpose section 15 of the 2010 Act to protected characteristics other than disability. I summarised the intuitive and logical appeal of this option but did not subject the proposal to a detailed evaluation in this chapter. That exercise will begin in the next chapter and be developed throughout the remainder of the thesis.

Chapter 5 – unpacking the sex-related discrimination model

5.1 Introduction

The purpose of this chapter is to transpose a model of "related discrimination" to sex discrimination. To date, UK law has confined the "related discrimination" model to the protected characteristic of disability. Up until this point in the thesis, I have deliberately kept the definition of "related discrimination" a vague one. The definition of what "sex related discrimination" is, and more importantly, *what it should be*, has been reserved for this chapter. With regard to the former, I have restricted my understanding of the concept as involving adverse treatment meted out to an individual because of a manifestation, consequence or effect of a protected characteristic, sex, rather than being because of the protected characteristic itself. A practical example, set within the context of disability discrimination, should help elucidate the distinction between the two concepts.

> *If employer A, upon learning of employee B's HIV diagnosis, dismisses B because he has an inherent prejudice against individuals who are HIV positive, he will have committed an act of direct disability discrimination. There is a direct causal link between the adverse treatment (dismissal) and the disability, namely the HIV infection.*[440] *However, if A dismisses B because his business is struggling to sustain B's long-term sickness absences arising from the HIV condition, this will amount to a prima facie case of disability related discrimination. The causal link in the "related discrimination" example is between the adverse treatment (dismissal) and something which is related to the disability (the sickness absences).*

Admittedly, the picture I have painted thus far of the "sex related discrimination" model is too brief, and much too vague, to act as a workable statutory formulation. I need to provide a much more detailed legal framework if it is to

[440] HIV being a "deemed disability" under the 2010 Act Schedule 1, paragraph 6.

have any potential for practical application in real-life legal cases. Perhaps, then, the best way to start is by deconstructing the “related discrimination” formulations that have already been enacted. These existing definitions and their respective “building blocks” may help me to build my own model.

In this chapter, I shall therefore compare the constituent components of section 3A of the 1995 Act and section 15 of the 2010 Act (along with the approach taken in EU law in relation to the defence to an indirect discrimination claim). The comparative exercise will focus on the differing causation requirements of each section (“discrimination arising from” v “disability-related discrimination”) the comparator issues (“unfavourable” v “less favourable” treatment) and the nature of the respective general defences (the proportionality v the “objective justification” v the “material and substantial” defence).

These exercises will involve a review of the main case law in each of these areas. In this way, the “best parts” from each of the statutory provisions can be extracted to help me forge my own legal formulation of “sex related discrimination.” When I refer to the “best parts,” I mean that I shall choose whichever provision is more closely aligned with the main practical purpose of the “related discrimination” model. The main practical purpose of the model is to strike a balance between safeguarding the interests of people who possess a protected characteristic, such as sex or disability, with the genuine commercial and social needs of the putative discriminator. Moreover, my position is that, not only should the statutory components be calibrated in this way, but the provisions should be capable of being applied by courts and tribunals in a practical setting. So, they must be clear and succinct.

Subsequent to the completion of the comparative analysis, I shall delve deeper into the judiciary's interpretation of the “building blocks” of the “related discrimination” model. This will be done to try and determine whether the existing interpretation can be improved upon and, in so doing, bring the statutory provisions into even closer alignment with their purposes. Thereafter, I shall examine the philosophical underpinnings of the “sex-related

discrimination" model. In doing so, I will demonstrate that it is a distinct conceptual model from the direct and indirect sex discrimination claims. Moreover, I shall distinguish "sex related discrimination" from the 2010 Act's model of positive action.

Section 5.2 will summarise the evolution of the "disability-related discrimination" claim in the UK. The section will begin by unpacking the concept of "disability-related discrimination". I shall also describe how the disability-related discrimination claim had a broad reach, particularly in the employment context, until it was effectively rendered redundant by the Law Lords' decision in *Lewisham Borough Council* v. *Malcolm* (*Malcolm*).[441] This concerning development was rectified, in large part, by the enactment of section 15 of the 2010 Act. Section 5.2 will outline how section 15 restored the law in this area to a *similar* position to the position it had been in before the Law Lords' decision in *Malcolm*. I shall also analyse the purposes of the "related discrimination" legislation. This will allow me, in later sections, to ascertain, via the comparative exercises described above, which of the statutory components aligns more closely with the underlying purposes of the legislation.

Section 5.3 will explain why the comparator approach was abandoned in section 15 and why this was a positive legal development. I shall go on to argue that the "unfavourable treatment" test, currently confined to sections 15 and 18 of the 2010 Act, should be transposed to the protected characteristic of sex. A review of the relevant case law in this area will also be carried out, concluding that the senior UK judiciary has not sufficiently clarified what is meant by "unfavourable treatment." Given this lack of clarity, I am obliged to pick an interpretation which, I shall argue, best meets the protective purposes of the legislation.

Section 5.4 compares the differing causal link requirements in section 3A and section 15. This exercise will be conducted to argue which interpretation is a

[441] [2008] UKHL 43, [2008] 1 AC 1399

better “fit” for my model of “sex related discrimination.” This will involve a detailed appraisal of the sections 3A and 15 case law to shine further light on how the respective causal links have been interpreted. As a result of this analysis, the section will accentuate inconsistencies in the courts and tribunals’ approach to causation. Some judges have adopted a relatively “loose” approach to causation in “related discrimination” claims whilst others have opted for a stricter approach. I shall argue that the latter is necessary and then reinforce my position with reasoned argumentation.

Section 5.5 will critically assess the general defences in sections 3A and 15, together with the *Bilka* “objective justification” formulation devised by the ECJ. Again, this will require an evaluation of the relevant case law in this area. The section will express a preference for the “objective justification” defence.

Section 5.6 will delve into the normative foundations of the “sex-related discrimination” claim. This analysis will demonstrate the moral wrongs which underlie this form of discrimination. It will also show how the “sex-related discrimination” model has different moral underpinnings than the direct or indirect sex discrimination claims. In addition, the “sex-related discrimination” claim will be distinguished from the positive action measures in section 158 of the 2010 Act. As a result of its free-standing nature, I shall argue that “sex-related discrimination” should be recognised, and applied, as a distinct head of claim.

Section 5.7 will conclude the Chapter.

5.2 A summary of the “related discrimination” model

5.2.1 Disability-related discrimination

Domestic law has already provided examples of the “related discrimination” model. As far as the 1995 Act was concerned, section 3A dealt with disability-related discrimination in the employment context whilst sections 19 and 20 covered the application of the claim to the provision of goods, facilities and

services to the public. These statutory provisions were repealed by the 2010 Act and replaced by section 15.

Section 3A(1)(a) of the 1995 Act outlined the nature of disability-related discrimination and a general justification defence to disability-related discrimination found its expression in section 3A(1)(b):

> 3A "(1) For the purposes of this Part, a person discriminates against a disabled person if
>
> (a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply, and
>
> (b) he cannot show that the treatment in question is justified."

This justification was fleshed out in section 3A (3) which stated:

> "(3) Treatment is justified for the purposes of subsection (1)(b) if, but only if, the reason for it is both material to the circumstances of the particular case and substantial."

Section 20(1) adopted the same wording as section 3A to define "disability-related discrimination" in the provision of services to members of the public. However, whilst section 3A claims were subject to a "material and substantial" defence, section 20 claims could only be defended, under section 20(4), on a short list of narrow and circumscribed grounds.[442]

Section 15 of the 2010 Act is defined as follows:

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[442] Whilst *James* was a service provision case, this chapter will focus on the employment formulation, and defence, under section 3A. This focus is due to section 3A having had a much broader defence than section 20. Moreover, the vast majority of case-law, and commentary, focused on the section 3A rather than the section 20 claim. As a result, this chapter will seek to determine whether the employment provisions of the section 3A claim should be transposed to cases involving the provision of goods, services and facilities to the public. The comparative exercises mentioned in the Introduction will therefore involve a contrast between the section 3A and section 15 claims, and their constituent components.

> "15(1)A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

It should be borne in mind that section 3A required "less favourable" treatment. As a result, there was also a need for a comparator to prove disability-related discrimination. This comparator did not need to be in the same or very similar circumstances as the claimant. This was a departure from the direct discrimination provisions in the Sex Discrimination Act 1975 and the Race Relations Act 1976 which required the comparator to be in the same, or very similar circumstances, to the claimant.

Under section 3A, the focus was on the reason for the less favourable treatment and the appropriate comparator was a person to whom that reason did not apply. This comparator requirement was confirmed by the Court of Appeal in *Clark* v. *Novacold ("Clark").*[443] The effect of *Clark* was that, in a case where a disabled employee was subjected to less favourable treatment because of long-term sickness absence under section 3A, the appropriate comparator was a non-disabled person who was not on long-term sick leave. The key point was that the "reason" for the less favourable treatment, namely the long-term sick leave, did not apply to the comparator.

Whilst the 1975 and 1976 Acts required the discrimination to be "on the grounds" of sex or race (direct discrimination)[444] the 1995 Act, as amended,

[443] [1999] IRLR 318
[444] 1975 Act, s1(1)(a); 1976 Act s 1(1)(a).

stipulated that discrimination could be “on the grounds” of disability and / or “related” to the disability.[445] The EAT has confirmed that the phrase “on the grounds of disability” connotes a more precise claim, with a more limited scope, than the wider and more malleable “for a reason which relates to disability.”[446] So, one of the statutory purposes for the “related discrimination” claim was to give the disability provisions in the 1995 Act a broader reach than direct discrimination claims on the grounds of sex or race. Still, the 1995 Act did not include indirect disability discrimination as a head of claim. As a result, cases of what would otherwise have been presented as indirect disability discrimination had to be brought under the ambit of the disability-related provisions of the 1995 Act (often in conjunction with the “reasonable adjustments” claim under section 4A of the 1995 Act).

It was the combination of the loose *Clark* comparator, coupled with the broader “related discrimination” model, which gave the disability discrimination provisions in the 1995 Act a relatively wide ambit. Moreover, as Horton observes, this reach was extended further by the fact that the 1995 Act did not require that the putative discriminator have actual or imputed knowledge of the disability.[447]

However, in the *Malcolm* case the Law Lords adopted a highly restrictive interpretation of the appropriate comparator in disability-related discrimination claims and, in doing so, overturned the *Clark* decision. To return to the example above, the result of *Malcolm* was that the appropriate comparator in section 3A claims became a non-disabled person *who was on long-term sick leave.* Whilst *Malcolm* was a housing case, it was transposed to the

[445] Disability Discrimination Act 1995 (Amendment) Regulations 2003, SI 2003/1673, sections 3A (1) and (5)
[446] *High Quality Lifestyles Ltd* v *Watts*, UKEAT/0671/05/ZT, [46].
[447] Horton, R, ’The end of disability-related discrimination in employment?’ (2008) 37(4), ILJ 376, 377.

employment context and imposed an unduly high burden on claimants trying to establish a *prima-facie* case of disability-related discrimination.[448]

Indeed, the strict interpretation in *Malcolm* resulted in the counterintuitive situation where a claim for disability-related discrimination was, in effect, indistinguishable from direct disability discrimination claims. By way of explanation, the *Malcolm* interpretation entailed that the comparator be in the same factual circumstances as the claimant. Followed to its logical conclusion, this interpretation meant that the only significant difference between the claimant and the comparator was that the claimant had been treated less favourably than the comparator on the grounds of a protected characteristic, such as disability. However, this mirrored the definition of direct disability discrimination under the 1995 Act.

As a result, the 2010 Act introduced two new legal claims, in the context of disability, to try to clear up the post-*Malcolm* obfuscation in this area of the law: discrimination arising from disability and indirect disability discrimination. The former head of claim, contained in section 15 of the 2010 Act, was a new instantiation of the "related discrimination" model. I shall now move on to consider this statutory provision.

5.2.2 Discrimination arising from disability

The EAT and Court of Appeal have helped to shape the contours of the section 15 claim in a series of decisions. This will become more apparent as the analysis in this chapter progresses. For now, a couple of examples should help to illustrate this point.

One example is *Basildon and Thurrock NHS Foundation* v *Weerasinghe (Weerasinghe),*[449] where the EAT distinguished section 15 from section 13 of the 2010 Act as the former claim involves "unfavourable treatment" whilst the

[448] For an example, see *Aitken* v *Commissioner of Police of the Metropolis* [2011] EWCA Civ 582 (*Aitken*).
[449] [2016] ICR 305

latter refers to “less favourable treatment.”[450] In addition, the EAT also held in *Weerasinghe* that section 15 should not be equated with section 3A as the former statutory provision had “superseded” the latter.[451] This was an important judicial statement as it emphasised that section 15 should be seen as a different variant of the “related discrimination” model than section 3A.

Following suit, the Court of Appeal went on to stress 4 important differences between the two models in *City of York Council* v *Grosset* (*Grosset*).[452] Arden L.J. (as she then was) helpfully distinguished these 4 differences: that the phrase “arising from disability” had replaced “disability-related discrimination,” that section 15 had abandoned the necessity for a comparator, that the proportionality defence had replaced the “material and substantial” defence and that section 15(2) imports a requirement that the putative discriminator knew, or should have known, that the claimant had a disability.[453]

Despite the different statutory wording in section 3A (and 20) of the 1995 Act and section 15 of the 2010 Act, it is suggested that they have the same broad purposes. In the context of employment, the purpose of section 3A was to balance the right of workers to participate fully in the workplace with the legitimate business and social needs of the employer. Moreover, section 20 of the 1995 Act was designed to balance the right to be provided with facilities, goods and services with certain circumscribed social and commercial goals. Section 15 of the 2010 Act, which covers the employment and service provision contexts, seeks to balance the full exercise of these rights with the commercial and social needs of the putative discriminator. This balancing exercise is described in the Explanatory Notes to the 2010 Act:

> “This section (15) is a new provision. The Disability Discrimination Act 1995 provided protection from disability-related discrimination but, following the judgment of the House of Lords in the case of

[450] *Ibid*, [25].
[451] *Ibid*, [15]
[452] [2018] ICR 1492.
[453] *Ibid*, [65].

> *London Borough of Lewisham v Malcolm* [2008] UKHL 43, those provisions no longer provided the degree of protection from disability-related discrimination that is intended for disabled people. This section is aimed at re-establishing an appropriate balance between enabling a disabled person to make out a case of experiencing a detriment which arises because of his or her disability, and providing an opportunity for an employer or other person to defend the treatment."[454]

By introducing the section 15 model, the legislature was therefore striking a balance between the protection of disabled people and the commercial and social necessities of the putative discriminator. This balance, which had been lost in the confusion arising from the *Malcolm* case, is the primary practical purpose of section 15. Another purpose of section 15 is that it widens the scope of the 2010 Act's protection to disabled people (as compared to people with other protected characteristics).

I shall now move on to section 5.3 which explores the excision of the comparator requirement from section 15.

5.3 "Unfavourable treatment" v "less favourable treatment"

5.3.1 "Less favourable treatment"

The main problem with the *Clark* comparator requirement was that it set down a threshold which could always be met in disability-related discrimination claims. As Lord Bingham observed in *Malcolm*, the claimant will always satisfy the loose *Clark* comparator requirement. The reason that the claimant will always be able to satisfy the test is because the less favourable treatment is for a reason which does not apply to the comparator. Lord Bingham then opined that this test will always be met because if there is no reason there

[454] Equality Act 2010 Explanatory Notes (www.legislation.gov.uk/ukpga/2010/15/notes) accessed 27 June 2023, paragraph 70.

would be no treatment.[455] This judicial reasoning is difficult to argue against. Indeed, Lords Scott and Neuberger also agreed in *Malcolm* that the *Clark* approach to comparators was too wide for substantially the same reasons as Lord Bingham.[456]

Malcolm was a housing case under the 2010 Act, rather than an employment case, and the Law Lords had to tailor the comparator requirements to the housing context when deciding *Malcolm*. Their main concern seems to have been that the wider *Clark* construction would cause a lot of difficulties for landlords.[457] As a result, a majority of the Law Lords (Lady Hale dissenting) overturned the *Clark* decision and adopted a much narrower comparator approach for housing cases (which was later transposed to the employment context).

Whilst there were some concerns that the *Clark* approach may have been too wide, it soon became clear that the *Malcolm* decision rendered "disability-related discrimination" in the employment context a redundant head of claim.[458] Indeed, *Malcolm* equated disability-related discrimination with direct disability discrimination. The Law Lords did so despite clear Parliamentary intentions that they should be distinct, and distinguishable, heads of claim. Section 3A (5) of the 1995 Act was designed to apply to cases of direct disability discrimination whilst section 3(A)(1) was drafted to cover instances of disability-related discrimination. If Parliament had wanted to elide the two claims, it would have done so via a single statutory provision.

So, on the one hand, the *Clark* comparator was too wide. On the other, the *Malcolm* construction was too narrow. This, in itself, gives a strong signal that the "less favourable" criterion should not be used in my definition of "related discrimination." If I do use it, I am bound to run up against one of these insuperable difficulties with the formulation's comparator requirements.

[455] *Malcolm*, n.441, [14].
[456] *Ibid*, [32] and [140].
[457] Horton, n.447, 379.
[458] *Aitken*, n.448

Indeed, there appears to be no way of circumventing these comparator problems with the "related discrimination" model other than by dispensing with the comparator approach altogether.

This is the conclusion the Government reached when debating the relevant provisions of the Equality Bill (later the 2010 Act) in Parliament. This was made plain by the Solicitor General when speaking at a Public Bill Committee on clause 14 of the Equality Bill (which became section 15 of the 2010 Act):

> "Like the provision in the 1995 Act, clause 14 is intended to provide that the disabled person demonstrates that they have been subjected to detrimental treatment because of something connected with their disability and, secondly, that the duty holder should be able to justify that treatment. However, we have revised the wording from the 1995 Act because we cannot simply carry it forward as the finding in the courts said that we did not achieve the protection that we intended."[459]

Given the difficulties with the comparator approach, the Government therefore decided to remove the comparator requirement altogether when drafting the section 15 legislation.

5.3.2 "Unfavourable treatment"

Accordingly, section 15(1) appropriated the "unfavourable treatment" criterion. Before I can determine whether to include "unfavourable treatment" as a component in my model of "sex related discrimination," it is necessary to ascertain what the term "unfavourable treatment" means.

At the EAT stage of the *Williams* case, Langstaff P opined that "unfavourable treatment" should not be equated with the more common concept of

[459] Equality Bill (Hansard (HC Debates), 16 June 2009.

"detriment" in anti-discrimination law.[460] He astutely observed that the drafters of section 15 would have been aware of the concept of "detriment." If they had intended the word "detriment," that is the word they would have used when drafting section 15. I agree with the observation of Langstaff P here. He then went on to suggest that "unfavourable treatment" could mean placing the disabled person at a disadvantage.[461] He suggested the word "disadvantage" as that was the word used to describe the concept of "unfavourable treatment" in the pregnancy and maternity context.

No doubt following the same line of reasoning, the Equality and Human Rights Commission's Code of Practice on Employment also states that being treated unfavourably for the purpose of section 15 means that the person "must have been put at a disadvantage."[462] However, when the *Williams* case reached the UKSC, the Court held that it would not be productive to try to compare the term "unfavourable" treatment with concepts such as "disadvantage" or "detriment."[463] Having said that, one of the difficulties with the UKSC's judgement in *Williams* is that the Court was prepared to state what "unfavourable treatment" *was not* but did not then go on to give an explanation or definition of what "unfavourable treatment" *actually is.*

This apparent reluctance by the UKSC to fuel the concept of "unfavourable treatment" with substantive content is also reflected, at a general level, in the section 15 case law. Indeed, the only expanse of interpretation given to the concept of unfavourable treatment by the senior UK judiciary in section 15 case-law appears to be that it does not require a comparison exercise.[464] As a result, the legal definition of "unfavourable treatment" is still somewhat murky some 15 years after the 2010 Act was brought into force.

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[460] "Detriment" is covered by section 39 of the 2010 Act. Langstaff P's dicta can be found at *Trustees of Swansea University Pension and Assurance Scheme and another* v *Williams* [2015] ICR 1197, [27].
[461] *Ibid*, [28].
[462] Paragraph 5.7.
[463] *Williams v The Trustees of Swansea University Pension & Assurance Scheme* [2018] UKSC 65, [2019] 1 WLR 93, [24]
[464] *Grosset*, n.452, [65].

Given the dearth of judicial guidance on what "unfavourable treatment" means, I have assessed the academic literature on the concept. However, it has also received scant attention by legal and jurisprudential scholars. Nevertheless, one scholar who did consider the concept was Hepple. Indeed, Hepple wrote about "unfavourable treatment" at a philosophical level, arguing that it amounts to the deprivation of something which the claimant values.[465] This is a predominantly subjective test: the claimant's value-system and preferences determine what amounts to unfavourable treatment for her. The requirement of unfavourable treatment is therefore a relatively low threshold for triggering the application of section 15, as Lord Carnwath observed in the *Williams* case.[466]

It is my position that the definition of unfavourable treatment should be both subjective and set at a relatively low threshold to counter the unduly strict requirements set down by the *Malcolm* decision and to contextualise each person's individual experiences as unique to that person. The definition should also be sufficiently malleable to cover a wide range of acts and omissions, and it is suggested that the term "unfavourable treatment" has that malleability. The absence of a comparator also reinforces a substantive, rather than a formal, model of equality thereby reducing the risks of "levelling down" which were referred to in Chapters 1, 2 and 3

It is suggested that these are positive aspects of the "unfavourable treatment" criterion. Discrimination can come in many forms. The legislature seemed to recognise this, when enacting section 15, by casting the net wider than the more familiar "less favourable" treatment formulation and it did so by using the "unfavourable treatment" criterion. The latter allows broader parameters than the former when it comes to those acts and / or omissions which may constitute the adverse treatment complained of.

[465] Bob Hepple, *Equality: The Legal Framework* (Hart Publishing, 2014) 178.
[466] *Williams*, n.463, [103].

Moreover, at least in the context of sex discrimination, removing the comparator requirement shifts the focus away from whether the victim's experiences, and treatment, are comparable to those of the culturally dominant standard. As such, a female claimant does not need to show that her experiences and treatment are comparable to men's experiences, as she would if the alleged sex discrimination was based on a "less favourable" treatment test. Instead, her claim can focus on her own treatment, both as a woman and a human being with her own unique traits and values.

This subjectivity is therefore a strong component of the "sex related discrimination" model I am building. It also helps to highlight that "sex related discrimination" is a distinct head of claim from indirect sex discrimination. The latter involves assessing whether an individual, and the group to which she belongs, has received a "particular disadvantage." This is an objective test which stands in stark contrast to the subjectivity of the "sex related discrimination" claim.

Consequently, my view is that Hepple's interpretation of the unfavourable treatment criterion should fit well within my model of "sex related discrimination." However, if it is to be included, I must make some minor modifications to Hepple's definition. Whilst a subjective interpretation of the "unfavourable treatment" benchmark is to be welcomed, there must be a light-touch measure of objectivity which applies to it.

Indeed, the value preferences of the claimant should be ones which are, in general, morally acceptable to reasonable people in a modern democratic society. By way of example, if the claimant argued that the "unfavourable treatment" amounted to having to sit next to a black woman in the workplace, and this argument was based on negative racial stereotyping, such an argument should not cross the relatively low threshold imposed by the "unfavourable treatment" criterion in section 15 because such a view is morally repugnant and contrary to the purposes of anti-discrimination law as a whole.

These proposed characteristics of the "unfavourable treatment" criterion may be countered by the objection that such characteristics will lead to a disproportionately high number of successful section 15 claims and that, as a result, it imposes unduly onerous burdens on employers and other putative discriminators. However, as will be argued in the next section, the relatively "loose" definition of unfavourable treatment can be balanced out with much tighter causation requirements.

It could also be argued that the "unfavourable treatment" standard, with its lack of a comparator requirement, does not apply particularly well to the protected characteristic of sex on the basis that it is a general and widespread category. At present, the unfavourable treatment criterion applies specifically to pregnancy, but it applies logically in that case, because only women can get pregnant.[467] The argument might go along the lines that, since only women can get pregnant, they are in a unique situation and should not therefore be compared with men in the context of pregnancy.

It might also be contended that "unfavourable treatment" should only be applied to disability because the individual disability, unlike the other protected characteristics in the 2010 Act, originates from amongst a broad spectrum of disabilities. This factor, it could be argued, together with the specific and highly individualised effects which the disabilities have on each disabled person, places each disabled person in his or her own situation, which is either unique or, at the very least, highly separable from the circumstances of other disabled people.

These potential objections are relevant to the mandate of this thesis as they could be used to support the argument that the "unfavourable treatment" test should not be extended to the protected characteristic of sex. Indeed, it might be argued that the sexes are not sufficiently distinguishable to attract the protection of the "unfavourable treatment" model. In particular, the argument

[467] 2010 Act, section 18

could be advanced that disability and sex are too different for the "unfavourable treatment" model to be transposed to the latter.

My position is that, whilst this objection might have some superficial appeal, that appeal breaks down upon closer analysis. Clearly, it is uncontroversial to maintain that, historically, women's experiences of the social, cultural and political landscapes have been dramatically different from men's. Even though women's encounters within these socio-cultural and political contexts may have improved with time (at least in most developed countries) there is still, in general, a wide gap between the expectations and experiences of men and women in our society. By way of example, women will, at least in most cases, be required to bear greater childcare responsibilities than men. Moreover, if the woman has a career, she will often be expected to balance her work commitments with family responsibilities in ways which are not expected of men.

As McColgan has observed, the use of comparators accentuates these differences between men and women, rather than mitigating them, because the less fortunate group (generally women) must always show "likeness" with the more fortunate group (generally men) to establish equality of treatment.[468] Indeed, McColgan gives the 1970 Act and the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (2000 Regulations)[469] as paradigm examples of this problem with the comparator approach.[470] The female claimant must prove, under these legislative provisions, that she is deserving of the same treatment as her male comparator based on the type of job and workplace, together with the types of employers for whom they work.[471] However, as McColgan correctly points out:

[468] Aileen McColgan, 'Cracking the comparator problem: discrimination, "equal" treatment and the role of comparisons' (2006) 6 EHRLR 650, 656.
[469] (SI 2000 / 1551).
[470] McColgan, n.468, 655.
[471] *Ibid*, 656.

> "Much of the disadvantage suffered by women, and by part time workers in particular, stems precisely from the fact that they are not like men in these respects. And to the extent that that lack of likeness is associated with discriminatory treatment (in the sense of treatment related to sex) it is immune from challenge under legislation which adopts the comparator requirement. Such legislation has little to offer to women who are subject to disadvantage by virtue of *uniquely*, predominantly or stereotypically "female" characteristics or behaviour (my emphasis)."[472]

Given these differences in expectations, and experiences, between men and women, my position is that, by using the unfavourable treatment model in the context of sex discrimination, the law makes important steps towards recognising these differences. As McColgan observes, the comparative approach merely serves to reinforce these differences, which amount to a broad range of historical disadvantages between men and women.[473]

McColgan also correctly identifies that women's characteristics and conduct are often "unique" and therefore distinguishable from those of men. It is submitted that this emphasis on the "uniqueness" of women's attributes and bearing, as compared with those of men's, further strengthens the position that the "unfavourable treatment" definition should be extended to the protected characteristic of sex.

My view is that the law on sex discrimination should also recognise that the woman is not just a woman; but a unique human being. In recognition of this, Hepple's argument that "unfavourable treatment" be interpreted as a predominantly subjective concept becomes even more attractive. It does so by more accurately reflecting the experiences of the woman as an individual human being, with her own unique characteristics and value-preferences.[474]

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[472] *Ibid*, 656.
[473] See n.468
[474] See n.472

Consequently, my position is that the removal of the comparator approach in cases of ”sex related discrimination” would represent a move towards recognising the autonomy of women in this area of the law and, as a result, should be welcomed. The “unfavourable treatment” approach also avoids the problems with the formal equality model I outlined in earlier chapters.

As a result, my position is that the “unfavourable treatment” criterion should be used in my model of “sex related discrimination” and the “less favourable treatment” requirement should be discarded. Moreover, my concept of “unfavourable treatment” should be interpreted in line with Hepple’s understanding of the concept, subject to some light objective parameters to make it workable in practice.

Having confirmed my position, I can now move on to analyse how the causation requirements in my model of “related discrimination” should be understood.

5.4 “Discrimination arising from sex” v “sex-related discrimination”

5.4.1 Introduction

This section has three main aims. The first is to summarise the basic components of the causation test in “related discrimination” claims. This should give a deeper and broader understanding of the concepts behind the claim, so far as causation is concerned. The next task is to identify the appropriate statutory wording, in the context of causation, for my definition of “related discrimination.”

To do so, I must analyse the causation requirements in the 1995 Act’s “disability-related discrimination” and the 2010 Act’s “discrimination arising from disability” provisions. Thereafter, the next goal is to identify the more appropriate interpretation of the preferred statutory wording. When I state a need to identify the more appropriate interpretation, I mean that the interpretation should accord with the purposes of the “related discrimination”

model and that it must work well in a practical tribunal or courtroom setting. To carry out these tasks, I must review and critically evaluate the relevant case law pertaining to sections 3A and 15.

5.4.2 Common causal requirements in the "related discrimination" model

The "related discrimination" model (as it applies to disability and potentially to other protected characteristics such as sex) involves an indirect causal link between the adverse treatment and the protected characteristic. Hence, the link need only be between the adverse treatment and a manifestation or consequence of the protected characteristic.

This causal link requirement applies regardless of whether the section 3A or section 15 causation tests are used. With section 3A claims, the treatment had to be because of something related to the disability whilst in section 15 cases it must be because of something arising in consequence of the disability. By way of example, it is not sufficient to state that there has been a breach of section 15 simply because there has been unfavourable treatment. The reason for the treatment must be assessed by the court or tribunal.[475] This will often involve some enquiry into the mindset of the putative discriminator to help determine his motives. However, as with direct discrimination, motive is only relevant to help the judge to establish the reason for the treatment. Once the reason has been identified, motive becomes irrelevant.[476] Moreover, the putative discriminator's motives can be conscious or unconscious.[477] These are the main concepts which both versions (sections 3A and 15) of the "related discrimination" models share. Having established these common components, I shall now move on to analyse the causation tests applicable to section 3A.

5.4.3 The causation requirements of section 3A An important case on causation, so far as section 3A was concerned, was *Taylor* v *OCS Group*

[475] *Hall*, n.413, [17]
[476] *Ibid*, [17].
[477] *Ibid*, [17]. See also *Nagarajan* - n.79

Limited (*Taylor*).[478] In *Taylor*, the claimant, Mr Taylor, was profoundly deaf and this deafness amounted to a disability under the 1995 Act. The employer, OCS Group, dismissed the claimant for gross misconduct. The gross misconduct involved the claimant accessing a colleague's computer and emailing himself a copy of work-related documents which he was not authorised to view. The employer dismissed the claimant on the grounds of gross misconduct after a disciplinary hearing. Despite being deaf, the claimant was not given access to an interpreter during the disciplinary hearing. Moreover, he had significant difficulties when trying to "lipread" the words spoken by the disciplinary chairperson. As a result, Mr Taylor was not able to sufficiently grasp what was being discussed during the disciplinary hearing. His internal appeal against dismissal was rejected by the employer so he went on to lodge Employment Tribunal claims for unfair dismissal and disability-related discrimination. After a series of appeals and cross-appeals, the case reached the Court of Appeal. For present purposes, I shall focus on Mr Taylor's disability-related discrimination claim in the Court of Appeal.

Mr Taylor's claim was based on his contention that, because of his deafness, he was unable to understand what was happening during the disciplinary hearing. That lack of capacity, in turn, hampered his ability to explain the reasons behind his misconduct and increased the chances of him being dismissed. The Court of Appeal rejected this argument. In doing so, it held that an employer could not discriminate against a disabled employee unless the employer treated the employee differently for a reason that was both related to the employee's disability and present in the employer's mind at the point of dismissal.[479]

Furthermore, the court held that, whilst the claimant may have been unable to express himself cogently at the disciplinary hearing, and that may have

[478] [2006] EWCA Civ 702; [2006] ICR 1602
[479] *Ibid*, [72] - [74].

increased the chances of his dismissal, the employer did not have a disability-related reason in its mind when it took the decision to dismiss.[480]

The only reason which operated in the employer's mind, at the time it took the decision to dismiss, was the claimant's gross misconduct.[481] However, the claimant's gross misconduct had nothing to do with his disability. Given that there was no disability-related reason in the employer's mind at the time it dismissed, the dismissal could not constitute disability-related discrimination.[482]

The Court of Appeal also acknowledged that, in many cases (not in this one though) the employer may have several reasons for dismissing an employee. If there were several reasons, the Court held, a finding of disability-related discrimination could stand so long as the disability-related reason was a "significant" reason for the dismissal.[483] Moreover, the Court held that the significant disability-related reason could establish a case for disability-related discrimination even though the thought processes leading to the formation of the reason were based on unconscious motives.[484]

As a Court of Appeal decision, at the time of the judgment (2006), the *Taylor* case was the most authoritative judicial statement on the causation requirements for disability-related discrimination under the 1995 Act. It is suggested that the decision is a sensible one given that Mr Taylor's deafness had no connection whatsoever with his decision to misappropriate confidential company files.

The *Taylor* case set down a test for causation which resembled the general causal requirements for a direct discrimination claim. The common components of each claim were that the motive (conscious or unconscious) could only help determine the reason for the discrimination and was thereafter

[480] *Ibid*, [73].
[481] *Ibid*, [72].
[482] *Ibid*, [72].
[483] *Ibid*, [72].
[484] *Ibid*, [72].

irrelevant; the disability-related reason had to be a *significant* influence for the adverse treatment; and also had to be present in the mind of the putative discriminator at the time it took the decision to mete out the adverse treatment. All things considered, the *Taylor* case seemed to outline succinct and comprehensible rules relating to causation in the disability-related discrimination context.

However, a few years later, in the *Malcolm* case, the Law Lords disagreed about the causal requirements of the disability-related discrimination claim. Lord Bingham viewed the words "related to" as connoting a broad connection with the disability which need not be too precise.[485] Nevertheless, Lady Hale opined that the causal connection should not be "remote" and that the more causal links in the chain, the less likely that the reason was related to the disability.[486] Lord Neuberger's opinion seemed to be an attempt at some sort of "middle-ground" between Lord Bingham's and Lady Hale's position on causation. Indeed, Lord Neuberger stated that a "*relatively* loose or indirect connection between the reason and the disability would suffice."[487] Lord Scott, though, arguably gave the vaguest interpretation of the causal requirement when he simply stated that the disability-related reason must play some "causative part" in the decision-maker's reasoning.[488]

The *Malcolm* case shows how divided the Law Lords were on the issue of causation in disability-related discrimination claims. Given that the most senior members of the judiciary in the UK failed to agree on the correct causal test under the 1995 Act, this raises a strong presumption that the statutory wording was perhaps not as transparent, or understandable, as it should have been.

Hepple also recognised this, noting that the Law Lords in *Malcolm* were unable to agree on how close the relationship between the "reason" and the "disability"

[485] *Malcolm*, n.441, [10].
[486] *Ibid*, [83].
[487] *Ibid*, [169].
[488] *Ibid*, [28].

should be under the 1995 Act.[489] As a result, his position was that the statutory wording under section 15 would simplify this area of the law.[490] Whilst I agree with Hepple that the wording "arising from discrimination" is more intuitively straightforward than "disability-related discrimination," it will be necessary to analyse the main section 15 case law to determine whether the revised statutory formulation had the effect of simplifying the law. I shall proceed to a case law analysis in the next section. In the meantime, it is safe to state, as a prima facie position, that the widespread division in the House of Lords regarding causation in the *Malcolm* case would appear to make the "disability-related" causation test an unattractive one for my model of "related discrimination."

5.4.4 The causation requirements in section 15

I shall critically analyse the main cases relating to section 15 causation in this section. The first is *Land Registry* v. *Houghton* ("Houghton")[491] where four employees were not paid bonuses because they had received disciplinary warnings regarding their sickness absence levels. The Land Registry had a written policy that employees who received warnings about their sickness absence levels would not be paid a bonus. The four employees lodged section 15 claims with the Employment Tribunal, contending that this rule amounted to unfavourable treatment arising from their disabilities and that such treatment could not be justified using the proportionality defence under section 15(2).

At the EAT, the Land Registry argued that the causal link between the disabilities and the non-payment of the bonuses was too remote to satisfy the section 15 causation requirements.[492] This argument was buttressed by the

[489] Hepple, n.465, 178.
[490] *Ibid*, 178.
[491] UKEAT/0149/14/BA
[492] *Ibid*, [18].

fact that the bonuses were denied by Human Resources employees who had no knowledge of the claimants' disabilities. HHJ Peter Clark dismissed this argument. In doing so, he stated that it was clear that the bonuses were not being paid to the 4 employees because of the sickness absence warnings.[493]That was the reason for the failure to pay the bonuses and only the reason, not the motive, was relevant in such discrimination claims. Indeed, the motives of the Human Resources employees were irrelevant.

During his judgment, HHJ Peter Clark made some notable, if perhaps controversial, remarks about the new causation requirements in section 15 of the 2010 Act:

> "Having removed the need for a comparator, which requirement under the DDA had led the House of Lords to neutralise the protection granted by section 3A(1), it seems to me that Parliament has loosened the causative link between the disability and the unfavourable treatment complained of by the use of the deliciously vague formulation, "because of something arising in consequence of the [Claimant's] disability", bearing in mind that, in the context of discrimination law, "causation is a slippery word"[494]

The *Houghton* case was an early EAT decision on section 15, and these remarks by HHJ Peter Clark indicated a loose approach to causation under the new statutory provisions.

That suspicion was confirmed by a later decision of the EAT in *Hall.*[495] In *Hall*, the claimant took several prolonged absences from work due to a heart condition and stress. The police force suspected the claimant was not unwell and placed her under surveillance to ascertain the position. Consequently, the police came to the genuine, but wrong, conclusion that the claimant had been

[493] *Ibid*, [19].
[494] *Ibid*, [5].
[495] See n.413

falsely claiming to be unwell. The claimant was then summarily dismissed following a disciplinary hearing held in her absence.

She then lodged Employment Tribunal claims for unfair dismissal and discrimination arising from disability. The tribunal held the dismissal to be unfair but rejected the section 15 claim. The latter claim was rejected by the tribunal because the reason for the dismissal was the police force's genuine (albeit mistaken) belief that the claimant was taking false periods of sickness absence. The claimant appealed this finding on section 15 to the EAT. The EAT allowed her appeal because the sickness absences, being a manifestation of her disability, were an effective cause, or a significant influence, of the unfavourable treatment that she was subjected to. As a result, her section 15 claim was upheld.

The reasoning adopted by the EAT in coming to this conclusion is noteworthy. The EAT reasoned that the tribunal had made the mistake of requiring a manifestation of the claimant's disability to be the cause of the unfavourable treatment for the section 15 claim to be successful. By contrast, the EAT held that only an "effective" or "significant" connection is required to establish causation under the looser section 15 test.[496] Moreover, that connection does not need to be the sole reason for the treatment. Indeed, it does not even have to be the *main* reason for the unfavourable treatment.[497]

To reinforce this loosening of the causal link, Justice Laing in *Hall* quoted HHJ Peter Clark's reference in *Houghton* to section 15's "deliciously vague" formulation with approval and concluded "that Parliament's intention in enacting section 15 was to reverse the effect of *Lewisham* v *Malcolm* and to loosen the causal connection which is required between the disability and any unfavourable treatment."[498]

[496] *Ibid*, [42].
[497] *Ibid*, [42]
[498] *Ibid*, [35]

Manison has, rightly in my view, commented that the EAT's formulation of "discrimination arising from disability" only required a relatively loose causal link in the *Hall* case; thereby "reinforcing the assertion that s.15 has a wide and, at times, favourable scope."[499] By "favourable scope," Manison means a favourable scope for claimants lodging section 15 claims, reflecting her views that, relatively speaking, the section 15 claim only requires a loose causal link.

My views on the *Hall* case largely accord with Manison's position. Indeed, it is clear, from the EAT's reasoning in *Hall*, that the claimant need only establish some sort of relevant link to satisfy the causation requirements of section 15. It is therefore my position that, if the *Hall* (and, by necessity, the *Houghton*) line of reasoning on causation is followed, the claimant need only show that the manifestation of the disability was part of the background *context* relating to her claim. Indeed, in these cases, the word "causation" may as well have been replaced with the word "context."

Returning to the *Weerasinghe* decision, however, the EAT adopted a stricter approach to the causation requirements in section 15. In *Weerasinghe*, the claimant, a surgeon, had a serious respiratory infection which amounted to a disability under the 2010 Act. He was absent from work for substantial periods of time due to the disability's effects. During his absence, he stated that he was too unwell to meet in person with his clinical director. However, it transpired that he attended interviews and training courses abroad during this period of sickness absence. As a result, he was dismissed.

The claimant went on to lodge Employment Tribunal claims for unfair dismissal and discrimination arising from disability. The Employment Tribunal held that the employer had breached section 15 because there was a link between the claimant's disability and his dismissal.[500] The employer appealed this decision.

[499] Nicola Manison, 'Discrimination in the workplace: reasonable adjustments and discrimination arising from disability' (2016) 133 Emp LB 2, 4.
[500] *Weerasinghe*, n.449, [12].

Part of the appeal focused on the causation requirements of section 15. It was argued that the tribunal adopted an unacceptably loose causal requirement when finding that all that was required under section 15 was a link between the treatment and the disability.[501] Instead, the tribunal should have identified what the "something" was which arose from the disability and whether the claimant was treated unfavourably because of that "something."[502]

The EAT allowed the employer's appeal. In doing so, it held that the tribunal, by merely requiring a connection between the disability and the treatment, had taken an incorrect and inappropriately loose approach to the issue of causation.[503] Indeed, the EAT went on to state that the risk of taking such a loose approach is that it might fail to distinguish causation from the context in which the events occurred.

As a result, the EAT found it necessary to provide more detailed guidance on how tribunals should approach the issue of causation under section 15. In doing so, it opined that there were two distinct causal steps in section 15.[504] The first was that the tribunal had to refer to the words "because of something" in section 15(1) and identify what the "something" is.[505] Secondly, that "something" had to arise in consequence of the disability.[506] Finally, the unfavourable treatment had to be because of the "something" in question.[507]

It appears that, in *Weerasinghe*, the EAT decided to tighten up the causal test under section 15. This causal test had been loosened by *Houghton* and *Hall* to the point where it seemed that, so long as the claimant could establish a contextual link between the disability and the adverse treatment, the section 15 causal test was met. In *Weerasinghe*, which was presided over by the President of the EAT at that time, Langstaff J, there was a clear attempt to

[501] *Ibid*, [22].
[502] *Ibid*, [22].
[503] *Ibid*, [34].
[504] *Ibid*, [26].
[505] *Ibid*, [26].
[506] *Ibid*, [26].
[507] *Ibid*, [26].

establish a two-step test which reflected the actual wording of section 15. As Langstaff J made plain, tribunals must follow the statutory wording when adjudicating section 15 claims.

It is suggested that Langstaff J tightened up the causal test in section 15 because he could see the danger of a loose causal test, such as that adopted in *Houghton* and *Hall*, which would merely require that the disability form part of the context of the claim. This would have represented an unacceptably loose causal requirement and would have leaned too heavily in the claimant's favour. As a result, the *Weerasinghe* decision should be seen as a positive development as far as the causal requirements of section 15 are concerned. Langstaff J's approach was endorsed by the next President of the EAT, Mrs Justice Simler, in *Pnaiser v. NHS England.*[508] It therefore seemed as though the law was pointing in favour of a stricter, and more structured, approach to causation in section 15 claims.

However, in *Risby* v. *London Borough of Waltham Forest* (*Risby*)[509] the EAT reverted back to a very loose causation test. In *Risby*, the claimant was paraplegic and needed a wheelchair to assist with his mobility. He was invited to a training workshop by the employer. When he tried to attend the workshop, he was prevented from doing so as there was no wheelchair access to the building in which the training was to take place. Upon learning of this lack of accessibility, the claimant lost his temper and directed racist and other highly offensive remarks towards his colleagues. The employer summarily dismissed the claimant for his remarks.

The claimant then lodged Employment Tribunal claims for unfair dismissal and discrimination arising from disability. The section 15 claim was rejected by the Employment Tribunal. It held that the claimant made the racist remarks because of a personality trait; there was therefore no direct connection between his disability and the use of racist language. The claimant appealed

[508] UKEAT/0137/15/LA, [2016] IRLR 170 [31].
[509] UKEAT/0318/15/DM

this finding to the EAT, submitting, *inter alia*, that the tribunal had approached the section 15 causation test in the wrong way by requiring a direct link between the disability and the racist remarks. The claimant's appeal on this point was upheld by the EAT.

In doing so, the EAT held that there was no "direct linkage" required between the disability and the misconduct.[510] All that was required was that the disability was an "effective" cause of the claimant's conduct.[511] The EAT went on to hold that the section 15 chain of causation had been satisfied in this case:

> "18. If he had not been disabled by paraplegia, he would not have been angered by the Respondent's decision to hold the first workshop in a venue to which he could not gain access. His misconduct was the product of indignation caused by that decision. *His disability was an effective cause of that indignation and so of his conduct*, as was, of course, his personality trait or characteristic of shortness of temper, which did not arise out of his disability (my emphasis)."[512]

As can be seen from the quote above, the EAT held that the section 15 causation test was met despite there being multiple links in the causal chain. My position is that the multitude of causal links should have precluded a finding of discrimination arising from disability in *Risby*. The EAT's finding of a breach of section 15, following the reasoning in paragraph 18 of the judgment (above) was based on very thin grounds. Indeed, this is another case where the manifestation of the disability is better seen as forming part of the background context of the claim, rather than being a key link in the causal chain.[513]

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[510] *Ibid*, [17].
[511] *Ibid*, [17].
[512] *Ibid*, [18].
[513] IDS Brief, 'Disability discrimination: EAT considers causation in context of s.15 EqA discrimination' (2016) 1047 IDS Emp L Brief 5-7.

The next significant decision on section 15 causation was the EAT case of *Charlesworth* v *Dransfields Engineering Services Ltd* (*Charlesworth*).[514] This case both exemplifies and clarifies the distinction between causation and context in section 15 claims.

Mr Charlesworth, the claimant, was diagnosed with cancer and took approximately two months off work to receive treatment. During this time, the employer was considering redundancies and other cost-cutting measures. The employer realised that the claimant's absence did not have a significantly detrimental impact on the running of its business. Consequently, when the claimant returned from work, he was placed at risk of redundancy.

Following his redundancy, he lodged unfair dismissal and discrimination arising from disability claims with the Employment Tribunal. The thrust of the claimant's section 15 claim was that it was his disability-related absences which led to his dismissal.[515] The claimant supported this position by arguing that any disability-related cause is sufficient to satisfy the causation requirements, irrespective of whether the cause operated in the mind of the putative discriminator at the time he took the decision to dismiss.[516]

This argument was rejected by the EAT. Mrs Justice Simler, then President of the EAT, held that the cause had to be "effective" or "significant" and operate on the mind of the employer at the time the discriminatory act or omission took place.[517] In the present case, she stated that the reason behind the employer's treatment of the claimant was because of its belief that his role was genuinely redundant.[518] Whilst his disability-related absence from work had highlighted that the business could operate effectively without him, that was not the same thing as saying that the claimant was dismissed because of his absences.[519]

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[514] UKEAT/0197/16/JOJ
[515] *Ibid*, [10].
[516] *Ibid*, [10].
[517] *Ibid*, [14].
[518] *Ibid*, [18].
[519] *Ibid*, [18].

All things considered, given that the reason for the claimant's dismissal was a genuine redundancy, there was no breach of section 15.[520] In reaching this conclusion, Mrs Justice Simler held that the claimant's disability had merely been part of the context leading to his dismissal, rather than a link in the causal chain.[521]

Whilst *Charlesworth* feels, on an intuitive level, that it was a harsh decision for the claimant, my position is that it was the correct legal outcome. The fact that the claimant's role was redundant was not causally linked to his disability-related absences. The absences merely called attention to the fact that the business could operate effectively without the claimant.

So, my position is, as the EAT held in *Charlesworth*, that the absences were part of the background context behind the claimant's redundancy, rather than being part of a causal chain leading to a finding of discrimination arising from disability. That said, it is difficult, if not impossible, to reconcile the *Charlesworth* decision with cases like *Hall, Houghton* and *Risby*. In the latter cases, there are, as I describe above, strong grounds to argue that the manifestation of the disability in these cases was part of the context, rather than part of the causal chain leading to a breach of section 15.

At this point in the evolution of the section 15 claim, it seems that there were two schools of thought in the EAT on the causal requirements related to section 15. On the one hand, cases like *Weerasinghe* and *Charlesworth* laid down a relatively strict causation standard which closely followed the wording in section 15. On the other hand, cases like *Hall*, *Houghton* and *Risby* were less focused on the statutory wording, and more interested in whether a general link between the disability and the adverse treatment could be established.

This division of opinion was recognised by HHJ Peter Clark when he gave permission for the appeal in *Charlesworth*. Indeed, he recognised that the EAT

[520] *Ibid*, [18] - [20].
[521] *Ibid*, [18].

had applied a more stringent approach to the causation test in *Weerasinghe* than it had in *Hall* and that a resolution on these causation issues was required at the EAT level.[522]

The causation issues under section 15 finally reached the Court of Appeal in the *Grosset* case. Mr Grosset was a secondary school teacher with cystic fibrosis. This health condition amounted to a disability under the 2010 Act. He had to follow a strict physical exercise regime to control the symptoms of his health condition. His employer was aware of his health condition and made adjustments accordingly. However, when a new headmaster was appointed, he was not informed of Mr Grosset's health condition. Over time, Mr Grosset's workload significantly increased. This meant he did not have enough time to exercise to control the symptoms of cystic fibrosis.

Consequently, Mr Grosset experienced increased stress levels. During this time, he showed an "18-rated" film, *Halloween*, to a group of 15-year-old pupils without the school's permission. The school dismissed Mr Grosset on the grounds of gross misconduct. As a result, he lodged claims for unfair dismissal and discrimination arising from disability. The tribunal held that the school had breached section 15 when dismissing Mr Grosset. The school appealed this decision but the EAT rejected its appeal.

When the Court of Appeal came to adjudicate the section 15 claim, it held that a two-step test should be adopted. The first step was to ask whether the putative discriminator, A, had treated the alleged victim, B, "unfavourably" because of an identified "something." The second step was to query whether that identified "something" arose in consequence of B's disability.[523]

Regarding the first step, the court was required to assess the mindset of A with a view to establishing whether the "unfavourable" treatment occurred because of A's attitude to the relevant "something."[524] The second issue was an

[522] *Ibid*, [13].
[523] *Grosset*, n.452, [36].
[524] *Ibid*, [37].

objective one, requiring the court to determine whether there was a causal link between B's disability and the relevant "something."[525]

The Court of Appeal held that there was such a causal link in the present case. The increased workload, and his escalated stress levels, had prompted an error of judgment on the claimant's part, namely showing an inappropriately rated film to a class of 15-year-olds. In addition, the court held that, so long as the "something" was linked to B's disability, it was not necessary for A to be aware that there was an objective causal link between the two.[526] Whilst section 15 required the employer to have actual or imputed knowledge of the disability, it did not have to have knowledge of the "something" which arose from the disability.[527]

The *Grosset* case was a sensible and welcome clarification from the Court of Appeal on the law relating to section 15 causation. As I shall go on to argue in the next section, the interpretation of section 15, as laid down in *Grosset*, should be adopted in my model of "sex related discrimination."

It is clear, from the review of the main case law, that the courts and tribunals have approached the section 15 causation test in different ways. I shall now move on to build a case for the interpretations that should be included in my model of "related discrimination."

5.4.5 The causation test in the "related discrimination" model

Whilst the "related discrimination" model should have a looser causal test than direct discrimination, it should not be too loose. It should be borne in mind that the "unfavourable treatment" criterion, which has already been incorporated into my definition of "related discrimination," is both subjective and loose, and necessarily so. However, there is a risk that, by adopting a formulation that is

[525] *Ibid*, [38].
[526] *Ibid*, [39] - [40].
[527] *Ibid*, [39] - [40]

excessively subjective and loose, the test leans too heavily in the claimant's favour.

To bring some balance back to the definition, it is therefore suggested that the causation test should be tighter. As described above, the EAT's approach to causation in section 15 claims has been highly divisive. Some decisions, such as *Houghton*, *Hall* and *Rigby*, embrace a loose causal test where the manifestation of the disability needs to only be part of the background context of the factual circumstances to meet the section 15 causation test. If this "contextual link" approach is combined with a loose "unfavourable treatment" test, my definition will run the risk of being too claimant friendly. This risk is heightened further if such a formulation was to be combined with an approach which permits multiple links in the chain of causation. This pro-claimant bias would defeat the primary purpose of the legislation, which is to achieve a relatively even *balance* between the interests of the claimant and the putative discriminator.

It is fortunate for present purposes, then, that the Court of Appeal in *Grosset* followed the other school of thought in the EAT on section 15 causation. This approach, which was exemplified by cases such as *Weerasinghe* and *Charlesworth*, was to focus strictly on the statutory wording in section 15. Indeed, this strict adherence to the statutory wording was adopted, as described above, to avoid confusing the concepts of causation and context. *Grosset* follows the same path as *Weerasinghe* and *Charlesworth* with its focus on the wording of the statute. It also sets out a clear and succinct two-step test for causation which, it is submitted, could be applied well by legal practitioners, laypeople and judges in a practical courtroom or tribunal setting.

Grosset also clarifies the law on the state of knowledge which the putative discriminator needs to have to establish liability under section 15. As described earlier, the putative discriminator only needs to have actual or imputed knowledge of the disability. He does not need to know about the "something" which arises from the disability. This distinction is sensible because the

employer is unlikely to have the medical expertise required to establish such a causal link. Instead, what the employer should be doing is seeking advice from qualified medical professionals on such issues. The *Grosset* case therefore highlights the importance of consultation with medical professionals regarding such matters. If the employer has failed to do so, ignorance should not be able to be used as a defence.

All things considered, the *Grosset* test for causation is the most practical interpretation for the purposes of my "sex related discrimination" model. Accordingly, the *Grosset* approach to causation will be the interpretation I use when I come to apply my model of "sex related discrimination" to the *James* case.

5.4.6 Conclusion

This section has demonstrated that the "related discrimination" models under sections 3A and 15 have some important common components. Both statutory provisions require a link between a manifestation of a protected characteristic and the treatment complained of; both allow the judge to assess mindset and motive so long as this is only used to establish the reason for the treatment; and the motives themselves can be conscious or unconscious. Despite that, they also have important differences. The *Malcolm* case raised a strong presumption that the section 3A model on causation should not be transposed to my own "sex related discrimination" formulation. However, a review of the EAT cases also showed a lot of inconsistencies in the judicial approach to section 15 causation. Thankfully, the law is clearer in light of the Court of Appeal's decision in *Grosset*.

In addition to the law being more stable, it is my position that the *Grosset* approach provides the "related discrimination" model with a clear and succinct test to establish causation under section 15. It also provides a stricter causal standard than earlier EAT cases such as *Houghton*, *Hall* and *Risby*. This is important to help achieve a balance between the interests of the putative discriminator and the potential victim of this form of discrimination. Having

arrived at an appropriate causal test for my model of "related discrimination," I shall now move on to consider potential defences to the "related discrimination" claim.

5.5 Defending the "related discrimination" claim

5.5.1 Introduction

This section will identify and analyse the most appropriate defence, and judicial interpretation of that defence, for my "related discrimination" model, starting with an evaluation of the "material and substantial" defence under the 1995 Act. Thereafter, I shall critically evaluate the proportionality defence under sections 15 and 19 of the 2010 Act and the "objective justification" test under EU law. The tests will then be compared to establish which defence is most appropriate for my model.

5.5.2 "Material and substantial" defence

In the employment context, an employer could defend a disability-related discrimination claim under the 1995 Act if he could show that the treatment was material to the circumstances of the claim and substantial.[528] An employer could not invoke the "material and substantial defence" unless it had first shown it had satisfied its (potential) duty to make reasonable adjustments under section 3A (2) of the 1995 Act. So, if such a duty existed, the employer would have to demonstrate that it had fulfilled this duty before the defence could be relied upon.

In *HJ Heinz Co Ltd* v *Kenrick (Heinz*)*,* the claimant, Mr Kenrick, had taken considerable periods of sickness absence.[529] As a result, the employer dismissed him. At the time of dismissal, the claimant had not been formally diagnosed with a medical condition which would have explained the symptoms which caused his prolonged absences from work. However, his physician

[528] 1995 Act s 5(3).
[529] [1999] EAT/1082/98; [2000] ICR 491, [16].

made the employer aware, prior to dismissal, that he suspected the claimant was experiencing symptoms of chronic fatigue syndrome. The employer did not follow up on this line of enquiry by consulting with other medical professionals before dismissing Mr Kenrick. He was then diagnosed with chronic fatigue syndrome after he was dismissed. In the circumstances, the tribunal held that his chronic fatigue syndrome amounted to a disability and the employer should have been aware of the strong possibility of a health condition amounting to a disability at the time it took the decision to dismiss.

Mr Kenrick's Employment Tribunal claims for unfair dismissal and disability-related discrimination were successful. The employer appealed both findings to the EAT. In its judgment, the EAT considered the nature of the "material and substantial" defence. Its first port of call, as the statute required, was to refer to the *Code of Practice: Disability Discrimination* (1996) ("the Code") which stated that "the (disability-related) reason has to relate to the individual circumstances in question and not just be trivial or minor."[530] The EAT accepted this wording in the Code as the correct interpretation of the "material and substantial" defence.[531]

The EAT correctly identified in *Heinz* that the "material and substantial" test, by requiring a standard that had, as its baseline, the qualifications of not being "trivial" or "minor," set an unusually low threshold. Moreover, the EAT made it plain that the lowness of the threshold was not an appealing aspect of this area of the law:

> "Whatever one might think about the lowness of such a threshold (lower, it might be thought, than the word "substantial" would usually indicate), if the reason for the treatment relates to the individual circumstances in question and is not just trivial or minor then justification has to be held to exist in the category of case which we are dealing with... This is not a conclusion we reach with

[530] *Ibid*, [16].
[531] *Ibid*, [16].

> enthusiasm but as the language of the domestic statute is clear (and no reference has been made to Community law) the remedy for the lowness of the threshold, if any is required, lies in the hands of the legislature not of the courts."[532]

This interpretation of the "material and substantial" defence in *Heinz* obviously leaned heavily in favour of the employer's interests, thereby weakening the balance which the "disability-related" provisions were intended to strike.

Moreover, whilst the *Heinz* case demonstrated that the "material and substantial" test was unbalanced, the Court of Appeal weakened the defence even further with its decision in *Post Office* v *Jones (Jones*).[533] In this case, the Court of Appeal held that, when interpreting the "material and substantial" defence, the tribunal could not substitute its own view for the employer's view, even if it believed that the (in this case, medical) evidence it had before it was superior to the evidence the employer had when it discriminated against the employee.[534]

Instead, the Court of Appeal held that the tribunal should limit its discretion to considering whether the employer's alleged act of discrimination was within the range of reasonable responses open to it.[535] Lord Justice Pill likened this judicial exercise to the more familiar "band of reasonable responses" test for unfair dismissal under section 98(4) of the Employment Rights Act 1996 ("1996 Act"):

> "The limited function of the employment tribunal may in some circumstances place them in a situation which is less than straightforward procedurally. However, it is not one with which they are unfamiliar. It is different *but not very different from the task employment tribunals have to perform in cases of unfair dismissal*.

[532] *Ibid*, [16].
[533] [2001] EWCA Civ 558; [2001] ICR 805
[534] *Ibid*, [27].
[535] *Ibid*, [28].

> In *Foley v Post Office* [2000] ICR 1283 it was held in this court that, in applying the law of unfair dismissal in section 98 of the Employment Rights Act 1996, tribunals should continue to adopt the "band or range of reasonable responses" approach to the issue of the reasonableness or unreasonableness of a dismissal as expounded in *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 . Under that section the tribunal's task is to consider the reasonableness of the employer's response and, under the present section, it is to consider the materiality and substantiality of his reason. In both cases the members of the tribunal might themselves have come to a different conclusion on the evidence but they must respect the opinion of the employer, in the one case if it is within the range of reasonable responses and *in the other if the reason given is material and substantial* (my emphasis)."[536]

As Cabrelli observes, the *Jones* decision introduced a test into disability-related discrimination law which required the judge to determine whether the alleged discrimination fell within a "range of material and substantial reasons."[537] In effect, this was a more lenient standard of judicial scrutiny than had existed in previous disability-related discrimination cases.[538]

My position is that a test equivalent to the "band of reasonable responses" test under unfair dismissal law should not have been transposed to discrimination law. As argued in Chapter 4, empirical evidence has shown that the judiciary's interpretation of the "range" or "band" test tends to heavily favour the employer's interests.[539] Moreover, the introduction of the "range" test is even more concerning when one considers that Parliament clearly intended to

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[536] *Ibid*, [28].
[537] David Cabrelli, 'Rules and standards in the workplace: a perspective from the field of labour law' (2011) 31(1) LS 21, 28.
[538] *Ibid*, 31.
[539] Tor Brodtkorb, 'Employee misconduct and UK unfair dismissal law: does the range of reasonable responses test require reform?' [2010] 52(6) International Journal of Law and Management 429-50. See also Aaron Baker, 'The "range of reasonable responses" test: a poor substitution for the statutory language' [2021] 50(2) ILJ 226.

confer greater protections to people with disabilities (and in discrimination law in general) than they have provided to employees under the unfair dismissal provisions.[540] The heavy pro-employer bias also threatens the statutory purpose of the disability-related discrimination regime, namely the need to strike a balance between the interests of the employee and employer.

Consequently, the "band of reasonable responses" test seems particularly ill-fitted to discrimination law and *Jones* was not, in my view, a positive development in this area of the law. Indeed, this points strongly towards the conclusion that the "material and substantial" test should not form part of the defence in my model of "related discrimination." As a result, I shall now move on to a critical review of the case law relating to the section 15 proportionality defence to determine whether this defence holds more promise for my model.

5.5.3 The proportionality defence under section 15 of the 2010 Act

5.5.3.1 An introduction to the defence

Section 15 differs from section 13 in several respects. One of the main differences is that section 13 has no general defence whereas section 15 has a proportionality defence. It is suggested that this discrepancy is because the moral opprobrium attached to section 15 claims is not as great as that which attaches to the section 13 claim. There are good reasons for this distinction. By way of explanation, direct disability discrimination claims focus on the disability itself (e.g., Multiple Sclerosis (MS)) whilst section 15 claims focus on the manifestations of the disability (e.g., sickness absences accruing because of the MS).

There is a moral dimension built into this distinction. The section 13 claim is an example of blatant discrimination against a disabled person because (s)he has a disability whilst the section 15 claim is generally a less serious form of discrimination where the perpetrator may be acting for various reasons which

[540] Jackie Davies, 'A cuckoo in the nest? A "range of reasonable responses" justification and the Disability Discrimination Act 1995' (2003) 32(3) ILJ 164, 176.

do not have an inextricable link with the disability. For example, if an employer dismisses a disabled person for capability reasons because of long-term sickness absence resulting from her MS condition, the employer's reasons for doing so might well have nothing (at least nothing directly) to do with the employee's disability. Instead, they might reflect economic pressures on the business which are unsustainable because of the claimant's long-term absences.

Consequently, all other things being equal, there are intuitive and logical reasons to suggest that the section 13 perpetrator is more morally blameworthy than the section 15 perpetrator. The law recognises this moral distinction by refusing a justification defence in the former but allowing it in the latter. As has been mentioned throughout this chapter, one of the main statutory purposes of the "related discrimination" claim is to strike a balance between safeguarding disabled people and protecting legitimate commercial and social interests. This is another good reason why a proportionality defence should be available in the section 15 context. It allows employers, and other putative discriminators, to justify what would otherwise be discriminatory conduct by appealing to genuine, often pressing, social or economic factors.

The wording of the proportionality defence in section 15 mirrors the wording of the defence in section 19. Lawson sees this replication as bringing the section 15 defence into alignment with the section 19 defence.[541] Her view is supported by the Court of Appeal's decision in *Griffiths* v. *Secretary of State for Work and Pensions* (*Griffiths*) which held that the proportionality defences for sections 15 and 19 were essentially the same.[542] Moreover, the UK Supreme Court held in *Aster* that the section 15 proportionality test reflected the section 19 defence.[543]

[541] Anna Lawson, 'Disability and employment in the Equality Act 2010: opportunities seized, lost and generated' (2011) 40(4) ILJ 359, 365.
[542] [2015] EWCA Civ 1265; [2017] I.C.R. 160; [27].
[543] [2015] A.C. 1399, 1416. See also David Cabrelli, *Employment Law: Texts and Materials* (Oxford University Press 2020) 880-1.

The uniform nature of the interpretation between the two heads of claim is important, not least because it entails that case law on the section 19 proportionality defence can assist with the interpretation of the proportionality defence under section 15. Bearing this in mind, I shall now move on to review the case law on the proportionality defence under both statutory provisions. The purpose of this exercise is to determine whether there is a judicial interpretation of this defence which I might be able to use in my "sex related discrimination" model.

5.5.3.2 A review of the case law on the proportionality defence

The 1975 and 1976 Acts called for the putative discriminator to defend the indirectly discriminatory policy or practice by establishing that it was "justifiable."[544] This was initially interpreted as meaning "necessary" and given a similar interpretation as the American "business necessity" test.[545]That "necessity" test had been laid down by the *Griggs* case. This test set a high threshold, requiring that the provision was the only alternative available to the putative discriminator.[546]

The EAT held, in the early indirect discrimination case of *Steel* v. *Union of Post Office Workers and Another (Steel*),[547] that this strict business necessity test was the correct defence to adopt in UK discrimination law.[548]However, a few years later, in *Ojutiku v. Manspower Services Commission* (*Ojutiku*),[549] the Court of Appeal rejected the *Steel* approach. In doing so, it stated that the defence should not be equated with the "necessity" test but subject to a lower threshold of what was "acceptable to right-thinking people as sound and tolerable reasons."[550] This brought the justification defence in indirect

[544] Hepple, n.465, 170
[545] *Ibid*, 170.
[546] Fredman, n.1, 295.
[547] [1978] ICR 181
[548] *Ibid*, 187.
[549] [1982] ICR 661 (CA)
[550] *Ibid*, 668.

discrimination cases more into alignment with a “reasonableness” rather than a “necessity” standard.[551]

The next notable case was the ECJ’s key decision in the indirect sex discrimination case of *Bilka.*[552] This case concerned an employer’s policy of excluding part time workers from an occupational pension scheme. The ECJ held that, to establish a defence to an indirect discrimination claim, the policy or practice had to meet a genuine business need, be suitable to achieve that objective, and necessary to that end.[553] This strict objective justification test, which required the court or tribunal to look for the least discriminatory measure, aligned much more closely with the *Steel* approach than the looser *Ojutiku* position.[554] In effect, the ECJ had laid down a strict “necessity” test in *Bilka*.

However, in *Hampson* v *Department for Education and Science,*[555] (*Hampson*) the Court of Appeal expressed a preference for a “reasonable necessity” over a strict “necessity” standard:

> “In my judgment ‘justifiable’ requires an objective balance between the discriminatory effect of the condition and the *reasonable needs* of the party who applies the condition (my emphasis).”[556]

The House of Lords then re-visited the indirect discrimination defence in *Webb* v *EMO Air Cargo (UK) Limited* (Webb).[557] In doing so, it quoted the *Hampson* “reasonable needs” test with approval and stated that the *Hampson* test had overridden the stricter “necessity” test.[558] This importation of the “reasonable needs” of the employer introduced a “reasonableness” defence into the law,

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[551] Rachel Ingleby, Jackie Lane, ’Indirect discrimination, justification and proportionality: are UK claimants at a disadvantage?’ (2019) 47(4) ILJ 531, 532.
[552] See n.42.
[553] *Ibid*, 702.
[554] Ingleby and Lane, n.551, 532 – 3.
[555] [1991] 1 AC 171 (HL)
[556] *Ibid*, 191. See also Aaron Baker, Proportionality and employment discrimination in the UK, (2008) 37(4) ILJ 305.
[557] [1993] 1 WLR 49 (HL)
[558] *Ibid*, 56

which was not present in *Steel* or *Bilka*, and which slowly developed into the prominent approach in the UK to the present day.

By way of example, in *Barry* v *Midland Bank (Barry)*,[559] the claimant, Mrs Barry, took voluntary redundancy. She had worked full time for 11 years then part time for 2 years with the employer. Her redundancy payment was based on her final salary and length of service. This meant that her redundancy payment was calculated using her part time hours. She argued that the calculation of the payment was indirectly discriminatory against women who were more likely to work part time hours. The House of Lords rejected this claim. In doing so, it eschewed the strict "necessity" test laid down in the *Bilka* case, whilst claiming to follow it.[560] Indeed, the Law Lords held that, even though a more advantageous method of calculating redundancy pay for women might be available, in terms of the total hours worked, the redundancy scheme was still objectively justified.[561] The purpose of the payment was to mitigate the financial losses of redundant employees, not to compensate them for past service.[562] As a result, the Law Lords held that the relevant criterion to assess financial loss was the employee's final salary.[563] Given that all employees' redundancy packages were calculated in this way, there was no disproportionate disadvantage to men or women.[564]

Hence, in the *Barry* case, the House of Lords, on the one hand, openly acknowledged that another method of calculating redundancy pay could have been more advantageous to women whilst contending, on the other hand, that it was following the strict "necessity" test laid down by the *Bilka* decision. It is my view that this was a contradictory position for the Law Lords to have taken. As described above, one of the main elements of the *Bilka* "necessity" test is that there were no other, less discriminatory alternatives open to the putative

[559] [1999] ICR 859 (HL).
[560] *Ibid*, 871.
[561] *Ibid*, 875-6.
[562] *Ibid*, 862; 867.
[563] *Ibid*, 863.
[564] *Ibid*, 863.

discriminator. By abandoning this requirement in *Barry*, the House of Lords was continuing to move the UK case law away from the "necessity" test towards a standard which bore more resemblance to a "reasonableness" test.

This move towards a "reasonableness" standard by the House of Lords was continued by the Court of Appeal in *Health and Safety Executive* v. *Cadman* (*Cadman*).[565] In this case, the Court relied on *Barry* when holding that the objective justification test did not oblige the employer, when demonstrating that the provision was "necessary," to establish that it was the only course open to the employer.[566] Instead, the employer only had to demonstrate that the measure was "reasonably necessary."[567]

The Court of Appeal confirmed the "reasonableness" approach to objective justification yet again in *Hardy & Hansons Plc* v *Lax* (*Hardy*).[568] In *Hardy*, the Court of Appeal stated that the word "necessary" in the *Bilka* formulation should be qualified by the word "reasonably."[569] The Court was, however, at pains to stress that this "reasonableness" criterion did not mean that a test, akin to the "band of reasonable responses" test under section 98(4) of the 1996 Act, should be extended to discrimination cases.[570] Indeed, the Employment Tribunal had the task of determining whether the objective justification test was met, without deferring to the employer's discretion.[571] In doing so, the tribunal was required to take account of the principle of proportionality.[572] That did not mean that the employer must show that no other alternative to the measure it adopted was possible.[573] However, it did mean that the tribunal had to take account of the reasonable needs of the putative discriminator and whether the measure adopted was "reasonably necessary."[574]

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[565] [2004] EWCA Civ 1317; [2005] ICR 1546
[566] *Ibid*, [31].
[567] *Ibid*, [31].
[568] [2005] EWCA Civ 846; [2005] ICR 1565
[569] *Ibid*, [32].
[570] *Ibid*, [32].
[571] *Ibid*, [32].
[572] *Ibid*, [32].
[573] *Ibid*, [32].
[574] *Ibid*, [32].

By the time that the *Hardy* case was decided, the "reasonable necessity" test had become firmly embedded in UK law. As a result, in the age discrimination case of *Chief Constable of West Yorkshire Police* v *Homer* (*Homer*)[575] Lady Hale held that, to be a proportionate justification, a measure had to be an appropriate means to achieve a legitimate aim and "reasonably necessary" to do so.[576] She went on to state that, even if there were alternative means of achieving the legitimate aim, that would not necessarily make a provision disproportionate.[577]

The "reasonableness" criterion has also been followed in two recent decisions of the EAT. In the section 15 claim of *Department for Work and Pensions* v. *Boyers* (*Boyers*)[578] the EAT followed the *Hardy* and *Homer* approach to objective justification.[579] In doing so, it held that when determining whether unfavourable treatment could be a proportionate means of achieving a legitimate aim under section 15, the adjudicator had to balance the reasonable needs of the putative discriminator against any discriminatory effects on the alleged victim of discrimination.[580] In addition, the treatment which was the subject-matter of the claim must "be appropriate and reasonably necessary to achieving the aim."[581]

Meanwhile in *Gray* v *University of Portsmouth* (*Gray*)[582] the EAT held that, to establish the requirements of the proportionality defence in section 15, the putative discriminator had to balance the discriminatory impact on the claimant against its genuine needs.[583] This was not the same task as determining whether the employer had acted within the "band of reasonable responses" under section 98(4) of the 1996 Act.[584] Instead, adopting the reasoning in the

[575] See n.113
[576] *Ibid*, [22].
[577] *Ibid*, [25].
[578] EA-2020-001050-OO.
[579] *Ibid*, [22].
[580] *Ibid*, [22]; [44].
[581] *Ibid*, [22]; [44].
[582] UKEAT/0242/20/OO
[583] *Ibid*, [55].
[584] *Ibid*, [56].

Hardy case, it was clear that the tribunal must carry out its own assessment as to whether the proportionality test was met.[585] The EAT also held that it was applying the *dicta* in the *Bilka* case when applying the proportionality principle.[586] However, it then went on to hold that the "necessity" test (as expressed in *Bilka*) actually meant "*reasonably*" necessary.[587]

Having examined the case law, I shall now move on to compare the respective defences with a view to selecting one for my "related discrimination" model.

5.5.3.3 Choosing a defence for the "related discrimination" model

The objective justification and proportionality tests, as understood in both EU and UK law, are more rigorous than the "material and substantial" defence. Indeed, under the proportionality test, the judge must make her own assessment regarding the operation of the defence. The same does not apply to the latter test. Giving the judge the opportunity to review the facts, and make her own assessment of them, is a considerable improvement on the *Jones* approach. Clearly, the *Jones* approach gave far too much weight to the putative discriminator's own reasoning processes, and the decision which arose from that reasoning. Consequently, my position is that the "material and substantial" test would not work well as a defence in my model of "sex related discrimination."

Nonetheless, the UK judiciary's interpretation of the proportionality defence has its own problems. The previous section summarised a long line of case law in the UK which involved a gradual move away from the strict "necessity" test in *Bilka* towards a more general "reasonableness" standard. The "necessity" component of the objective justification test has, without any explicit recognition from the judiciary, slowly morphed into a "reasonable necessity" test in the UK. This is concerning because the term "reasonably

[585] *Ibid*, [56].
[586] *Ibid*, [38].
[587] *Ibid*, [38].

necessary," at least within the context of the proportionality defence, carries a very different meaning to the word "necessary."

Within the context of the proportionality claim, a strict "necessity" standard entails that the measure adopted by the putative discriminator be the least discriminatory option. However, as was shown in the review of the UK case law, the "reasonable necessity" test can be satisfied where there are other less discriminatory options available to the decision-maker.

Before I move on to the problems with the UK approach, it is necessary to anticipate, and address, potential criticisms that transposing the EU strict necessity test into the domestic legal sphere may bring.

It may be argued that the law in this area should defer to employers' views on how they implement measures which serve the aims of the business. Indeed, such an argument would rest upon the belief that employers are more familiar with the requirements of the business than judges and, as a result, that they are better placed than tribunals or courts to make decisions which affect their businesses.

As such, it could be submitted that courts and tribunals should allow the employer more managerial discretion by favouring the "reasonable necessity" test over the strict necessity test. However, I find this argument unconvincing. As Baker argues, specialised tribunals are better equipped than employers to assess the impact of discriminatory measures.[588] Moreover, the judge, unlike the employer, is not an interested party in the decision under consideration.[589] This helps ensure that discriminatory effects are measured in an objective and impartial manner. Consequently, my position is that judicial deference is not a strong ground to adopt a "reasonable necessity" defence.

Another point which may be raised against the introduction of a strict necessity test is that judges will be reluctant to adopt it. Bearing in mind that it will be

[588] Baker, n.556, 327
[589] *Ibid*, 327

Employment Tribunal judges who will have to interpret the proportionality defence most frequently, it is possible that they may prefer to apply the reasonableness, rather than the necessity, test as that is what they have been routinely doing in discrimination cases. In addition, there may also be a judicial reluctance to apply EU law in a post-Brexit legal environment.

My view is that this is another flimsy argument. Indeed, many judges, particularly Employment Tribunal judges, will already be familiar with the *Bilka* guidance, so it will not represent "new law" to them. Moreover, it is my position that progressive legislative change should not be thwarted by the perception that judges will take a retrograde attitude towards it. It should also be borne in mind that organisations, such as the EHRC, are well-placed to train judges on "new" discrimination laws as and when they arise. Furthermore, as Ingleby and Lane correctly argue, the introduction of a strict *Bilka* necessity test into domestic law should be relatively straightforward.[590] Given the test's simplicity, with its focus on the least discriminatory alternative, judges should not get entangled in the mechanics of a discretionary process when it comes to the interpretation of the defence.[591]

Having dealt with possible objections to the introduction of a strict necessity defence to UK law, I shall now move on to critically evaluate the current UK position. There are three main problems with the UK approach. The first, and most obvious, problem is that the test focuses more on a "reasonableness" rather than a "necessity" standard. In doing so, it frustrates one of the main purposes of discrimination law. This purpose is to confer greater legal protections on employees (and other individuals) with protected characteristics, such as those with disabilities, than the law confers on employees in general. As far as employees in general are concerned, the "reasonableness" standard in unfair dismissal law is the most appropriate way of providing them with the protections they need. With that in mind, it is my position that the difference in the relative levels of protection (between

[590] Ingleby and Lane, n. 551, 548
[591] *Ibid*, 548

discrimination and unfair dismissal law) should be achieved by the adoption in discrimination law of a stricter standard than "reasonableness". As demonstrated by *Bilka*, the stricter "necessity" standard has provided this enhanced protection to individuals with protected characteristics in the EU for several decades.

Another problem with the UK's approach is that by holding that a measure is proportionate even when there are potentially less discriminatory means of achieving the legitimate aim, the law, in effect, creates a new variant of the "range" or "band" test. It does so because there will, at least in some cases, be permissible discriminatory alternatives. Given the existence and potential validity of these alternatives, the question the judge must effectively answer is: "was the treatment, x, within the bounds of reasonable necessity?" If the answer to that question is "yes," then the measure will likely be held to be a proportionate measure.

However, there is no safeguard within the definition of proportionality to restrict what might amount to the bounds of "reasonable necessity." Depending on the circumstances of the case, what is permitted as "reasonably necessary" may stretch across relatively broad parameters. Admittedly, however, this variant on the "band" test is still stricter than the section 98(4) test as the judge ultimately decides whether the measure falls within the boundaries (rather than the employer or putative discriminator in unfair dismissal cases).

The final difficulty with the "reasonably necessary" test is that it does not, on a logical level, sit comfortably with the concept of proportionality. To state, on the one hand, that there may be less discriminatory alternatives available to the employer, and then go on to argue, on the other hand, that the measure is proportionate, is a contradictory position for the law to take. Indeed, it is suggested that the main function of the proportionality test is to carry out a balancing exercise to arrive at the least discriminatory option. As a result, it will be the least discriminatory option which ultimately strikes the balance between the employer and employee's interests. As argued earlier in this chapter,

striking this balance is the main purpose of the “related discrimination” claim. In practice, therefore, only a strict “necessity” test can fulfill the purposes of the “related discrimination” claim.

Despite these observations, my position is that the UK proportionality test is still preferable to the “material and substantial defence” because the former defence is much more rigorous than the latter. However, the “objective justification” defence, as expressed in the *Bilka* case, is much stricter again than the UK’s interpretation of the proportionality defence. This is important because it allows the court or tribunal to exercise greater scrutiny over the putative discriminator’s actions, thereby fulfilling the protective purposes of the “related discrimination” model.

Moreover, the *Bilka* test, by insisting on strict “necessity,” also allows the correct balance to be struck between conflicting interests because it involves a search for the least discriminatory alternative. Indeed, as I argued above, the search for the least discriminatory alternative reflects the true purpose of the proportionality exercise. As a result, the *Bilka* test also shifts the proportionality standard back on to its natural moral bedrock - “necessity” - rather than “reasonableness.” Finally, the *Bilka* test avoids the risk of a “band” or “range” test being imported into this area of the law as only one discriminatory option, the least discriminatory option, is permitted.

Consequently, the *Bilka* test avoids the problems associated with the UK’s approach to the proportionality test. In doing so, it also strikes an appropriate balance between the competing interests involved whilst serving the protective purposes of the “related discrimination” model.

As a result, my position is that the wording in my definition should be interpreted in line with the strict “necessity” test in *Bilka* rather than the looser “reasonable necessity” test in UK law. This requires that the justification test should replace the words “a proportionate means of achieving a legitimate aim” (the UK definition) with the *Bilka* version which requires that the provision be

"objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."[592]

Before moving on to expound the full definition of my "related discrimination model, a couple of more observations regarding the *Bilka* test should be borne in mind, First, the "legitimate aim" in *Bilka* must correspond to a genuine need on the part of the undertaking.[593] Moreover, the "appropriate" requirement in the *Bilka* defence requires that the putative discriminator adopts an appropriate, or suitable, means of achieving the legitimate aim. These are important points to stress as they will be applied to the facts of the *James* case in the next chapter.

5.5.3.4 Conclusion

This section has demonstrated that the "material and substantial" defence is not sufficiently robust to merit a place in my "related discrimination" model. Moreover, the UK judiciary has insisted on interpreting the more rigorous proportionality defence in a rather loose and logically contradictory fashion. Given these considerations, I have incorporated the *Bilka* "objective justification" test into my model of "related discrimination."

Before I analyse the *James* case, I must critically examine the philosophical underpinnings of the "sex-related discrimination" claim. This exercise is necessary to determine whether my model can be distinguished from the UK's positive action provisions and the direct and indirect discrimination heads of claim.

[592] *Bilka*, n.42, [36]
[593] *Ibid* [36]. See also Michael Connolly 'Objective Justification, Less Discriminatory Alternatives and the 'Great Repeal Bill'' (2017) 17 Int'l J Discrimination & L 195, 202. Aaron Baker, n.556, 309-10.

5.6 The philosophical underpinnings of the "sex-related discrimination" claim

5.6.1 Introduction

This section will focus on the normative foundations of the "sex related discrimination" model I have constructed. This will involve an enquiry as to whether the prototype is based on a formal or substantive conception of equality. Moreover, I shall assess whether the model breaches the dignitarian and autonomy-based interests which lie at the heart of the direct sex discrimination claim. In doing so, I shall have to compare the moral bases of the "sex related discrimination" and direct sex discrimination claims. Thereafter, I shall contrast the "sex related discrimination" claim's moral foundations with those rooted in the indirect sex discrimination claim.

As described in the introduction, this thesis represents a foray into novel philosophical and legal territory. As a result, there is no literature I can refer to when analysing these issues. Consequently, unless stated otherwise, this section will comprise my own views.

5.6.2 The egalitarian roots of the "sex-related discrimination" model

The "sex related discrimination" model deliberately eschews a formal model of equality. It should be recalled that the sole concern of formal equality is symmetry of treatment, leading to risks of "levelling down" the treatment between the sexes. Direct sex discrimination, with its focus on "less favourable treatment," adopts this formal variant of equality.[594] This of course begs the question "less favourable than whom?"

In most direct sex discrimination claims, the woman must rely on a male comparator to establish that she has been treated less favourably than a man

[594] 2010 Act s 13(1)

in the same or similar circumstances. As I have argued throughout the thesis, this reliance on a male "norm" is unhelpful, as the woman's identity, cultural expectations and life-experiences are often not comparable with a man's.

The "sex related discrimination" claim recognises these differences by replacing the words "less favourable treatment" with "unfavourable treatment." Indeed, the latter wording extinguishes the requirement for a comparator altogether. In doing so, the "sex related discrimination" model moves away from the formal conception of equality towards a substantive egalitarian approach. It does so by recognising that people commence the metaphorical "race of life" at different starting points. By acknowledging this, the "unfavourable treatment" criterion requires that individuals be treated differently, in accordance with these respective starting points, to ensure equality of outcomes. This approach to equality is to be welcomed. It recognises that one person's circumstances are often not comparable with another's. Indeed, given this inherent disparity, it often makes no sense to treat different people on a like-for-like basis.

5.6.3 Does "sex-related discrimination" breach the autonomy of the victim?

Hepple has observed that the "unfavourable treatment" in the "related discrimination" claim will generally amount to a deprivation of something which the claimant values.[595] As described in section 5.3.2, this is a predominantly subjective test with some light objective constraints. When transposed to the protected characteristic of sex, it also sets a low threshold for claimants trying to establish a *prima facie* case of "sex-related discrimination."

My position is that, by subjecting the claimant to "unfavourable treatment" the putative discriminator will, at least in most cases, be breaching the claimant's autonomy. In addition, my view is that the definition of "unfavourable treatment"

[595] Hepple, n.465, 178

is sufficiently malleable to cover a wide range of acts and omissions. This is important because a breach of autonomy can come in many different forms.

In most cases, the "deprivation" and resulting breach of autonomy will prevent the victim of "sex related discrimination" from doing or pursuing something which he or she values. In labour law cases, the "something" will often involve the loss of a job or even a career. However, as will be argued, the malleability of the "unfavourable treatment" criterion extends to a much wider, and objectively milder, range of acts and omissions than dismissal itself.

The victim must be deprived of a choice or opportunity which is consonant with the generally shared moral values of right-thinking members of a society. However, even within these constraints, the "unfavourable treatment" criterion covers a wide range of potential autonomy-breaches. So long as the deprivation is an opportunity which the claimant values, the bar for "unfavourable treatment" will generally be overcome. As a result, "unfavourable treatment" does not need to be as significant as a job-loss. It could potentially amount to autonomy breaches such as demotion, deprivation of training opportunities or to work-related benefits such as free gym memberships, to mention just a few examples.

The interpretation of "unfavourable treatment" as a breach of autonomy, involving the deprivation of a significant option or opportunity, looks, at first blush, to amount to the same moral wrong that is present in direct sex discrimination.[596] Direct sex discrimination also involves a breach of the victim's autonomy.

However, within the context of autonomy, there are significant differences between the moral wrongs involved in direct sex discrimination and "sex related discrimination" claims. In the case of direct sex discrimination, the breach of autonomy must be because of the individual's sex. So, there must be a direct causal link between the breach of autonomy, on the one hand, and

[596] See section 3.2.2.

the protected characteristic of sex, on the other. However, this direct causal link is not required in cases of "sex related discrimination." Indeed, to establish "sex related discrimination" the causal link need only be between the breach of autonomy and something which is related to (or arises) from the claimant's sex. This is a key moral distinction which requires further unpacking.

To establish direct sex discrimination, the claimant should need to prove, *inter alia*, that her autonomy has been breached as a direct result of her sex. Indeed, such cases will generally constitute blatant examples of sexism, prejudice and / or stereotyping against the woman. Given that women have been subjected to historical disadvantages compared with men, in the political, social and economic spheres of life, this overtly prejudicial act (or omission) makes the direct discriminator's conduct a particularly grave moral wrong.

By contrast, a breach of the "sex related discrimination" model will typically not involve blatant cases of prejudice, sexism or stereotyping given that there is not a direct causal connection required between the breach of autonomy and the sex of the putative victim. Instead, the breach of autonomy must be because of a factor, or characteristic, which is related to (or arises from) sex. Unlike direct sex discrimination (properly understood)[597] this can involve a wide range of benign conduct, such as the legitimate economic and social aims of the employer. It sometimes *does* involve malign conduct or the perpetration of an act or omission which is disproportionately discriminatory when measured and balanced against the employer's goals. However, such cases will generally not "slip through the net" of the "sex related discrimination" model because they will not be capable of justification under the stringent requirements of the objective justification test.

As such, the breach of autonomy in a "sex-related discrimination" claim is likely to constitute a less serious moral wrong than a breach of autonomy in the case of direct sex discrimination.

[597] See section 3.2 for more detail on the moral content of the direct sex discrimination claim.

5.6.4 Does “sex-related discrimination” breach the human dignity of the victim?

My position is that “sex related discrimination,” unlike direct sex discrimination, will not usually involve a breach of human dignity. This view is based on similar reasoning to that which has already been employed to morally distinguish the respective autonomy-breaches between the two claims. Regardless, my reasons still require some further explanation and illustration.

In Chapter 3 I agreed with Hellman’s model of human dignity as one of the general moral underpinnings of the direct sex discrimination claim (I then built on Hellman’s model).[598] According to Hellman, each human being possesses human dignity simply because he or she is a human being, and this dignity is not therefore dependent on other human characteristics such as sex or race.[599]

By way of recall, there are three principal elements in Hellman’s conception of human dignity, and how direct discrimination can breach it. First, the discriminator must draw distinctions between people. Second, when drawing the distinctions, the discriminator will directly discriminate on such grounds by “demeaning” the victim.[600] It is this demeaning act or omission which constitutes the principal moral wrong underlying direct discrimination. In addition, there is usually (but not always) a third factor involved: the putative discriminator tends to wield more power than the alleged victim.[601]

As I argued in Chapter 3, the discriminator in a direct sex discrimination claim can breach the victim’s dignity in two ways: either he demeans the victim whilst not being aware of her dignity (which will not serve as a defence) or he is aware of the victim’s dignity but violates it anyway.[602] Clearly, such conduct is likely to manifest as acts of sexism, blatant prejudice and / or stereotyping. One, or more, of these behaviours will “demean” the victim of direct sex discrimination.

[598] See section 3.2.3.
[599] See section 3.2.3 for more detail on Hellman’s theory.
[600] See section 3.2.3
[601] See section 3.2.3
[602] See section 3.2.3.

This prompts consideration of whether Hellman's theory of discrimination as a "demeaning act" can be applied to the "sex related discrimination" model.

My position is that it would be very difficult, if not impossible, to transpose all three of Hellman's characteristics to the "sex related discrimination" claim. Indeed, my view is that the only part of Hellman's theory which will generally be applicable to the "sex related discrimination" model is that there will often be a power imbalance between the putative discriminator and victim in "sex related discrimination" claims. By way of explanation, most "sex related discrimination" cases will usually occur in the employment context, in keeping with the general trend across all discrimination claims involving the nine protected characteristics in the 2010 Act. As such, there will often be a power imbalance between the discriminator (the employer) and victim (the employee) in a "sex related discrimination" claim given that the employment relationship generally involves an inequality of bargaining power.[603]

Whilst this aspect of Hellman's theory will generally be satisfied, the others will not. It is unlikely that the putative discriminator will breach human dignity by drawing distinctions between people and, in doing so, demeaning the alleged victim. This requires some explanation.

My position is that actions or omissions which further the legitimate aims of the business are unlikely to have the same demeaning effect on the putative victim as direct sex discrimination does. The main reason for this lies in the intentions or motives of the employer. These intentions, or motives, will be relevant insofar as they allow the adjudicator to ascertain the reason(s) for the unfavourable treatment. Once the reason(s) for the unfavourable treatment have been identified, the intentions or motive cease to be relevant.

In the case of "reason why" examples of direct sex discrimination, the intention is, in general, to treat the individual less favourably because of her sex. . For example, a male employer may refuse a woman a job simply because he has

[603] *Autoclenz v Belcher* [2011] UKSC 41; [2011] ICR 1157; [11].

a profound dislike for females and views them as inferior to men. Such an act would result in the drawing of distinctions between men and women which would result in a demeaning effect on the female job applicant. Indeed, it would be a breach of her dignity because the prospective employer treats women as somehow less worthy, perhaps less human, due to their sex. In doing so, he ignores the inviolable and equalising effect of human dignity which I analysed in Chapter 3. This will be an act of debasement regardless of whether the discriminator recognises the victim's human dignity. Ignorance will not, and should not, serve as a justification in such cases.

As such, the reason(s) for the less favourable treatment will generally consist of an act, or omission, which is grounded on prejudice, stereotyping and / or bias in cases of direct sex discrimination. By contrast, the intention or motive of the putative discriminator in a "sex related discrimination" claim will generally be to pursue a genuine social or commercial aim of the business; not to treat the individual less favourably, and is therefore less likely to debase the victim than direct discrimination.

A couple of practical examples should help to demonstrate how the "sex related discrimination" model can be applied to genuine business aims , such as managing employee performance and regulating the conduct of employees.

The "sex related discrimination" prototype can be applied to conduct issues by employees. By way of example, A woman, B, has worked as a Solicitor in a law firm for twelve years. She experiences symptoms of Pre-Menstrual Syndrome ("PMS") which include irritability, tension and anger. A is aware that B experiences these symptoms of PMS.

During a meeting between A, her line manager and two senior partners of the firm, A's line manager informs her that her annual fee targets have not been met and that she must show improvement in her chargeable hours or may face disciplinary action. B is experiencing symptoms of PMS during this meeting. She reacts with anger towards the line manager by making a derogatory statement about his sexuality as she perceives him to be homosexual.

The firm decides to take disciplinary action against B and thereafter summarily dismisses her on the grounds of gross misconduct due to her homophobic remarks. Her appeal against dismissal is rejected by the firm. B, who has no previous disciplinary history with A, believes that her conduct was directly attributable to her PMS, and lodges an Employment Tribunal claim for "sex-related discrimination," amongst others.

Her "sex-related discrimination" claim states that the summary dismissal was the unfavourable treatment. It goes on to claim that this treatment was because of B's homophobic remarks to her line manager. This conduct arose from B's PMS condition and therefore from her sex because only women can get PMS. If B was able to establish a *prima facie* claim for "sex-related discrimination" along such lines, then A would have to defend this using the objective justification test. If such circumstances arose, A might be able to establish that its intentions were not to demean B but to pursue a genuine need to foster a work environment free from discrimination. Of course, this is, and should be, a legitimate social aim for all employers and B should be able to demonstrate that the reason for the unfavourable treatment was to promote equality, diversity and inclusion in the workplace.

The "sex-related discrimination" model can also be applied to performance-related issues in the workplace. By way of illustration, B has worked as a bookkeeper for a small carpet cleaning business, A, for 23 years. She is undergoing menopausal symptoms which include "brain fog" (which leads to lapses in her concentration and memory) night sweats and joint pains. B has informed the owner of the business that she is experiencing these symptoms.

Due to a series of accounting errors by A, the business has lost a significant sum of money over the past 12 months. As a result, the owner of the business has issued A with a final written warning as he believes her performance is inadequate and that the business cannot continue to sustain such financial losses. B, who has never received a disciplinary sanction by the business before, is demoralised by this, especially as she feels that her errors were the

result of brain fog and fatigue. She attributes her fatigue to her night sweats and joint pains which cause her to wake up periodically throughout the night.

As such, B lodges an Employment Tribunal claim for “sex-related discrimination” against the company. She claims that the unfavourable treatment was the final written warning and that she was issued it because of work errors arising from her menopausal symptoms. Given that only women can get the menopause, B feels that the symptoms arise from her sex.[604]

If B can convince the Tribunal that these factors were at play, she will have established a *prima facie* claim for “sex-related discrimination.” It would then be for the business to defend this course of conduct. In doing so, it should be relatively easy for the company to convince the Tribunal that there was no intention or motive to demean B when it issued the warning. Instead, the warning was issued to manage B’s performance; a legitimate business aim, and to help secure its solvency. From thereon, the company would also need to prove that its actions were objectively justified in all other relevant respects.

As these examples show, the “sex-related discrimination” model can be used to implement genuine commercial and / or social aims of the employer. Indeed, it is unlikely that the reason for the unfavourable treatment in “sex related discrimination” will amount to an overt act of prejudice, bias or stereotyping as these will not tend to do service to the pressing social and / or economic aims of the employer. As a result, the “sex related discrimination” claim is unlikely to breach human dignity in the same way as direct sex discrimination. However, even if it did so on rare occasions, it would still, in all likelihood, be incapable of being defended under the objective justification defence. Indeed, this robust defence would generally weed out such overtly discriminatory behaviour.

[604] It could be argued that the indirect sex discrimination model could be applied to this hypothetical example as well. A full analysis of the merits between indirect sex discrimination and "sex related discrimination" is omitted due to space constraints. However, for an analysis of the main distinctions between the two heads of claim, please see section 5.6.5.

5.6.5 “Sex-related discrimination” v indirect sex discrimination

The conceptual underpinnings of the indirect discrimination provisions represent a stark example of redistributive justice.[605] As Connolly notes, indirect discrimination has justified redistribution of wealth and other benefits from the historically privileged to the historically underprivileged.[606] Women generally tend to belong more to the latter than the former category.

Indirect discrimination differs from the “related discrimination” claim in that it is group-focused, rather than focused on the individual. One further difference between the two claims is that section 19(2)(a) states that indirect sex discrimination might occur where the PCP either puts, or *would put*, persons with whom B shares the protected characteristic at a particular disadvantage when compared with persons with whom B does not share it. In other words, a hypothetical disadvantage to a group of people may trigger an indirect sex discrimination claim provided that the claimant has also been affected by the application of the PCP. By contrast, “sex related discrimination” claims only apply to individuals who have been unfavourably treated for reasons which arise from sex.

As a consequence, there are reasonable grounds to argue that the indirect sex discrimination claim provides a progressive step towards transformative equality and redistributive justice. The “sex related discrimination” claim, by contrast, focuses on the individual rather than the group or society. Consequently, unlike indirect sex discrimination, there is no focus on transformative equality or redistributive justice in the “sex related discrimination” claim.

Moreover, the “sex related discrimination” claim cannot claim neutrality in the same way as the indirect sex discrimination claim. The former claim is not neutral in its application: it will either be benign or malign conduct which relates

[605] See section 2.3.2.
[606] See section 2.3.3.

to, or arises from, the protected characteristic of sex. By contrast, indirect sex discrimination involves the application of neutral PCPs. Whilst this may seem a somewhat subtle distinction, it is a very real one.

5.6.6 “Sex-related discrimination” v positive action

It could be argued that “sex related discrimination” is not distinguishable from the model of positive action found in section 158 of the 2010 Act. Moreover, this might lead some to argue that the the “sex related discrimination” model only justifies measures which are already lawful by reason of the positive action provisions. This requires some unpacking.

Positive action, as defined by section 158, can take place (i) when a person (P) thinks that people, who share a protected characteristic, are put at a disadvantage which is connected to the protected characteristic; (ii) where the group sharing the protected characteristic have different needs from other people; and (iii) where participation by people sharing a particular protected characteristic is disproportionately low.[607]

If any of these conditions apply, P can take proportionate action to allow those sharing the protected characteristic to overcome the disadvantage, meet the different needs or encourage people sharing the disadvantaged protected characteristic to take part in the underrepresented activity.[608]

The EHRC Code of Practice on Employment expands on the definition of “disadvantage” in section 158(1) to include exclusion and rejection of such employees, lack of opportunities and barriers to certain employment opportunities.[609] The EHRC goes on to specify that “different needs” are those which tend to be created by historical disadvantage.[610] That disadvantage may result in the group sharing the protected characteristic having disproportionate

[607] Section 158(1)
[608] Section 158(2)
[609] Paragraph 12.16
[610] *Ibid*, paragraph 12.18

requirements which are of particular relevance to that group.[611] Section 158 also allows P to encourage and facilitate people who share a particular protected characteristic to take part in the underrepresented activity, so long as such measures are proportionate.[612]

These provisions allow P to initiate a range of measures which can be taken to overcome the hurdles faced by these different groups. Targeted advertising, internships and open days are some of the examples provided by the EHRC Code to alleviate disadvantage.[613] To address different needs, P could organise initiatives such as exclusive training events, support and mentoring.[614] In addition, provision of bursaries, outreach work and networking opportunities are some examples of measures P can take to encourage participation in underrepresented activities.[615]

Positive action, as defined by section 158 of the 2010 Act, is not the same thing as "positive discrimination." The latter allows a form of "reverse discrimination" which goes well beyond the limits of positive action, and involves practices such as quotas for people who share a certain protected characteristic or a blanket policy which requires all women to be interviewed for an existing job vacancy, regardless of experience or merit.[616] Indeed, positive discrimination often involves a blanket policy, adopted by an employer, which automatically favours one group sharing a protected characteristic from another.[617] This form of reverse direct discrimination is unlawful in Great Britain.[618] In the context of sex discrimination, positive discrimination is a distinct concept from "sex related discrimination." Indeed, the former will

[611] *Ibid,* paragraph 12.18
[612] *Ibid*, paragraph 12.24
[613] *Ibid*, paragraph 12.17
[614] *Ibid*, paragraph 12.19
[615] *Ibid*, paragraph 12.24
[616] Hepple, n.465, 279
[617] *Ibid*, 285
[618] David Cabrelli, 'The devolution of competence in equalities law' (2016) 20(3) Edin LR 372, 374-5

routinely involve the more favourable treatment of women whilst the latter applies to both sexes equally.

Viewed from a broad perspective, positive *action* and "sex-related discrimination" appear similar. Both involve the encouragement of advantageous treatment to people in historically disadvantaged groups. In that sense, both are motivated by the substantive equality standard which requires unequal treatment to achieve equality in outcomes. However, when one drills deeper into the components of the respective models, they exhibit significant differences.

Positive action is not obligatory for legal actors; it is entirely voluntary.[619] By contrast, "sex related discrimination" would oblige legal actors to behave in certain ways. As a result, the "sex related discrimination" model creates legal rights, and obligations; positive action does not. Another difference is that positive action is an exception to the general proscription on direct discrimination,[620] whereas "sex related discrimination" is a distinct head of claim from direct discrimination.

The model of positive action, as defined by section 158, only applies to the interests of minority or disadvantaged groups. However, "sex related discrimination" is tailored to cater for individuals from both majority and minority groups. Another difference between the two is that positive action targets groups of people sharing a protected characteristic whilst "sex related discrimination" only applies to individuals. In addition, positive action will only apply for a finite period of time whereas it is envisaged that "sex-related discrimination" would operate indefinitely.[621] Finally, the "sex related discrimination" model utilises the *Bilka* objective justification test whilst section 158 uses the UK variant of the proportionality test.[622]

[619] EHRC Code of Practice on Employment, paragraph 12.4
[620] Hepple, n.465. 79
[621] EHRC Code of Practice on Employment paragraph 12.31.
[622] 2010 Act, section 158(2)

Given these differences, it is unsurprising that the “sex related discrimination” model, with its objective justification defence, can be used to justify employers’ practices in circumstances where the positive action provisions have no application. This is probably best illustrated using a practical example. As such, I shall use the conduct-related hypothetical example I constructed in section 5.6.4 to highlight the differences between how the two defences operate in practice.

In the conduct-related dismissal, where A directed homophobic remarks towards her colleague, the employer should be able to defend its decision to dismiss the employee using the objective justification defence in the “sex related discrimination” model. It is likely to be able to successfully argue that the promotion of equality, diversity and inclusion in the workplace is a genuine social need and that the means of achieving that need, namely dismissal of the homophobic employee, were appropriate and necessary in the circumstances.

However, the positive action provisions would not permit the employer to defend its conduct. Whilst the pursuit of equality, diversity and inclusion is a social value which is generally reflected in the availability of positive action, the provisions are too narrow to justify the dismissal of an employee. Indeed, section 158 merely sets out some limited ways of promoting more favourable treatment of the historically disadvantaged, such as the arguably underwhelming initiatives I have described above.

Consequently, there are no provisions in section 158 which give employers the power to dismiss (or otherwise discipline) an employee in the name of positive action. Furthermore, even if such a power was available in the present example, it would involve the application of a highly divisive argument that the interests of homosexual men (clearly a historically disadvantaged group) should be favoured over the interests of women (also a historically disadvantaged group). This would involve weighing the extent of the historical disadvantage experienced by different groups and how they should be

measured in some sort of pyramidal hierarchy. As my summary of the positive action provisions demonstrates, there is no mechanism to support such a weighting exercise. Moreover, such exercises are likely to be counterproductive in any event as they could involve each disadvantaged group attempting to show that the extent of their disadvantage is greater, and more pervasive, than another group's. Clearly, the positive action measures were not designed to facilitate such controversial and divisive exercises.

As a result, the "sex related discrimination" model can be distinguished, both in terms of its structure and application, from the positive action measures in section 158. The former has broader and deeper discretionary potential for employers who wish to justify otherwise discriminatory conduct than the latter. As such, I shall now move on to consider the distinctions between "sex related discrimination" and the other sex discrimination heads of claim in the 2010 Act.

5.6.7 A moral spectrum of sex discrimination claims

The normative foundations, or moral underpinnings, of the "sex related" discrimination claim are different, and distinguishable from, the moral wrongs associated with direct and indirect sex discrimination. Indeed, there is a moral spectrum at play in this area of the law.

Direct sex discrimination (properly understood)[623] requires a direct causal link between the breach of autonomy, and dignity, and the protected characteristic of sex. It will therefore tend to constitute blatant examples of prejudice, stereotyping and sexism. It therefore deserves to be considered as the most egregious form of sex discrimination.

However, indirect sex discrimination (again properly understood)[624] involves the application of facially neutral PCPs which inadvertently disadvantage, or

[623] See section 3.2.3.
[624] See section 3.3.

might disadvantage, a group of people of the same sex. As a result, it is the least heinous form of sex discrimination.

Lying between these two heads of claim is the “sex related discrimination” claim. This claim is less immoral than the direct sex discrimination claim because it generally involves a less serious breach of autonomy than the direct sex discrimination claim. The former claim results in a breach of autonomy because of something which arises from sex. As argued earlier in this section, this will often involve benign conduct, such as the genuine commercial or social needs of the putative discriminator. It will therefore generally lack the blatant manifestations of prejudice, stereotyping and sexism which are found in the direct sex discrimination claim. Moreover, discrimination arising from sex does not breach the dignity of the putative victim (at least in most cases) whilst a breach of dignity will generally be present in acts or omissions which constitute direct sex discrimination.

However, the “sex related discrimination” claim is more morally reprobate than the indirect sex discrimination claim. The latter claim involves the correction of facially neutral PCPs that have been applied by the employer, in a way that achieves redistributive justice for people of a particular sex, generally women. By contrast, the “sex related discrimination” claim is not a neutral head of claim. Indeed, there is the potential for the discrimination arising from sex to be malign in conduct (albeit the potential is generally less present than in direct sex discrimination claims). Where there is malign conduct, the “sex related discrimination” claim provides the “safety net” of the objective justification test. Indeed, if the conduct is malign, it will be very hard, if not impossible, to justify it under this strict necessity test.

Moreover, the “sex related discrimination” model cannot claim, even when the conduct is ultimately benign, to be truly neutral in the same way as indirect discrimination. It cannot make a claim of neutrality in relation to the protected characteristic of sex because the discrimination still arises from, or is related to, sex.

My position is that the law recognises these moral distinctions between the different heads of claim by way of the presence, or absence, of general defences. Indeed, the law recognises that, generally speaking, “related discrimination” claims (e.g. section 15 claims) are less morally reprobate than direct discrimination claims by providing a defence in the former but not the latter head of claim.

This leads one to the strong suspicion that, when legislating on these two claims, Parliament must have been clear on the differing moral wrongs between them. The same can be said for the existence of the proportionality defence in the indirect discrimination claim. The existence of this defence again presupposes that Parliament must have viewed the indirect sex discrimination claim as involving a less serious moral wrong than direct sex discrimination claims.

5.6.8 Conclusion

To sum up, this section has demonstrated that the “sex related discrimination” claim is a distinct head of claim from direct or indirect sex discrimination. It is also legally and conceptually distinguishable from positive action. So far as the respective legal claims are concerned, , “sex related discrimination” rests on different moral foundations from the other two claims. In turn, these differing moral foundations ultimately lead to the conclusion that there is a moral spectrum of discriminatory conduct so far as the protected characteristic of sex is concerned.

5.7 Conclusion

The “building blocks” of my “sex related discrimination” model are now complete. The first component is that the model should dispense with the comparator requirement and refer to “unfavourable” rather than “less favourable” treatment.

Moreover, “unfavourable treatment” should be seen as a subjective concept, with some light objective parameters. As far as causation is concerned, my position is that a “tight” version of the section 15 causation model, as exemplified in the *Grosset* case, should be preferred. A tighter version of causation will help to balance out the relatively “loose” requirement in the interpretation of “unfavourable treatment.”

Finally, my model adopts the EU objective justification test over the UK’s “material and substantial” and proportionality tests. In doing so, I have argued that my version of the objective justification test should be interpreted in line with the strict “necessity” test in the *Bilka* case. I have also shown that “sex-related discrimination” is a morally distinct head of claim from direct and indirect sex discrimination.

As a result, I can now finalise my formulation of “sex related discrimination” which reads as follows:

> “A person (A) discriminates against another person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's sex, and
>
> (b) A cannot show that the treatment is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”

As will be demonstrated in the next chapter, the above formulation is an effective way of achieving the main purpose of the “sex related discrimination” claim.

Moreover, as I shall go on to argue, it is also sufficiently clear and succinct to act as a workable definition in a practical tribunal or courtroom setting.

Chapter 6 - transposing the "related discrimination" model into the law of sex discrimination

6.1 Introduction

I shall argue in this chapter that my model of "sex related discrimination" can solve the problems associated with the law on direct sex discrimination which were identified in Chapter 3. These problems relate to the dissociation of the law from its moral roots, the way in which the section 13 definition has often not been applied by judges in criterion-based cases of so-called direct sex discrimination, and the inflexibility of the current law.

The model will be applied to the facts in *James* to generate a legal outcome. The result of this exercise, where I take on a fictionalised judicial role, is that the Council is able to defend the operation of its admissions policy. I thought that it would be useful to adopt this judicial perspective because it allows me, and the reader, to take a "bird's eye view" of the facts of the case and determine how a judge might apply the "sex related discrimination" model to these facts. As such, this exercise in judicial reasoning helps me to highlight the practical benefits of my model.

My application of the "sex related discrimination" definition to the *James* case also highlights the flexibility which my prototype possesses over the direct sex discrimination claim. As a result, I shall go on to develop my position that the law on sex discrimination should be amended to include the "sex related discrimination" claim.

The problems with direct sex discrimination law which were identified in Chapter 3 will be briefly summarised in section 6.2. They will then be condensed, as some of the problems overlap at legal and conceptual levels. Having condensed the problems, in section 6.3 I shall then move on to apply my "sex related discrimination" model to the facts of the *James* case. By

deciding that the Council did not discriminate against Mr. James because of something arising from his sex, I shall be adding to my pre-existing position on the *James* case. This position, which I have argued throughout the thesis, is that there was no direct or indirect sex discrimination in *James* and the Law Lords were wrong when they decided that there was. It will, however, be suggested that if the judiciary had had the "sex related discrimination" concept at their disposal, their decision in *James* would probably have come down in favour of the Council's position.

Section 6.4 will argue that, by resolving the difficulties with the *James* case, my model also clears up the more general problems associated with this area of the law. This inference is drawn from the argument that *James* was, as argued in Chapter 3, a paradigmatic example of the problems inherent within direct sex discrimination law.

Consequently, the "sex related discrimination" model will be shown to have the potential to apply to a broader purview of cases than the case I have used as my test case. Indeed, it will be argued that it could apply to at least some of those cases of (what would otherwise be labelled as) direct sex discrimination where the alleged discrimination is based on a criterion or rule. Moreover, I briefly consider the question as to whether the "related discrimination" model can be applied to other protected characteristics, besides sex and disability discrimination, but leave a full analysis of this for another day due to time and space constraints.

My analysis culminates with my position that the "sex related discrimination" formulation should be given legislative effect. Section 6.5 will then conclude the Chapter.

6.2 The difficulties with the law on direct sex discrimination

My analysis in Chapter 3 demonstrated that the real reason for the Council's treatment of Mr. James was his pensionable age, not his sex. Indeed, the Law Lords openly accepted that the Council's reason for giving people of pensionable age free access to their recreational facilities was to recompense such people for the loss of income which they otherwise would have received had they still been working.[625] So, the Council's policy of free access to those of pensionable age was based on a benign reason. Yet, the Law Lords still held this benign reason to be an act of direct sex discrimination. That cannot be right. I shall call this "problem one" for the purposes of this section.

I also argued in Chapter 3 that, to hold that a policy with a benign reason was direct sex discrimination, as the Law Lords did in *James*, was morally counterintuitive. The problem arose from the fact that there was no general defence to direct sex discrimination, combined with the "inherently discriminatory" and "but for" tests laid down in earlier case law. Indeed, this combination of factors precluded the judge from carrying out an evaluation of the reason for the allegedly less favourable treatment. All that was required, as far as a majority of the Law Lords were concerned, was an indissociable link between the protected characteristic and the criterion or rule. As was argued in Chapter 3, this requirement removed the moral bedrock which the law of direct sex discrimination should rest upon. This will be labelled as "problem two" for now.

The judge's inability to assess the reason for the treatment produces legal, as well as moral, problems. To constitute direct sex discrimination, under the (now repealed) 1975 Act and the 2010 Act, the treatment must be "on the grounds of" or "because of" a protected characteristic. In other words, it is the *reason* for the treatment which is relevant when determining whether there was direct sex discrimination. Consequently, to ignore the reason for the treatment

[625] *James*, n.35, 772-73.

amounts to a failure to apply the relevant statutory provisions on direct discrimination. [626] I shall call this “problem three”.

This complex interaction of factors has resulted in the judge being unable to distinguish, in some criterion-based cases of alleged direct sex discrimination, between blatant examples of direct discrimination (due to reasons such as prejudice, sexism or stereotyping) and cases where the treatment is based on a potentially benign reason. My position is that the law should recognise the moral differences between these examples by allowing a defence in the latter but not in the former.[627] This will be called “problem four” for now.

Another difficulty that was highlighted by the *James* case (and others such as *Amnesty* and *JFS*)[628] was that these cases were not examples of direct or indirect discrimination. This was bound to cause difficulties for judges as there was no statutory provision within the architecture of the UK’s system of discrimination laws within which these “related discrimination” cases could be properly adjudicated. This remains the case to the present day despite *James* being decided by the House of Lords over thirty years ago. Given the absence of such a statutory provision, and the flexibility it would bring, it should not be surprising that judges are having to resort to strained and illogical reasoning to fit these cases within the direct or indirect paradigms. I shall refer to this as “problem five”.

The main problems in this area of the law can therefore be condensed into three themes: a lack of flexibility within the current law (problem five), a legal problem (problem three) and a moral problem (problems one, two and four). Problems one, two and four can be condensed because, in effect, they boil down to the same thing. Indeed, they all strongly indicate that the current law on direct sex discrimination fails to distinguish between malign and benign reasons for actions when determining whether the act amounts to direct sex

[626] See section 3.3.1.
[627] See section 3.4 for a more detailed analysis.
[628] See sections 2.4.2.1 and 2.4.2.2 for more detail.

discrimination. As previously stated, this failure only appears to arise in criterion-based, rather than "reason-why," cases of direct discrimination.[629]

Seen from this perspective, to help strengthen the case for a new head of claim, my definition of this claim will have to resolve these three issues: the flexibility problem, the legal problem and the moral problem. These problems are serious and need to be resolved. Reform is very unlikely to come from the senior judiciary as the "inherently discriminatory" test has been firmly embedded in the case law for several decades. Moreover, for the senior judiciary, such as the UKSC, to introduce an intermediate head of claim between direct and indirect sex discrimination would likely be an act of "judicial legislation" and a consequent breach of the principle of the separation of powers. As a result, the situation requires legislative reform. That is why I have drafted proposed statutory wording, and I shall now turn to the application of this formulation to the facts in *James*.

6.3 Applying the "sex-related" discrimination model to the *James* case

6.3.1 Introduction

The sex discrimination model I have constructed has five separate components. Before I break these down, it is worth repeating my proposed statutory wording:

> "A person (A) discriminates against another person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's sex, and

[629] Examples are *James*, *JFS* and *Amnesty*. The reason for this is likely to be based on the relationship between a criterion or policy and the "inherently discriminatory" test. The "inherently discriminatory" test works well in criterion or policy-based acts of potential discrimination as the policy can be set aside as "inherently discriminatory" without the judge having to look at the reasons for the policy. Judges cannot do this in "reason why" cases as the judge has to ascertain the reason for the less favourable treatment. Due to time and space constraints, I shall not delve any deeper into this issue at this stage. Nevertheless, it is a ripe avenue for a future study.

(b) A cannot show that the treatment is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."

The first component is that A must have treated B unfavourably because of "something". Secondly, the unfavourable treatment must be because of "something" that has arisen in consequence of B's sex. If Mr James can establish both, he will have made out a *prima facie* case of "sex related discrimination" using the *Grosset* two-step test. Before applying the *Grosset* test to the factual circumstances in *James*, it is worth noting that the test mirrors the two causal requirements in my own definition of "sex-related discrimination." This is not a coincidence, as I shall come on to describe in section 6.3.3.

If a *prima facie* case of "sex related discrimination" is established, the burden of proof then moves on to the employer to objectively justify the discrimination. To do so, the employer must first identify a legitimate aim. In line with the *Bilka* model, that legitimate aim must amount to a genuine commercial or social need. In this way, the employer must demonstrate that such a need exists. Moreover, it must prove that the means of achieving the need were appropriate. Finally, it must also establish that those means were necessary.

If the employer can successfully fulfil these criteria, it will be able to defend the "sex related discrimination" claim. As a "fictional judge" for the purposes of this chapter, it is my task to critically evaluate the objective justification defence.[630] As a result, I have the discretion to decide whether the objective justification standard has been met by the putative discriminator.

As described in Chapter 5, part of my role will be somewhat different to the part played in the interpretation of the "standard" objective justification defence for indirect discrimination in section 15(1)(b) of the 2010 Act by the UK

[630] *Hardy*, n.568 [31] - [32]; *Homer,* n.113, [20], [24] - [26].

judiciary. Indeed, the UK judge only needs to be satisfied under section 15(1)(b) that the means were within the bounds of "reasonable necessity." The means test can be satisfied even in cases when a less discriminatory alternative exists.

By contrast, I can only hold that the objective justification test is met if the means are "strictly necessary," as that is the standard required by the *Bilka* test. In that way, the means can only be held to be necessary provided they are the least discriminatory option. Moreover, I shall also weigh the putative discriminator's need to apply the treatment against the severity of the harm done to the purported victim.

I must have these legal points, and distinctions, in mind when I attempt to adjudicate the facts in *James*. I must also bear in mind that *James* was a service provision case rather than an employment case. The former category of cases is less common than the latter. Moreover, as I shall go on to explain in the next section, service provision cases were (and still are) governed by separate statutory provisions in the relevant legislation.

6.3.2. The relevant law

The relevant statutory provisions in the *James* case were sections 1(1)(a) and 29 of the (now repealed) 1975 Act. Section 1(1)(a) stated:

> "1(1) A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if - (a) on the ground of her sex he treats her less favourably than he treats or would treat a man."

Of course, the prohibition on direct sex discrimination in section1(1)(a) also applied where a man was treated less favourably than a woman.

The relevant portions of section 29(1), so far as the *James* case was concerned, comprised the following:

> ”29(1) It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a woman who seeks to obtain or use those goods, facilities or services - . . . (b) by refusing or deliberately omitting to provide her with goods, facilities or services of the like quality, in the like manner and on the like terms as are normal in his case in relation to male members of the public or (where she belongs to a section of the public) to male members of that section. (2) The following are examples of the facilities and services mentioned in subsection (1) - (a) access to and use of any place which members of the public or a section of the public are permitted to enter; . . . (e) facilities for entertainment, *recreation* or refreshment; (my emphasis) . . .”

Again, a reference to a woman in section 29 also applies to a man, and *vice versa.* These were the applicable legislative provisions at the time when *James* was decided by the House of Lords. However, the definition of direct sex discrimination, which is currently in force in the UK under section 13 of the 2010 Act, carries the same substantive meaning as the repealed section 1(1)(a).[631] The only difference is that the requirement that the less favourable treatment be “on the grounds of” sex (section 1(1)(a)) has been replaced with the wording that the treatment must be “because of” sex (section 13). Nevertheless, as was noted in earlier chapters, the Explanatory Notes to the 2010 Act make clear that section 1(1)(a) of the 1975 Act and section 13 of the 2010 Act carry the same meaning despite this difference in wording, as does the relevant UK case-law.[632]

Sections 29(1) and (2) of the 2010 Act, which prohibit discrimination in relation to service provision to members of the public, is worded as follows:

[631] See section 2.2.1.
[632] *Essop*; n.88, [17]

> "(1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.
>
> (2) A service-provider (A) must not, in providing the service, discriminate against a person (B)—
>
> (a) as to the terms on which A provides the service to B;
>
> (b) by terminating the provision of the service to B;
>
> (c) by subjecting B to any other detriment."

Section 29 of the 2010 Act carries substantially the same meaning as its predecessor in section 29 of the 1975 Act. Both statutory provisions, in effect, make it unlawful for service providers to refuse to provide services to members of the public on the grounds of sex. Furthermore, both sexes must be provided with the same standards of quality when it comes to the services in question.

Given that the relevant statutory sections on service provision in the 1975 Act are, in their essence, the same as those in the 2010 Act, either set of provisions could be applied to the facts in *James*. In any event, this point is somewhat academic as the only points I need to extract from the relevant law is that a member of the public, Mr. James, has complained that he has not received the same level of treatment as his wife from a "service provider" (as defined by the 1975 or 2010 Acts) because he is a man and she is a woman. Moreover, he argues that this difference in treatment constitutes direct sex discrimination. Having established this, I can now move on to consider the merits of Mr James' case.

6.3.3 The application of the *Grosset* causation test to the *James* case

The causation test is a key component to my “sex-related discrimination” model. As a result, I shall now move on to apply my causation test to the facts in *James*.

Mr James received different treatment from his wife. Despite them both being aged 61, she was granted free access to the swimming pool whilst he had to pay the admissions fee. Clearly, there is a differential in treatment. At a broader level, that differential applied to all men in the age category of 60-64. A woman in that age bracket would receive free admission but a man of that age would have to pay. Hence, the protected characteristic of sex does have some relation, or link, to the difference in treatment. Of that there can be no doubt. The more difficult issue is how to determine the nature of the link.

My position throughout the thesis has been that Mr James’ treatment was based on him not having reached pensionable age. As a result, I do not think that *James* was a case of direct sex discrimination. To establish a case of direct sex discrimination, there must be a direct causal link between the treatment and the protected characteristic of sex. For that reason, if the Council had said to Mr James that he would have to pay simply because he was a man, that would be direct sex discrimination because a direct causal link between the treatment and his sex could be established. Of course, in *James*, that was not what happened. Instead, he was refused free admission because he had not reached pensionable age. This means that the causal link was between the allegedly discriminatory treatment (the admission fee) and the claimant’s pensionable age which was 65 for men and so his pensionable age arose from his sex.

Consequently, the wider nature of the indirect causal link precludes a finding of direct discrimination. However, this wider link is perfectly in keeping with “related discrimination” claims. This is best demonstrated by referring to the *Grosset* case. Mr Grosset was not dismissed because he had a disability. He was dismissed because of actions (showing an inappropriate film to school pupils because of elevated stress levels) which arose from his disability.

Nevertheless, the Court of Appeal held that these indirect links in the causal chain had still arisen in consequence of Mr Grosset's disability:

> "... the "in consequence" formula used in subsection 15(1)(a) ...does not require an immediate causative link between the "something" (i.e., that which provides the defendant employer with his reason for treating the claimant unfavourably) and the claimant's disability. So, in the present case, there is a sufficient causative link between the showing of the film by the claimant and his disability. In any event, this relatively wide approach to that issue of causation is, in my view, inherent in the broadly drafted "in consequence" formula used in subsection 15(1)(a) ..."[633]

Consequently, the *Grosset* case makes it clear that there is no need for the claimant to establish a direct causal link between the "something" and the protected characteristic. This makes sense as the "related discrimination" model is designed to apply to cases dealing with factors arising from the protected characteristic, rather than to the protected characteristic itself.

It is necessary to delve deeper into the *Grosset* judgment before I can establish whether Mr James has made out a *prima facie* case of "sex related discrimination." From chapter 5, it will be recalled that the *Grosset* case set out a two-step hurdle for the Claimant to demonstrate a *prima facie* case of discrimination arising from disability. The two steps were: (1) did A treat B unfavourably because of an (identified) something? (2) Did that something arise in consequence of B's disability?[634]

If I am to transpose a variant of the *Grosset* test to the protected characteristic of sex, and to apply it to the *James* case, then the first question in the test does not need to change at all. However, the second question must become: "did that something arise in consequence of B's *sex*, rather than B's disability?"

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[633] *Grosset*, n.452, [50] (Sales LJ).
[634] *Ibid*, [36].

As I argued in chapter 5, the *Grosset* test is preferable to the *Risby* line of case-law because the former focused on the statutory wording of section 15 whilst the latter merely looked for a broad contextual link between the allegedly unfavourable treatment and the disability. The *Risby* approach was too loose and leaned too heavily in the Claimant's favour, especially when combined with the subjectivity of the "unfavourable treatment" criterion. As a result, my preference for the *Grosset* approach has strongly influenced the first two components of my statutory formulation.

With this in mind, the first issue for determination is whether Mr James was subjected to "unfavourable" treatment and a consequent breach of his autonomy. In the circumstances, it is the admission fee to the Council's swimming pool which constitutes the unfavourable treatment. There is a strong implication, from the fact that Mr James took his case all the way to the House of Lords, that free access to the pool was something that he strongly valued. In this way, Hepple's subjective requirement, that the Claimant has been deprived of something which he values, is satisfied.[635]

However, I calibrated Hepple's concept of unfavourable treatment in chapter 5 by imposing light-touch objective parameters on it. This requires that the subject-matter of the unfavourable treatment must be something which right-thinking people in a democratic society would generally accept as being consistent with the accepted moral norms in that society. It seems safe to accept that the pursuit of fitness and recreation (by swimming) is something which reasonable people would generally accept as a positive pursuit.

As a result, the imposition of an admission fee to Mr James was an example of unfavourable treatment under my "sex-related discrimination" model which, in turn, amounted to a breach of Mr James' autonomy as it had the potential to deter him from pursuing a meaningful recreational activity.

[635] See section 5.3.2 for a fuller description of Hepple's account of unfavourable treatment under section 15 of the 2010 Act.

The next part of the test which I must consider is whether the unfavourable treatment arose in consequence of the relevant "something." Following the approach laid down in *Grosset*, this question can be answered by examining the Council's mental state. As Lord Justice Sales (as he then was) stated in his judgment in *Grosset*, this examination is conducted to ascertain the putative discriminator's reason for meting out the unfavourable treatment:

> "The first issue (as to whether the unfavourable treatment arose because of a relevant "something") involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something". In this case, it is clear that the respondent dismissed the claimant because he showed the film. That is the relevant "something" for the purposes of analysis."[636]

Applying this method to *James*, it becomes clear that the Council charged Mr James the admissions fee because he had not yet reached pensionable age. That was the relevant "something." Indeed, this is sharpened further when one considers that the Council was not applying a policy (which differentiated between the sexes) which it had designed itself. Instead, it was conferring benefits on those who were likely to be living on a pension. The differing pensionable ages, at the time, had been set by Parliament. For that reason, the Council was merely adopting a legal criterion which it had not created. The reason why it did this was, no doubt, because pensionable age was an easy and generally accurate way to gauge whether someone was living on a pension, as I shall come to expand upon in the next section.

The next issue is whether there is a causal link between Mr James' sex and the relevant "something." In *Grosset*, Lord Justice Sales also provides helpful guidance to courts and tribunals who must consider this issue:

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[636] *Grosset,* n.452, [37].

> "The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something". In this case, on the findings of the ET there was such a causal link. The claimant showed the film as a result of the exceptionally high stress he was subject to, which arose from the effect of his disability when new and increased demands were made of him at work in the autumn term of 2013."[637]

When one applies this logic to the factual circumstances in the *James* case, it is clear that there was a causal link between Mr James' sex and the relevant "something," his pensionable age. Indeed, his pensionable age arose from his sex. At that time, a man's pensionable age was 65. However, if Mr James had been a woman at that time, his pensionable age would have been 60.

Taken together, these components demonstrate that Mr James would have been able to establish a *prima facie* case of "sex-related discrimination" in the circumstances. He would have been able to demonstrate that he had been treated unfavourably, in a manner which breached his autonomy (by having to pay an admissions fee) because of something, pensionable age, which arose in consequence of his sex. As a result, the next consideration should be whether the Council would have been able to objectively justify this *prima facie* "sex-related discrimination". I shall now turn my attention to this issue.

6.3.4 Applying the objective justification defence to the *James* case

By way of recall, the *Bilka* objective justification test is one of strict necessity: the discriminatory act or omission must be the least restrictive means of achieving a legitimate aim. Accordingly, the first requirement, under the *Bilka* test, would have been for the Council to demonstrate that it had a "genuine need" to apply its policy or criterion. That criterion was that people of

[637] *Ibid*, [38].

pensionable age could use the swimming pool without having to pay an admissions fee.

My position is that the Council would have been able to defend the criterion as a genuine need by relying on social and public policy arguments. This could be done by highlighting that free admission to those who were living (or likely to be living) on a pension had the effect of compensating people, within certain age brackets, who were (generally, but not always) living on a more modest income than the level of income they received whilst working. In addition, concessions to pensioners, such as the example in the *James* case, recognises that people of advanced years are entitled to enjoy their retirement and pursue interests and hobbies of their own choosing. The granting of such concessions makes it, at least from a financial point of view, easier for such people to pursue these activities. It would be controversial for a court or tribunal to maintain the argument that these types of activities and / or hobbies are not an integral part of what gives meaning and value to peoples' lives.

As a result, my position is that the Council would have been able to demonstrate that the Council's policy was based on a genuine social need. Given that the policy would in all likelihood have met the threshold of genuine need, there should be no doubt that the policy would also have been held to be a measure that has been implemented in the pursuit of a "legitimate aim." Indeed, the former test is a more stringent one than the latter and as such, a criterion which satisfies a "genuine need" test will generally also be held to have achieved a "legitimate aim."[638]

The next question to ask is – what were the "means" adopted by the Council to achieve its aim? This is perhaps the most straightforward component to the objective justification test in this case. The means adopted to achieve access to recreational facilities for people living on a pension was to allow them free

[638] Baker, n.556, 313 -4.

entry to such facilities. It is submitted that this point is not contentious, and I shall not therefore dwell any further on it.

The final aspects of the balancing test are to consider whether the means adopted were "appropriate" and "necessary." The means the Council adopted were certainly appropriate. As previously stated, the Council used pensionable age as an indicator of whether someone was likely to be living on a pension. This seems entirely appropriate in the circumstances.

However, the more fraught question is whether the means were a "necessary" way for the Council to achieve its objective. It will be recalled that this involves identifying the least discriminatory way of achieving the Council's aim or need. Some might argue that, instead of using pensionable age, the Council should have required that every person who looked like they could be of pensionable age provide documentation setting out if and when they had retired and whether they were doing any consultancy or part-time work after their retirement. Moreover, a whole host of other boxes would have to be ticked if the Council was to be absolutely *certain* that the person of pensionable age was actually living on a pension.

However, as Bowers and Moran astutely observed, this potentially extensive exercise would likely be costly and unnecessary.[639] It would require a significant amount of extra labour to conduct these extensive and time-consuming exercises. Moreover, this method would constitute a line of enquiry that would be both invasive and contrary to personal privacy concerns for the Council to adopt. It could also be construed as aggressive and certainly contrary to the good-natured spirit of the concession itself. Given these observations, my position is that this interrogation of sorts should not be considered as a realistic course of action for the Council to adopt, even if it would guarantee that the individual is (or is not) living on a pension. As result, this then leaves pensionable age as the other way of determining whether someone is living on a pension. All things considered; my position therefore is

[639] Bowers and Moran, n.39, 317 – 8

that the Council's use of pensionable age was most likely the least discriminatory way of determining whether someone was living on a pension.

The final component of the objective justification defence, which involves a general weighing exercise of the benefits to the putative discriminator against the detriment to the alleged victim, also results in the finding that there was no "sex related discrimination" in *James*. Indeed, the benefits of conferring free access to a wide range of people in certain age categories is a broad social benefit which clearly outweighs the detriment (the admissions fee) which applied to a much narrower group of people (men in the age 60-64 category).

This is not to take a backwards turn on the rights of men in this age bracket to pursue hobbies and recreational activities. Far from it. Rather, it is a legal and moral assessment which comes into play when balancing the detriment to these men against the broader social benefits of the policy. The point is persuasively argued by Bowers and Moran:

> "The detriment in this case is the cost of admission to the swimming pool (75p at the time) multiplied by the number of visits made by men between the ages of 60 and 64 over a given period. The benefit of the scheme is free admission for all those over pensionable age. This is a rare case where it is possible to put a figure on a social benefit, and it is the cost of admittance multiplied by the number of visits by persons of pensionable age over the given period. Unless for some reason the swimming pool in question is particularly popular with men between the ages of 60 and 64, the benefit is almost certain to outweigh the detriment by a substantial margin. Thus, the benefit would be disproportionate to the loss and the balance test would come down on the side of the Council."[640]

I agree. Consequently, my position is that the Council would have been able to objectively justify the operation of its policy. It would have been able to

[640] *Ibid* 318.

demonstrate that its policy was in pursuit of a legitimate aim and that the means of achieving that aim were appropriate and necessary. My view is that this outcome, achieved by applying my model of "sex related discrimination," is not a simple and formalistic product of the application of "black letter law." Instead, the decision is based on the "sex related discrimination" model's ability to strike a balance between the interests of the parties involved. By striking this balance, and providing a defence to the putative discriminator, the "sex related discrimination" model is better able to capture the nuances of some sex discrimination cases than the strictly binary approach. I shall go on to expand on why my model resolves the more general problems with sex discrimination law in the next section.

In the meantime, it could be argued that the "sex-related discrimination" model, with its objective justification defence, is unnecessary as the Council could defend its policy using the positive action provisions in section 158(1) of the 2010 Act.

By way of recall, the positive action provisions in section 158(1) allow more favourable treatment of a group of people sharing a protected characteristic if a putative discriminator reasonably believes that such a group experiences historical disadvantage, different needs or exercises a significantly low level of participation in a particular activity. The more favourable treatment must, under section 158(2) be a proportionate means to achieving a legitimate aim for the positive action exception to successfully apply.

The positive action measures in section 158(1) have operated to justify direct discrimination in one reported case.[641] The Council could therefore try to run an argument along the lines that females have historically lacked access to swimming facilities when compared with men and that the free admission of female pensioners amounts to positive action to ameliorate that disadvantage. This position is borne out by the historical evidence which demonstrates that

[641] *R (Z and another) v Hackney London Borough Council and another* [2020] UKSC 40, [2020] 1 WLR 4327

women lacked equivalent access to swimming facilities when compared with men in the Victorian period.[642]

However, this does not take the positive action defence very far. The reason for this is that, for the positive action provisions in section 158(1) to apply, the disadvantage must not just be a historical one but one which exists into the present day.[643] Given that women can access swimming pools as easily as men in Great Britain in the present day, the Council would not be able to justify its policy on pensionable age using this argument..

Alternatively, the Council could try to justify its policy using the "different needs" provision found in section 158(1) of the 2010 Act. Such an argument might be along the lines that women, as a group of female pensioners, will generally be poorer than men of the same age. As such, it could be submitted that free admission for these women is a proportionate positive action measure, under section 158(2), to alleviate the different financial needs these women experience when compared with men of the same age. However, given the dearth of case law in this area of the law, it is very difficult to predict whether a court would accept such an argument. Section 12.19 of the EHRC Code does not mention financial needs as an example of what "different needs" may constitute. This seems like a significant omission. Nevertheless, the list at section 12.19 is not exhaustive so this factor does not rule out financial needs. All things considered, the matter would have to be determined by a court or tribunal.

Consequently, my position is that the "sex related discrimination" prototype yields the right outcome in *James* whilst the positive action model may be able do so. To sum up, in addition to there being no direct or indirect discrimination in *James*, there was also no "sex related discrimination." As will be fleshed out

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[642] David Day, 'Swimming Natationists, Mistresses, and Matrons: Familial Influences on Female Careers in Victorian Britain' (2018) 35(6) International Journal of Sport and the Law' 494 – 510.
https://www-tandfonline-com.eux.idm.oclc.org/doi/full/10.1080/09523367.2018.1543271

[643] EHRC Code of Employment, paragraphs 12.30 - 12.31

in section 6.4, applying the “sex related model” to the *James* case results in the more sensible outcome that there was no sex discrimination. Moreover, it does so whilst also fixing the problems identified earlier in the chapter relating to the moral, legal and flexibility issues associated with direct sex discrimination law.

6.3.5 Conclusion

I began this chapter by deconstructing the components of my “sex related discrimination” model. The first two components entailed that the claimant had to be treated unfavourably, resulting in a breach of his autonomy, because of something and that that “something” had to arise in consequence of sex. The interpretation of this formula was heavily influenced by the *Grosset* case. So long as a claimant was able to satisfy these two components, he or she would be able to establish a *prima facie* case of “sex related discrimination.”

If a *prima facie* case is established, the burden of proof shifts to the employer, who must be able to objectively justify this discrimination. My interpretation of the objective justification test was largely influenced by the *Bilka* test. The employer is required to demonstrate, when establishing this defence, the other three components of my “related discrimination” model: a “legitimate aim” or “genuine need,” and that the means adopted by the employer were both “appropriate” and “necessary,” and that the more general balancing exercise came down in their favour.

After setting out the relevant law, I concluded that Mr James had been treated unfavourably and that that treatment had been because of something arising in consequence of his sex. As a result, Mr James had made out a *prima facie* case of “sex related discrimination” in this scenario. Nevertheless, the Council was able to objectively justify its admissions policy by proving that the policy

represented a genuine social need and that the means of achieving this were both appropriate and necessary, and that the balancing exercise came down in the Council's favour.

In the final analysis, the "sex related discrimination" model, coming down in favour of the Council, yields a different result in my reconstruction of the *James* case than the application of the direct sex discrimination model by the House of Lords. This difference in outcome shows how the "sex related discrimination" definition allows the judge more flexibility in the adjudication process than the dichotomous approach. The reasons for this will be fleshed out in the next section where I explore how the "sex related discrimination" model not only produced the right result in *James* but also has the potential to improve UK sex discrimination law in a more systematic way.

6.4 Can the "sex-related" discrimination model rectify the problems in sex discrimination law?

6.4.1 Introduction

Section 6.4.2 will refer to my analysis of the *James* case. In doing so, it will argue that the introduction of an "intermediate" head of claim promotes judicial transparency and flexibility within this area of the law. Thereafter, section 6.4.3 demonstrates how the "sex related discrimination" model can rectify the judiciary's morally unacceptable approach to the law on direct sex discrimination, as exemplified by the *James* case. In doing so, I shall demonstrate how my model re-aligns the moral distinctions in "related" and direct sex discrimination cases so that they may be relocated to their appropriate moral bedrocks. In section 6.4.5, I highlight how my definition can also help unblock the legal problems which currently beset the law on direct sex discrimination. Section 6.4.6 will conclude the section.

6.4.2 – The problem with judicial transparency and flexibility

The first problem I shall analyse is the "flexibility" argument which was raised in section 6.2. The *James* case, and other cases such as *JFS* and *Amnesty*, were critically examined in Chapters 2 and 3 of this thesis. A common theme arose in this sub-set of supposed direct discrimination cases: they were neither examples of direct nor indirect discrimination. Instead, they fell into a conceptual "no man's land" between direct and indirect discrimination. Moreover, the judges in these cases felt somewhat uncomfortable when finding that direct discrimination had occurred in these cases. Indeed, the decisions were highly divisive, with *James* being divided by a 3:2 majority of the Law Lords whilst the finding of direct race discrimination in *JFS* was based on a 5:4 majority in the UK Supreme Court.

I focus my analysis principally on the *James* case from now on and begin by addressing the flexibility problem in section 6.2.[644] Given that *James* was not, on a structural level, a case of direct or indirect discrimination, the Law Lords were put in a very difficult situation. They had to come to a legal finding, one way or another, but had no statutory provision to govern the particular factual circumstances in *James*. If they focused heavily on the reason for the treatment, they would have been taken down the inescapable path that the real reason for the treatment was pensionable age. At the time of their decision, that would have been a difficult judgment to make because it would not have taken them any further towards the conclusion as to whether there was some kind of discrimination at play. Indeed, there was no law prohibiting age discrimination in the UK until 2006, well after *James* was decided.[645]

Clearly, if the Law Lords had found that the real reason for the differential treatment was pensionable age, they would not even have been able to treat

[644] There may well be good grounds to argue that the related discrimination model should be transposed to other protected characteristics, such as race or religion and belief. This is especially so given the structural similarities between the *James* and *JFS* cases – see John Finnis, 'Directly discriminatory decisions: a missed opportunity' (2010) 126 L.Q.R. 491 for a full account of the structural similarities between the two cases. However, due to space constraints, the present thesis will focus only on the potential transposition of the related discrimination model to the protected characteristic of sex.
[645] Employment Equality (Age) Regulations 2006 (SI 2006/2408) reg. 1.

James as a potential case of direct sex discrimination. As mentioned earlier in this chapter, Mr James' pensionable age arose from his sex. Given this relationship, the Law Lords would not have been able to establish a direct causal link between the treatment meted out to Mr James and the protected characteristic of sex. If they had found pensionable age to be the real reason, that would only have taken them as far as finding that there was an indirect causal link between the treatment and the protected characteristic. Of course, there was no "sex related discrimination" model in place at that time to deal with such cases.

Finally, it would have been artificial, to say the least, for the Law Lords to hold that *James* was an example of indirect discrimination. As I argued in chapters 2 and 3, the PCP in *James* did not apply in a neutral fashion towards all those in the appropriate pool for comparison. Seen from that perspective, indirect discrimination must surely have been seen as an unpalatable finding by the majority of the Law Lords who disregarded it.

I suspect that these considerations left the Law Lords in an intractable dilemma: they had no statutory provision which applied to the facts of the case before them. My view is that this dilemma led them to adopting some rather unusual legal tests to arrive at a legal finding of one sort or another. As detailed in Chapter 3, they found these by way of the "inherently discriminatory" and "but for" tests, and then combining these tests. The inherently discriminatory test effectively lays down an overly simplistic standard: so long as there is an indissociable link between the protected characteristic and the treatment, that is the end of the discussion. There is no need to enquire into the reason for the treatment. I also surmise that, by combining this "inherently discriminatory" test with the lack of a general defence in direct sex discrimination claims, the Law Lords did not have to pay any attention to the real reason for treatment, which was pensionable age. Moreover, they were then able to solidify their findings by invoking the use of the largely discarded "but for" test.

Nevertheless, the intention of this section is not to question the motives, or integrity, of the Law Lords. Rather, the intention is to demonstrate how some cases are examples of what I have chosen to call “sex related discrimination” and how a separate statutory provision is needed to cater for these cases. If this had been a third option open to the judges in *James*, they would have been able to decide the case in a more balanced manner. My fictional “judicial analysis” of *James* in section 6.3 supports this contention. I was able to use the “sex related discrimination” model to conclude that, whilst Mr James had a *prima facie* claim for “sex related discrimination,” the Council was able to defend this claim by way of the objective justification test. As demonstrated in my analysis, there was no need to invoke rather obscure, quasi-legal tests to reach a conclusion in *James*. Instead, the case was decided by the application of the wording in the statutory formulation.

This leads me on to another benefit of the “related discrimination” model in cases like *James*. The existence of this “third” head of claim would be likely to promote judicial transparency. If the “sex related discrimination” option was available, there would be no need for judges (or legal practitioners) to compress the facts of such cases within the direct or indirect paradigms. The existence of a defence would also allow the cases to be adjudicated in a more flexible and transparent manner. This is well-exemplified in my “decision” on the facts in *James.* By re-classifying *James* as an example of “related” rather than direct discrimination, the correct legal result was achieved using transparent reasoning.

The introduction of this “intermediate” head of claim would then sharpen the scope of the law on direct sex discrimination. It would do so by allowing direct sex discrimination to focus more on its proper province which is the elimination of blatant acts of discrimination through stereotyping, sexism and prejudice in general, i.e. purposeful attacks on the autonomy and dignity of individuals. This brings me on to the second problematic theme I identified in section 6.2 which concerns the moral issues at stake.

6.4.3 The moral problem with direct sex discrimination

James highlighted that, at least in some cases of so-called direct sex discrimination, the "but for" and "inherently discriminatory" tests fail to distinguish between benign and malign reasons for the supposedly less favourable treatment. Moreover, this problem becomes even more acute where there is a lack of a general defence to direct sex discrimination. As the law currently stands, the result of this combination of factors is that there will be some cases where the policy or criterion constitutes direct sex discrimination even though the reason for the treatment which underpins the policy is benign in nature. Not only does this strike me as morally counterintuitive, it also does not make any logical sense.

Before I analyse this point any further, I should address one potential objection to my views on the *James* case. I hold, at one and the same time, that the policy in *James* was based on benign reasons and also that it constituted "unfavourable" treatment under my "sex discrimination model." Some might argue that this is contradictory.

However, my position is that the two findings are perfectly compatible. By way of explanation, when the Council introduced its policy on free admission being based on pensionable age, it was acting for a benign reason. This benign reason was to facilitate easier access to recreational facilities for people who had reached pensionable age. This is a benign reason; it would be absurd to hold otherwise.

Nevertheless, there were unavoidable side-effects which came along with the implementation of this policy. Indeed, it meant that men in the 60 – 64 age bracket would have to pay an admissions fee whilst women in that age bracket received free admission. However, this was a disparity which Parliament had created (by enacting different pensionable ages for men and women) rather than the Council.

This disadvantage was held to satisfy the “unfavourable treatment” criterion in *James* given the relatively low threshold needed to satisfy it, coupled with the subjectivity of the concept of “unfavourable treatment.” Furthermore, the fact of the matter is that, when the legislature, and other public bodies emanating from the State, apply a broad social benefit to a wide swathe of the population, there will often be parties who are disadvantaged by the application of the social benefit. This does not make the policy or rule a “malign” one. Indeed, it may be a policy or rule with morally impeccable foundations which has some adverse consequences for a small margin of the population. That was the case in *James* because the admissions policy targeted people of pensionable age. Indeed, the admissions policy in *James* should be seen as a generally benign policy with a relatively small degree of unfavourable treatment for a small cross-section of people, Mr James included. Despite these consequences, it is clear that, on the whole, the policy’s benefits outweigh them by a significant margin.

My analysis in chapter 3 found that the moral bedrock of direct sex discrimination was forged from dignitarian and autonomy-based concerns. These concerns are breached when the discriminator treats the individual as a means to an end, rather than an end in herself. I have also argued that direct sex discrimination should be reserved for blatant cases of sexism, prejudice, bias and stereotyping. As described in chapter 5, these examples of direct sex discrimination, as it is properly understood, will be more morally reprehensible than “sex-related discrimination.” This is why the latter should have a defence, but the former should not.

It is, in large part, these moral distinctions between “sex related discrimination” and direct sex discrimination which makes the Law Lords’ decision in *James* so odd. The Council was not acting in a sexist, biased or prejudicial manner when charging Mr James an admissions fee to the swimming pool. Nor was it violating his dignity because he happened to be a man. Instead, the facts clearly show that there was a widely beneficial policy which the Council had

implemented but, in doing so, had treated Mr James (and potentially other men in the age 60 – 64 age bracket) unfavourably.

Given this clash of rights and duties in *James*, the "sex related discrimination" model would have been a far more appropriate head of claim to plead (from the point of view of legal practitioners) and to adjudicate on (from the point of view of the judges concerned) than the direct sex discrimination model. Again, this is readily apparent from my application of the "sex related discrimination" model to the *James* case in section 6.3. Indeed, the proposed wording of the statute was sufficient to strike the appropriate balance in *James* and there was no need to refer to confusing tests such as the "but for" and "inherently discriminatory" tests to arrive at a legal decision.

So far, I have demonstrated that my model of "sex related discrimination" would have been a more effective adjudicative tool to apply to *James* than the current model of direct sex discrimination in the UK. In addition, it should also be highlighted that the argument I am building gives a more focused role to discrimination law in general.

If the "sex related discrimination" model was enacted, it could be pled instead of, or as an *esto* alternative to, other sex and disability discrimination heads of claim. By way of example, if an employer dismisses a woman for sickness absences she has accrued due to an illness which is confined to one sex, such as endometriosis, and the illness itself does not qualify as a disability under section 6 of the 2010 Act, the woman could bring a "sex related discrimination" claim either as an *esto* alternative to disability discrimination or a free-standing "sex related discrimination" claim.

Indeed, she could claim that she has been treated unfavourably (by being dismissed) because of something, sickness absences, which arose from her sex-related health condition. Given that a concerning number of disability discrimination claims fall at the section 6 hurdle,[646] the "sex related

[646] Lawson, n.541, 362, Fredman n.1,155

discrimination" claim could then allow the putative victim a wider range of legal options to pursue. Moreover, it would allow the direct sex discrimination provisions to deal with more morally concerning examples of discrimination. It is also suggested that it would allow indirect sex discrimination claims to deal with cases with genuinely neutral PCPs.

However, my arguments in favour of a "sex related discrimination" model have, to this point, been based largely on moral and philosophical argumentation. The next section will argue why there are also strong legal reasons to favour a "sex related discrimination" model in the UK.

6.4.4 The legal problem with sex discrimination

Section 1(1)(a) of the 1975 Act defined direct sex discrimination as less favourable treatment of a woman, as compared to a man, "on the grounds of sex." Section 13 of the 2010 Act states that direct sex discrimination occurs when a woman is treated less favourably than a man "because of sex." Of course, these legal prohibitions also protect men from being treated less favourably than women. I have already argued elsewhere in this thesis that the two definitions mean essentially the same thing. I shall not repeat this argument again here. Instead, my focus will be on the statutory wording itself and how it relates to the application of the direct sex discrimination model to the *James* case.

There has been a consistent line of case-law in the UK, both pre- and post-dating *James*, which has held that it is the "reason" for the less favourable treatment which is legally relevant.[647] The reason does not have to be the only reason for the treatment, but it must, at the very least, be a significant reason.[648] By contrast, the "motive" is only relevant insofar as it allows the court or tribunal to determine the reason for the treatment.[649]

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[647] Birmingham Schools (n.80), Nagarajan (n.79), JFS (n.36) being prominent examples. See section 2.2.1.
[648] See n.91.
[649] See section 2.4.1 for a more detailed analysis of this line of case law.

I argued that this separating line between motive and reason is a good thing. Indeed, if motive was held to be the key factor in deciding whether the treatment was “less favourable,” that could take the law down a very “slippery slope” which I also described in chapter 2. As a result, my position is that focusing on the “reason” for the less favourable treatment is the right course for the law on direct sex discrimination to take.

I have already argued, in the preceding section, that the Law Lords in *James* circumvented the reason for the treatment, pensionable age, as it led to a legal “dead-end.” Whilst this circumvention was shown to empty the law on direct sex discrimination of its moral content, it also has important legal ramifications.

My view is that bypassing the reason for the treatment results in a position where the judge actually fails to apply the statutory provision at all. This view applies regardless of whether *James* was adjudicated under the 1975 or the 2010 Act definitions of direct discrimination. They both entail that the reason for the treatment is the law’s, and, by extension the judge’s, key concern when determining whether direct sex discrimination has occurred. As such, to fail to apply the statutes’ key concerns, the judge has also failed to apply the relevant law. Indeed, the Law Lords in *James* did not apply the definition of direct sex discrimination to the factual circumstances. Instead, they invoked and applied the curious “but for” and “inherently discriminatory” models instead.

All things considered; *James* can, on one view, be viewed as a masterful piece of judicial creativity which was invoked because the legislation failed to provide a legal answer to a particular set of factual circumstances. On the other hand, the Law Lords’ failure to interpret and apply the relevant law could be seen as a usurpation of their constitutional mandate. Rather than interpret the existing law on direct sex discrimination, the Law Lords arguably created new law by invoking a combination of the “but for” and “inherently discriminatory” tests. Of course, under the long-established principle of the separation of powers in the UK, the creation of new law is the proper province of the legislature, rather than the courts.

Either way, these are points that are worth considering carefully when assessing the utility of the "sex related discrimination" model. My practical application of the model to the *James* case hopefully illustrates that, by giving the adjudicator an additional, highly flexible statutory model, she can get back to the business of interpreting the law, rather than arguably creating new law. Indeed, the judge would be able, in such circumstances, to apply the two-stage *Grosset* test to establish whether the claimant has a *prima facie* claim for sex-related discrimination. If the answer to that enquiry is in the affirmative, the judge can then go on to consider the Respondent's objective justification test using the well-worn *Bilka* guidance.

Consequently, my position is that the "sex related discrimination" model set out in this thesis solves the problems with the law on sex discrimination, and direct sex discrimination in particular, where other theories have failed to do so.[650] Given this observation, I shall now move on to the question of whether the model should be given legislative effect.

6.4.5 Should the "sex related discrimination" model be given legislative effect?

My position is that the "sex related discrimination" model should be given legislative effect. The existing system of sex discrimination laws is defective for the reasons I have explained throughout this thesis.

If the law on sex discrimination involved the "related" head of claim, the application of genuine direct sex discrimination would remain in its proper province (claims based on overt sexism, bias, stereotyping and prejudice). Moreover, the law on indirect sex discrimination would be able to fulfil its proper mandate which is to deal with cases where the application of a facially *neutral* PCP results in a disproportionate disadvantage to a certain group of people. All in all, the three heads of claims would be realigned with their moral underpinnings.

[650] See Chapter 4 for a critical analysis of these theories.

In addition, the introduction of a new head of claim, designed to catch those cases which fall in the “gap” between direct and indirect sex discrimination, would give a broader range of legal choices to litigants and legal practitioners. If the legal practitioner, or party litigant, is not sure what type of discrimination the litigant has been subjected to, the “related discrimination” claim could be pled in the alternative to direct and / or indirect discrimination claims. Moreover, adjudicators would have more flexibility in the legal reasoning process if “sex related discrimination” was introduced as a new legal head of claim.

There are those who might argue that the introduction of a new claim to what is already a difficult area of law will only add to its complexity and cause further confusion. I disagree with this point of view. Indeed, by adding the “related discrimination” option into sex discrimination law, I believe that the debris and confusion caused by the strictly dichotomous approach will be largely cleared away. Moreover, I have tried to draft the “sex related discrimination” formula in a succinct and (hopefully) a comprehensible format so that it can be widely understood by party litigants, legal practitioners and adjudicators.

6.4.6 Conclusion

This section of the thesis has argued that the Law Lords were in something of a predicament when trying to decide *James*. My position is that these difficulties were unsurprising given that *James* was neither an example of direct nor indirect discrimination. It was a “sex related discrimination” case. Moreover, my model of “sex related discrimination” fills this “gap” in the law. Indeed, that is why the model applies to the *James* case in a far more straightforward and transparent manner than the direct or indirect discrimination models.

I also argued that my model of “sex related discrimination” clears up the problems with sex discrimination law where others have been shown to fail. Indeed, my model advances judicial transparency and flexibility, whilst eradicating the moral and legal problems with sex discrimination law that were

exemplified in the *James* case. It also re-aligns the different heads of claim with their moral foundations.

For these reasons, my position is that the “sex related discrimination” model I have constructed in this thesis should be given legislative effect.

Section 6.5 - Conclusion

This thesis demonstrated that *James* was not an example of direct or indirect discrimination. Instead, the case was an example of “sex related discrimination.” By identifying this new head of claim, my view is that an “intermediate” head of claim is needed in sex discrimination law to deal with criterion-based cases like *James*. The “sex related discrimination” model holds significant promise for the law of sex discrimination in general (and perhaps other protected characteristics). Indeed, it was shown to be a better adjudicative model to decide the *James* case than the current definition of direct sex discrimination. In doing so, it also solved the broader moral, legal and structural problems with the law governing sex discrimination in the UK.

Consequently, my position is that my “sex related discrimination” definition should be given legislative effect via an amendment to the 2010 Act. As a result, I shall now move on to conclude the thesis.

Chapter 7 – Conclusion

7.1 Overview

My conclusion in this chapter is split into three separate sections. The first section will summarise the answers to each of the research questions posed in chapter 1. Consequently, the overarching question of the thesis will then be answered. This will then lead me on to the second section which describes how the thesis represents an original contribution to the existing literature. Section 7.3 then sets out further avenues for research which arise from this thesis.

7.2 Summary of findings

7.2.1 Research question 1 - does "related discrimination" exist outwith the protected characteristic of disability?

Chapters 2 and 3 engage with this research question.

Chapter 2 found that some apparent cases of direct race discrimination can be re-classified as "race-related discrimination." These cases have some common features. They involve "criterion-based" examples of so-called direct discrimination. In addition, the discrimination in these cases is neither on the grounds of a protected characteristic, nor is it based on the application of a neutral PCP. Instead, the discrimination is "related" to, or arises from, the protected characteristic.

Chapter 3 involved a detailed critical analysis of the House of Lords' decision in *James*. As a result, I reached the conclusion that *James* was also a "related discrimination" case. I then used the *James* decision as my test case because the Law Lords held that it was a direct sex discrimination case. Instead, my position is that it was a case of "sex related discrimination."

As a result, my critical examination of these cases demonstrates that “related discrimination” cases do exist, albeit still only on a conceptual plane, outwith the protected characteristic of disability. Indeed, the *James* analysis allowed me to delve deeper into this conceptual claim and the problems with the law on direct sex discrimination, as I shall come on to describe in the next sub-section.

7.2.2 Research question 2 - what are the main problems with direct sex discrimination law in the UK?

This question is also answered in chapter 3. I reach the conclusion that the moral wrongs underlying direct sex discrimination are not consonant with the legal position.

Direct sex discrimination is found to be morally wrongful because it breaches human dignity and the autonomy of the victim. It breaches human dignity by demeaning the victim. The victim’s autonomy is violated because the discriminator deprives the victim of a life opportunity based on human characteristics which have historically been subjected to socio-economic, cultural and political disadvantages.

By contrast, the legal position does not require a breach of autonomy or dignity before a finding of direct sex discrimination can be established. This is apparent from the decision in *James* which involved an unfortunate combination of the “but for” and “inherently discriminatory” tests. These tests, when combined, imposed a morally bankrupt standard in some criterion-based direct sex discrimination cases. Indeed, this meant that, even if the putative discriminator had benign motives *and reasons*, the act or omission in question could still amount to direct sex discrimination in some cases. Not only was this decision in stark contrast with the moral position on direct sex discrimination, but it also completely empties the law on direct sex discrimination of its moral content, thereby striking an uncomfortable and counterintuitive chord.

7.2.3 Research question 3 – can any of the pre-existing theories in the literature solve the main problems with direct sex discrimination law?

There are three theories in the existing literature which purport to resolve the difficulties with direct sex discrimination I identified in chapter 3. Bowers, Honeyball and Moran argue that a general defence to direct sex discrimination could perform this function.[651] Smith and Campbell contend that their "reasoning-oriented" approach is the most effective way to ease the problems.[652] In addition, Forshaw and Pilgerstorfer maintain that their "quasi-direct discrimination" theory can ease the tensions in this area of the law.[653]

I critically analyse each theory and find them unconvincing. As a result, I turned to a brief proposal by Fredman (in her earlier writing) that the transposition of the section 15 model to protected characteristics other than disability might help to bridge the conceptual gap between the direct and indirect sex discrimination claims. This then forms the focus of the thesis in chapters 5 and 6.

7.2.4 Research question 4 – what definitional components should be included in my "sex-related discrimination" model?

This question was addressed in chapter 5 of the thesis. I compared the comparator and causation requirements in section 15 of the 2010 Act with those found in section 3A of the repealed 1995 Act. With regard to the former, I concluded that the "unfavourable" criterion in section 15 was preferable to the "less favourable" treatment found in section 3A principally because it removed the unavoidable difficulties associated with the comparator requirement in the latter head of claim. With respect to causation, I also opted for the section 15 version over that found in section 3A. Moreover, I chose a strict interpretation of the section 15 causation test to counterbalance the relatively loose and subjective idea of "unfavourable treatment." I then moved on to the question of

[651] See section 4.2.
[652] See section 4.3.
[653] See section 4.4.

which defence to use (having established that a defence to the "related discrimination" claim was desirable).

As a result, I compared the "reasonable and substantial" test in section 3A against the proportionality test in section 15 and the strict "necessity" defence enunciated by the ECJ in the *Bilka* case. I quickly dismissed the "reasonable and substantial" test due to various problems with its wording and interpretation by the courts.

This led me on to the observation that the "necessity" test was the preferable defence for my "sex related discrimination" model. I took that position because the *Bilka* formulation is, by focusing on "necessity," most compatible with the underlying purposes of a proportionality defence. Indeed, the "necessity" test in *Bilka* requires that the measure taken by the putative discriminator be the least discriminatory option available.

By contrast, the UK approach only requires a "reasonableness" or "reasonable necessity" defence. This "reasonableness" requirement can be satisfied even when the measure adopted by the putative discriminator is not the least discriminatory option available. I argued that this reasonableness requirement inevitably creates a new "band" test which questions whether the treatment was within the bounds of "reasonable necessity." Of course, the operation of this "band" test is not in keeping with the logical standards of the proportionality test. It is logically contradictory to state, on one hand, that the measure is proportionate but then go on to state that there were other, less discriminatory alternatives available to the putative discriminator.

Finally, the "necessity" test also adheres more closely to the normative foundations of the discrimination claim than the "reasonableness" criterion. The "reasonableness" test, as laid down by unfair dismissal law,[654] confers the requisite level of protection for employees generally whilst a higher level of protection (and judicial scrutiny) is required for employees with protected

[654] Employment Rights Act 1996, s98(4)

characteristics. The “necessity” test provides those greater protective functions whilst the “reasonableness” test fails to do so.

Chapter 5 culminated with my findings that “sex-related discrimination” is a distinct head of claim with different moral foundations than direct and indirect sex discrimination and it also differs considerably from the positive action measures found in section 158 of the 2010 Act. Thereafter, I placed the respective claims on a “moral spectrum” to accentuate their differences.

7.2.5 Research questions 5 and 6 – can my “sex-related discrimination” model be applied to real cases? Can this application generate the “right outcome” in such cases?

In chapter 6 I applied my “sex-related discrimination” definition to the facts in the *James* case. The application resulted in Mr James being able to make out a *prima facie* claim of “sex-related discrimination”. However, this was then objectively justified by the “necessity” test. In that way, there was no “sex related discrimination” in the *James* case, as well as no direct or indirect sex discrimination. My position is that this is a preferable outcome in *James* when compared with the decision reached by the Law Lords using the dichotomous approach.

Moreover, the application of my definition to *James* also demonstrated that, if the Law Lords had the “sex related discrimination” provision at their disposal, they could have reached the right outcome (at least as I see it) using far more transparent reasoning than was actually employed in the respective judgments of the majority in *James*. Indeed, there would have been no need for the judges to invoke rather obscure tests such as the “but for” and “inherently discriminatory” tests. In addition, the Law Lords would not have had to engage in mental contortions to squeeze the facts in *James* within the direct sex discrimination category.

7.2.6 The overarching question posed by the thesis

Having now answered each of the research questions posed in the Introduction, I am very confident that the "sex related discrimination" claim should be introduced as a new head of claim in our system of sex discrimination laws. Of course, I do not expect that outcome to flow solely from the results in this thesis. Rather, I hope that, by raising these issues for the first time in a written academic context (which I shall come on to outline in more detail in the next section) this thesis will stimulate academic discussion and further research on the benefits of the application of the "related discrimination" model to protected characteristics other than sex (more of which will be described in section 7.4).

7.3 An original contribution to the literature

I am conscious that the thesis represents novel theoretical territory. To my knowledge, no other studies have sought to demonstrate how the "related discrimination" model could be transposed to protected characteristics other than disability. Moreover, there are no theories within the existing literature which provide detailed arguments as to why such a transposition could strengthen areas of anti-discrimination law other than disability discrimination. As such, the thesis breaks new ground and represents original terrain when supporting the need for a model of "sex related discrimination." However, on a wider scale, it also leaves the door open for more research on other protected characteristics, as I shall now go on to explain.

7.4 Areas for further research

Having established a conceptual chasm between direct and indirect discrimination, I argued that the cases which fell within it contained common characteristics. As mentioned above, they tended to be "criterion-based" cases of so-called direct discrimination. I suspect that only criterion-based (as

opposed to “reason-why” cases) fall within a gap between direct and indirect discrimination because of the architectural similarities between a criterion or policy and the “inherently discriminatory” test.

As a result, the “inherently discriminatory” test works in some criterion or policy-based acts of potential discrimination as the policy can be set aside as “inherently discriminatory” without the judge having to look at the reasons for (or behind) the policy.

By contrast, judges in “reason why” cases must ascertain the reason for the less favourable treatment. To do this, the judge must look, with a critical eye, at all of the circumstances of the case. This latter exercise is not compatible with the the “inherently discriminatory” test. I have not explored the reasons for the distinction in greater detail in this thesis, but I suggest it is a fruitful avenue for further research.

My view is that this thesis also sets out several other pathways for further research. The structural similarities between the three cases I critically examined in chapters 2 and 3,[655] I suggest, raises a rebuttable presumption that a “race-related discrimination” model could provide similar benefits to this other protected characteristic. These benefits, which I have already shown to apply to sex discrimination claims, include a more nuanced account of anti-discrimination law, as opposed to the strictly dichotomous view that currently prevails. In turn, they also point towards a wider range of litigation options for claimants by filling an apparent conceptual “gap” in these areas of law. Moreover, they could also be used to promote judicial flexibility and transparency in the same way as the “sex-related discrimination” model does.

As a result, I hope that this thesis does three things. First, that it strengthens the case for legislative reform of our current sex discrimination laws by including a statutory provision on “sex related discrimination.” Second, I would like it to stimulate academic discussion on the potential importance of the

[655] *James* (n.35); *Amnesty* (n.36); *JFS* (n.36).

“related discrimination” model to protected characteristics other than disability. Finally, I also wish to encourage others to take up the mantle of exploring these topics in greater detail. Given that I have confined my arguments to one protected characteristic, it is hoped that others will explore the significance of the “related discrimination” claim to other protected characteristics, such as race, in the 2010 Act.

Bibliography

Adams, M, ‘Doing What Doesn’t Come Naturally. On the Distinctiveness of Comparative Law’ in Van Hoeke M, (ed.) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Bloomsbury 2013)

Adams, M, Bomhoff, J, ‘Comparing Law: Practice and Theory’ in Adams, M, Bomhoff, J, *Practice and Theory in Comparative Law* (Cambridge University Press 2012)

Adams, Z, Barnard, C, Deakin, Butlin, SK, *Deakin and Morris’ Labour Law* (7th edn, Hart Publishing 2021)

Allan R, Moon, G, ‘Dignity discourse in discrimination law: a better route to equality?’ (2006) 6 EHRLR 610

Auckland, C, ‘A facade of futility’ (2021) 137 (LQR) 451

Baker, A ‘Proportionality and Employment Discrimination in the UK’ (2008) 37(4) ILJ 305

_ _ ‘The "range of reasonable responses" test: a poor substitution for the statutory language’ (2021) 50(2) ILJ 226

Bamforth, N ‘Approaching the Indirect–Direct Discrimination Distinction: Concepts, Justifications and Policies’ in Hugh Collins and Tarunabh Khaitan (eds.) *Foundations of Indirect Discrimination Law* (Hart Publishing 2018)

Barmes, L, ‘Promoting diversity and the definition of direct discrimination’ (2003) 32(3) ILJ 200

Barnard, C, Hepple, B, ‘Indirect discrimination: interpreting Seymour-Smith' (1999) 58(2) CLJ 399

Bechtold, E, ‘Scotland’s new Hate Crime Act imperils freedom of expression’ (2022) 26(2) Edin LR 250

Bedford, D, ‘Key cases on human dignity under article 3 of the ECHR’ (2019) 2 EHRLR 185

_ _ ‘Human Dignity in Great Britain and Northern Ireland’ in Becchi, P, Mathis, K, *Handbook of Human Dignity in Europe* (2nd edn Springer International Publishing 2020)

Bell, J, ‘Legal Research and the Distinctiveness of Comparative Law’ in Van Hoeke, M (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Bloomsbury 2013)

Ben-Shahar, T, Paz-Fuchs, A, ‘Separate but Equal Reconsidered: Religious Education and Gender Separation’ (2019) 19 Human Rights Law Review 369

Bhailis de, C, Flynn, E, ‘Recognising legal capacity: commentary and analysis of article 12 CRPD’ (2017) 13(1) Int. J.L.C. 6

Biggs, H, ‘From dispassionate law to compassionate outcomes in health-care law, or not’ (2017) 13(2) Int JLC 172

Bogg, A, Costello, C, Davies, A.C.L., *Research Handbook in EU Labour Law* (Edward Elgar Publishing 2016)

_ _ *Doctrinal Method in Labour Law: Potential, Problems, Prospects* (forthcoming)

Bowers, J, Moran, E, ‘Justification in direct sex discrimination law: breaking the taboo’ (2002) 31(4) ILJ 307

_ _ Honeyball, S, ‘Justification in direct sex discrimination: a reply’ (2003) 32(3) ILJ 185

Bowes, A, ‘Can Religion Be Racially Discriminatory’ (2009) 10 Int'l J Discrimination & L 149

Brodtkorb T, 'Employee misconduct and UK unfair dismissal law: does the range of reasonable responses test require reform?' (2010) 52(6) Int JLM 429

Butlin, SK, 'The UN Convention on the Rights of Persons with Disabilities: does the Equality Act 2010 measure up to UK international commitments?' (2011) 40(4) ILJ 428

Hutchinson, T, 'Doctrinal Research – Researching the Jury' in Burton, M, Watkins, D, (eds.) *Research Methods in Law* (2nd edn Routledge 2018)

Cabrelli, D, 'The hierarchy of differing behavioural standards of review in labour law' (2011) 40(2) ILJ 146

_ _ 'Rules and standards in the workplace: a perspective from the field of labour law' (2011) 31(1) LS 21

_ _ 'The devolution of competence in equalities law' (2016) 20(3) Edin L R 372

_ _ *Employment Law: Texts and Materials* (4th edn Oxford University Press 2020)

Campbell, C, Smith, D, 'Direct Discrimination without a Comparator: Moving to a Test of Unfavourable Treatment' (2015) 43 Fed L Rev 91

_ _ 'The grounding requirement for direct discrimination' (2020) 136(Apr) LQR 258

_ _ 'Distinguishing between Direct and Indirect Discrimination' (2023) 86(2) MLR 307

Carozza, P, 'Human dignity and judicial interpretation of human rights: a reply' (2008) 19(5) EJIL 931

Cavanagh, M, *Against Equality of Opportunity* (Oxford University Press 2002)

Charlton, J, 'Are discrimination arising from disability claims an easy route to employment tribunal wins?' Employer's Law [2016] 12

Collins, H, ‘Discrimination, Equality and Social Inclusion’ (2003) 66 MLR 16

_ _ ‘Social inclusion: A Better Approach to Equality Issues’ (2005) 14 Transnat’l L & Contemporary Problems 897

_ _ ‘Objective Justification, Less Discriminatory Alternatives and the Great Repeal Bill’ (2017) 17(3) Int’l J Discrimination & Law 195

_ _ Khaitan, T, (eds) *Foundations of Indirect Discrimination Law* (Hart Publishing 2018)

_ _ Khaitan T, ‘Justification of Indirect Discrimination’ in Hugh Collins and Tarunabh Khaitan (eds) *Foundations of Indirect Discrimination Law* (Hart Publishing 2018)

_ _, _ _ ‘Indirect Discrimination Law: Controversies and Critical Questions’ in Hugh Collins and Tarunabh Khaitan (eds) *Foundations of Indirect Discrimination Law* (Hart Publishing 2018)

_ _ Ewing, KD, McColgan, A, *Labour Law* (2nd edn Cambridge University Press 2019)

Connolly, M, ‘Discrimination Law: Justification, Alternative Measures and Defences Based on Sex’ (2001) 30(3) ILJ 311

_ _ Townsend-Smith, R, *Townshend-Smith on Discrimination Law: Text, Cases and Materials* (Taylor and Francis Publishing 2004)

_ _ ‘Discriminatory Motive and the but for Test: The Proper Approach to Direct Discrimination in Britain and the United States’ (2007) 9 Int'l J Discrimination & L 37

_ _ ‘The Multiple Definitions of Harassment and Direct Discrimination: A Pandora's Attic’ *(*2009) 10 Int'l J Discrimination & L 101

_ _ Racial groups, the “but for” test, benign motives, and distinguishing indirect discrimination (2010) 95(Feb) Emp LB 2

_ _ ‘Objective Justification, Less Discriminatory Alternatives and the ‘Great Repeal Bill’’ (2017) 17 Int’l J Discrimination & L 195

_ _ ‘Discrimination law review 2018’ (2019) 149 Emp LB 5

_ _ *The English Judiciary, Discrimination Law and Statutory Interpretation* (Routledge 2019)

_ _ ‘Discrimination law review 2019’ (2020) 155 Emp LB 2

_ _ *Equality, Discrimination and the Law* (Routledge 2022)

Corby, S, Pauksztat, B, William, L, ‘Justice Obtained? How disabled claimants fare at Employment Tribunals’ (2019) 15(4) Industrial Relations Journal 314

_ _ William, L, Richard, S, ‘Combatting disability discrimination: a comparison of France and Great Britain’ (2019) 25(1) EJIL 41

Cunningham, N, ‘Indirect discrimination: between the wheat and the chaff’ (2009) 38(2) ILJ 209

Davies, J, ‘A cuckoo in the nest? A “range of reasonable responses” justification and the Disability Discrimination Act 1995’ (2003) 32(3) ILJ 64

Davies, ACL, *Perspectives on Labour Law* (2nd edn Cambridge University Press 2009)

_ _ ‘Judicial self-restraint in Labour Law’ 2009 38(3) ILJ 278

Davies, J, ‘Positive action under the Equality Act 2010: beyond voluntary’ (2015) 126 Emp L Bulletin 2

Department for Work and Pensions, ‘The Gender Pensions Gap in Private Pensions’ June 2023 <https://www.gov.uk/government/statistics/gender-pensions-gap-in-private-pensions/the-gender-pensions-gap-in-private-pensions#:~:text=The%20Gender%20Pensions%20Gap%20is,men%20and%20women%20around%20NMPA%20> accessed 1 December 2023

Dickson, J, 'Methodology in Legal Philosophy' in Carpentier, M, (ed.) *Meta-Theory of Law* (Wiley 2022)

Disability Rights Commission, 'Code of Practice on the Disability Discrimination Act 1995 – Employment and Occupation' <https://wypf.polfed.org/wp-content/uploads/2013/10/DRC-Employment-Code.pdf> accessed 27 June 2023

Dobinson, I, Johns, F, 'Legal Research as Qualitative Research' in Hong Chui M, McConville, M, (eds.) *Research Methods in Law* (2nd edn. Edinburgh University Press 2017)

Douglas, B, 'Undignified rights: the importance of a basis in dignity for the possession of human rights in the United Kingdom' (2015) 2(2) PL 241

Doyle, O, 'Direct Discrimination, Indirect Discrimination and Autonomy' (2007) 27 OJLS 537

Duff, RA, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing 2007)

_ _ Green, SP, (eds) *Philosophical Foundations of Criminal Law* (Oxford University Press 2011)

Dupre, C, 'Human dignity and the withdrawal of medical treatment: a missed opportunity?' (2006) 6 EHRLR 678

_ _ 'Unlocking human dignity: towards a theory for the 21st century' (2009) 2 EHRLR 190

_ _ '"Human dignity is inviolable. It must be respected and protected": retaining the EU Charter of Fundamental Rights after Brexit' (2018) 2 EHRLR 101

_ _ 'Making human dignity work' (2019) 2 EHRLR 115

Ronald Dworkin, *Taking Rights Seriously* (first published 1977, Bloomsbury 2013)

Editorial, ‘Comparator is a person with an infectious disease: High Quality Lifestyles Ltd v Watts: EAT’ (2006) 806 IDS Emp L Brief 3

_ _ ‘Motive irrelevant when treatment is on ground of race: Amnesty International v Ahmed: EAT’ (2009) 888 IDS Emp L Brief 5

_ _ ‘Response to ‘dangerous’ mental illness was lawful: Aitken v Commissioner of Police of the Metropolis: EAT’ (2010) 905 IDS Emp L Brief 5

_ _ ‘Comparison should exclude behaviour stemming from disability: Aylott v Stockton-On-Tees Borough Council’ (2010) 908 IDS Emp L Brief 5

_ _ ‘Equality Act 2010 – will it make any difference?’ (2010) 910 IDS Emp L Brief 2

_ _ ‘Jewish school’s admissions policy was discriminatory on racial grounds: R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS: Supreme Court’ (2010) 898 IDS Emp L Brief 9

_ _ ‘Dismissal for viewing pornography was unfair: City of Edinburgh Council v Dickson: EAT’ (2010) 899 IDS Emp L Brief 7

_ _ ‘Disability discrimination’ (2011) 916 IDS Emp L Brief 18

_ _ ‘Court of Appeal dismisses direct disability discrimination claim: JP Morgan Europe Ltd v Chweidan: Court of Appeal’ (2012) 960 IDS Emp L Brief 7

_ _ ‘Disability discrimination: tribunal did not consider alleged discriminator’s knowledge of disability’ (2013) 985 IDS Emp L Brief 13

_ _ ‘Employment law review 2013 – disability discrimination’ (2014) 988 IDS Emp L Brief 20

_ _ ‘Disability discrimination: wrong approach taken to constructive knowledge’ (2014) 990 IDS Emp L Brief 11

_ _ ‘Discrimination: hotel’s room policy directly discriminated against gay couple’ (2014) 989 IDS Emp L Brief 3

_ _ ‘Employment Law Review – 2014’ (2015) 1012 IDS Emp L Brief 14

_ _ ‘Denial of bonus because of sickness absence warning was discriminatory’ (2015) 1017 IDS Emp L Brief 17

_ _ ‘Disability discrimination: unfavourable treatment not the same as detriment’ (2015) 1031 IDS Emp L Brief 5

_ _ ‘In praise of disability discrimination law’ (2015) 1033 IDS Emp L Brief 2

_ _ ‘Disability discrimination: “loose” causation test for discrimination arising from disability’ (2015) 1034 IDS Emp L Brief 5

_ _ ‘Disability discrimination: EAT guidance on discrimination arising from disability’ (2015) 1035 IDS Emp L Brief 14

_ _ ‘Employment law review 2015 – discrimination’ (2016) 1036 IDS Emp L Brief 18

_ _ ‘Disability discrimination: disciplinary sanctions subject to reasonable adjustments duty’ (2016) 1037 IDS Emp L Brief 3

_ _ ‘Disability discrimination: EAT considers causation in context of s.15 EqA discrimination’ (2016) 1047 IDS Emp L Brief 5

_ _ ‘Disability discrimination / unfair dismissal: like-with-like comparison inappropriate’ (2016) 1056 IDS Emp L Brief 7

_ _ ‘Supreme Court resets indirect discrimination law’ (2017) 1068 IDS Emp L Brief 2

_ _ ‘Discrimination: Supreme Court overturns Court of Appeal on indirect discrimination’ IDS (2017) 1068 Emp L Brief 3

_ _ ‘Redundancy after sick leave was not discrimination arising from disability’ (2017) 1072 IDS Emp L Brief 11

_ _ ‘Disabled employees - dealing with misconduct’ (2017) 1079 IDS Emp L Brief 12

_ _ ‘Managing disability-related absence’ (2017) 1080 IDS Emp L Brief 12

_ _ ‘Practice and procedure: amendment of disability claim more than a mere relabelling exercise’ (2018) 1094 IDS Emp L Brief 14

_ _ ‘Dealing with persistent short-term absences’ (2018) 1095 IDS Emp L Brief 11

_ _ ‘Disability discrimination: knowledge of consequences of disability not required’ (2018) 1096 IDS Emp L Brief 8

_ _ ‘Errors to approach in causation in disability discrimination claims’ (2018) 1104 IDS Emp L Brief 11

_ _ ‘Disability discrimination: basing pension on part-time salary was not unfavourable’ (2019) 1109 IDS Emp L Brief 15

_ _ ‘Discrimination - positive action’ (2019) 1113 IDS Emp L Brief 30

_ _ ‘Dismissal may be discriminatory even if employer does not know of disability until appeal hearing’ (2019) 1115 IDS Emp L Brief 21

_ _ ‘Discrimination’ (2019) 1120 IDS Emp L Brief 8

_ _ ‘Sex discrimination claim based on maternity pay did not require comparator’ 1121 (2020) IDS Emp L Brief 24

_ _ ‘Capping exit payments was discriminatory’ (2020) 1124 IDS Emp L Brief 21

_ _ ‘Tribunal incorrectly focused on decision-making process in s.15 EqA claim’ (2020) 1127 IDS Emp L Brief 9

_ _ ‘Employee suffering from paranoid delusions did not have disability’ (2020) 1130 IDS Emp L Brief 11

_ _ ‘The Equality Act 2010 – ten years on’ (2020) 1130, IDS Emp. L. Brief 2

_ _ ‘Discrimination’ (2020) 1132 IDS Emp. L. Brief 15

_ _ ‘Tribunal failed to demonstrate “critical evaluation” on justification’ (2022) 1145 IDS Emp L Brief 19

_ _ ‘Dismissal procedure not irrelevant to assessment of proportionality under s.15 EqA’ (2022) 1151 IDS Emp L Brief 14

Editorial, ‘Racial groups, sub-groups, the demise of the but for test and the death of the benign motive defence’ (2010) 39(2) ILJ 183

Editorial, ‘The Equality Act 2010 - observations on the disability provisions’ (2011) 101 Emp L Bulletin 2

_ _ ‘The Equality Act 2010: impact on mental health-related disability claims’ (2012) 109 Emp L Bulletin 2

Ehrenberg, K, ‘Functions in Jurisprudential Methodology’ (2013) Philosophy Compass 447 - 456

Eidelson, B, ‘Treating People as Individuals’ in Deborah Hellman and Sophie Moreau (eds.) *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013)

Ellis, E, ‘Can public safety provide an excuse for sex discrimination?’ (1986) 102 LQR 496

_ _ Watson, P *EU Anti-Discrimination Law* (2nd edition, Oxford University Press, 2012)

Emir, A, *Selwyn's Law of Employment* (22nd edition, Oxford University Press 2022)

Equality Act 2010 Explanatory Notes <www.legislation.gov.uk/ukpga/2010/15/notes> accessed 17 May 2024

Equality and Human Rights Commission, 'Guidance on the Equality Act 2010' (https://www.equalityhumanrights.com/en/advice-and-guidance/equality-act-guidance) accessed 18 August 2023

_ _ 'Code of Practice on Employment' Stationery Office Limited, 2011 <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf> accessed 28 June 2023

Feldman, D, 'Human dignity as a legal value: Part 1' (1999) Win. PL 682

_ _ 'Human dignity as a legal value: Part 2' (2000) Spr. PL 61

Finch, E, Fafinski, S, *Tort Law* (Pearson 2021)

Finnis, J.M, 'Directly discriminatory decisions: a missed opportunity' (2010) 126 L.Q.R. 491

Forshaw, S, Pilgerstorfer, M, 'Direct and indirect discrimination: is there something in between?' (2008) 37(4) ILJ 347

Foster, D, Scott, P, 'Nobody's responsibility: the precarious position of disabled employees in the UK workplace' (2016) 46(4) Industrial Relations Journal 328

Fredman, S, 'Equality: A New Generation?' (2001) 30(2) ILJ 145

_ _ *Discrimination Law* (2nd edn Oxford University Press 2011)

_ _ 'Addressing disparate impact: indirect discrimination and the public sector equality duty' (2014) 43(3) ILJ 349

_ _ 'The reason why: unravelling indirect discrimination' (2016) 45(2) ILJ 231

_ _ ‘Direct and Indirect Discrimination: Is There Still a Divide?’ in Hugh Collins and Tarunabh Khaitan (eds.) *Foundations of Indirect Discrimination Law* (Hart Publishing, 2018)

_ _ *Discrimination Law* (3rd edn. Oxford University Press 2022)

Freeman, M.D.A. *Lloyd’s Introduction to Jurisprudence* (Sweet & Maxwell 1994)

Friedman, D, ‘A common law of human rights: history, humanity and dignity’ (2016) 4 EHRLR 378

Gardner, J, ‘Discrimination as Injustice (1996) 16(3) OJLS 353’

_ _ On the Ground of Her Sex(uality) (1998) 18 OJLS 167

_ _ ‘Discrimination: the good, the bad and the wrongful’ Meeting of the Aristotelian Society, 30 October 2017

Gill, T, Monaghan K, ‘Justification in Direct Sex Discrimination Claims; Taboo Upheld’ (2003) 32(2) ILJ 115

Gooding, C, *Blackstone’s Guide to the Disability Discrimination Act 1995* (Blackstone Press 1996)

Gordon, G, *The Criminal Law of Scotland* (W Green & Son 1978)

Gray, R, ‘Direct Discrimination: Redemption by General Defence’ (2018) 3 Edinburgh Student L Rev 68

Green, S, Gardner J, *Tort Law* (Red Globe Press 2021)

Griffin, J, ‘First Steps in an Account of Human Rights’ (2001) 9(3) European Journal of Philosophy 306

_ _ *On Human Rights*, (Oxford University Press 2008)

Hage, J, 'Comparative Law as Method and the Method of Comparative Law' in Adams, M, Heirbaut, D (eds.) *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoeke* (Hart Publishing 2014)

Hale, Lady, 'Dignity', Ethel Benjamin Commemorative Address 2010, <https://www.supremecourt.uk/docs/speech_100507.pdf> accessed 24 November 2022.

Hale, Lady 'Religion and Sexual Orientation: The clash of equality rights' (Speech at the Comparative and Administrative Law Conference, Yale Law School, 7 March 2014) <https://www.supremecourt.uk/docs/speech-140307.pdf> accessed 18 August 2023

Halls, K, 'Trends in female representation on the UK's top companies' boards' 14 November 2022, <https://www.linklaters.com/it-it/insights/blogs/employmentlinks/2022/november/trends-in-female-representation-on-the-uks-top-companies-boards> accessed 27 December 2023

Hannant, T, 'Still undignified rights: a disagreement with Benedict Douglas' (2016) Oct. PL 555

Haynes, A, Schweppe, J, 'You can't have one without the other one: "gender" in hate crime legislation' (2020) 2 Crim LR 148

Hellman, D, *When is Discrimination Wrong?* (Harvard University Press 2011)

_ _ 'Equality and Constitutional Discrimination' in Deborah Helman and Sophie Moreau (eds.) *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013)

_ _ 'Three ways of failing to treat others as equals: comments on Sophie Moreau's Faces of Inequality' (2021) 12(4) Jurisprudence 562

_ _ ‘Indirect Discrimination and the Duty to Avoid Compounding Injustice’ in Hugh Collins and Tarunabh Khaitan (eds.) *Foundations of Indirect Discrimination Law* (Hart Publishing 2018)

Henderson, C, Lockwood, G, Thornicroft, G, ‘Mental health disability discrimination: Law, policy and practice’ (2014) 14(3) Int’l J Discrimination & L 168

Hepple, B, *Equality: The Legal Framework* (Hart Publishing 2014)

Her Majesty’s Government, *The Equality Bill – Government Response to the Consultation (*Cm 7454, July 2008) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/238707/7454.pdf> accessed 22 May 2023

Honeyball, S, ‘Employment Law and the Appellate Committee of the House of Lords’ (2005) 24 CJQ 364

Horton, R, ‘The end of disability-related discrimination in employment?’ 2008, 37(4) ILJ 376 – 83

House of Commons Library, ‘Female Members of Parliament’ 23 October 2023 <https://commonslibrary.parliament.uk/research-briefings/sn06652/#:~:text=There%20are%20currently%20225%20MPs,elected%20was%20Constance%2C%20Countess%20Markievicz> accessed 29 February 2024

Husak, D, *The Philosophy of Criminal Law: Selected Essays* (Oxford University Press 2010)

Ingleby, R, Lane, J, ‘Indirect discrimination, justification and proportionality: are UK claimants at a disadvantage?’ (2018) 47(4) ILJ 531

Keane, E, ‘Withdrawal of life support for patients in PVS’ (2011) 17(2) MJLI 83

Jenkins, S, *'I'm a Garrick member. The exclusion of women is the opposite of liberal. It is out of date and wrong.'* The Guardian (London, 27 March 2024).

Keen, S, 'Employment: Comparing Comparators' (2011) 161 NLJ 308

Kentridge, J, 'Direct and indirect discrimination after Enderby' (1994) Sum. PL 198

Kestemont, L, *Handbook on Legal Methodology: From Objective to Method* (Cambridge University Press 2022)

Khaitan, T, *A Theory of Discrimination Law* (Oxford University Press 2015)

_ _, Sandy Steel 'Wrongs, Group Disadvantage and the Legitimacy of Indirect Discrimination Law*'* in Hugh Collins and Tarunabh Khaitan (eds.) *Foundations of Indirect Discrimination Law* (Hart Publishing, 2018)

Kilodny, N, 'Discrimination, subordination and pluralism' (2021) 12(4) Jurisprudence

Kotz, H, Zweigert, K, *An Introduction to Comparative Law* (3rd edn. Oxford University Press 1998)

Lawson, A, 'The EU rights-based approach to disability' (2005) Vol. 6 Int'l J Discrimination & L 269

_ _ 'Disability and employment in the Equality Act 2010: opportunities seized, lost and generated' (2011) 40(4) ILJ 359

Lippert-Rasmussen, K, 'Moreau on discrimination: pluralism, equality and the experience of discrimination' (2021) 12(4) Jurisprudence, 579

Lombard, J, 'Navigating the decision-making framework for patients in a minimlly conscious state' (2016) 22(2) MLJI 78

London Stock Exchange, Celebrating the 50th anniversary of women's admittance to the London Stock Exchange trading floor

<https://www.londonstockexchange.com/discover/news-and-insights/celebrating-50th-anniversary-womens-admittance-london-stock-exchange-trading-floor> accessed 15 January 2024

Lourie, J, Roll, J, 'Disability Discrimination Bill 1994/95, Research Paper 95/9' House of Commons, 19 January 1995 <https://researchbriefings.files.parliament.uk/documents/RP95-9/RP95-9.pdf> accessed 18 August 2023

Mair, J, 'Direct Discrimination: Limited by Definition?' (2009) 10 Int'l J Discrimination & L 3

Manison, N, 'Discrimination in the workplace: reasonable adjustments and discrimination arising from disability' (2016) 133 Emp LB 2

Mason, JK, Laurie, G, 'Personal autonomy and the right to treatment: a note on R (on the application of Burke) v General Medical Council (2005) 9(1) Edin LR 123

Mason, L, 'Does the decision in Griffiths v DWP mean an employer can discipline disabled staff on sick leave?' Employer's Law [2014] 17

May, J, Daly, E, 'Why dignity rights matter' (2019) 2 EHRLR 129

McColgan, A, 'Cracking the comparator problem: discrimination, "equal" treatment and the role of comparisons' (2006) 6 EHRLR 650

_ _ 'Reconfiguring discrimination law' (2007) Spr. PL 74

_ _ Discrimination, Equality and the Law (Hart Publishing 2014)

_ _ Discrimination Law: Texts, Cases and Materials (Hart Publishing 2023)

McConnachie, C, 'Human Dignity, Unfair Discrimination and Guidance' (2014) 34 OJLS 609

McCrudden, C, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19(4) EJIL 655

_ _ 'Indirect Religious Discrimination: Resisting the Temptations of Premature Normative Theorization' (2021) 34 Harv Hum Rts J 249

Middlemiss, S, ‘Shall I Compare Thee? The legal dilemma: The Choice of Comparators in Discrimination Cases’ (2000) 4 Int’l J Discrimination & L 293

Monaghan, K, ‘Limitations and Opportunities: a review of the likely domestic impact of Article 14 ECHR’ (2001) 2 EHRLR 167

Monateri, P, *The Structures of Comparative Law: Metaphors and Methods,* 15 November 2022 <https://ascl.org/the-structures-of-comparative-law-metaphors-and-methods/> accessed 10 January 2024

Moon, G, ‘From equal treatment to appropriate treatment: what lessons can Canadian equality law on dignity and on reasonable accommodation teach the United Kingdom?’ (2006) 6 EHRLR 695

Moran, E ‘Justifying Direct Discrimination: An analysis of the scope for a general justification defence in cases of sex discrimination’ (DPhil thesis, University College London, 2000) <https://www.proquest.com/docview/1757993735parentSessionId=MZr0fbsUsr9Z0SO4BIihOXRdpyPIeS49vNhHKSWX1IM%3D&pq-origsite=primo&accountid=10673> accessed 18 August 2023

Moreau, S, Hellman, D, (eds.) *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013)

_ _ ‘In Defence of a Liberty-based Account of Discrimination’ in Deborah Hellman and Sophie Moreau (eds.) *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013)

_ _ ‘The Moral Seriousness of Indirect Discrimination’ in Hugh Collins and Tarunabh Khaitan (eds.) *Foundations of Indirect Discrimination Law* (Hart Publishing 2018)

_ _ *Faces of Inequality: A Theory of Wrongful Discrimination* (Oxford University Press 2020)

_ _ ‘Reply to Critics’ (2021) 12(4) Jurisprudence 598

_ _ ‘Virtuously Discriminating: John Gardner’s Contributions to Discrimination Theory’ in Dempsey, MM and Tanguay-Renaud F (eds.) *From Morality to Law and Back Again: A Liber Amicorum for John Gardner* (Oxford University Press 2023)

Moss, K, ‘Post-Pnaiser Protection’ (2017) 167 NLJ 13

Mulder, J, *EU Non-Discrimination Law in the Courts: Approaches to Sex and Sexualties Discrimination in EU Law* (Hart Publishing 2016)

Munby, J, ‘why do we ignore dignity? Some comments’ (2019) 2 EHRLR 119

Nisbet, I, ‘Autism and the Equality Act’ (2016) 133 Emp LB 6

O'Cinneide, C, ‘The Uncertain Foundations of Contemporary Anti-Discrimination Law’ (2011) 11 Int'l J Discrimination & L 7

Office of National Statistics *Gender Pay Gap in the UK: 2022* <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/genderpaygapintheuk/2022)> accessed 27 December 2023

Oxford Open Education, ‘Women’s Education in Britain: A Brief History’ <*https://www.ool.co.uk/blog/womens-education-in-britain-a-brief-history/* > accessed 27 December 2023

Pendleton, M, ‘Rejecting the Dominance of Empirical Legal Scholarship: A Better Way of Choosing, Researching and Writing a Scholarly Article’ in Hong

Chui M, McConville, M, (eds.) *Research Methods in Law* (2nd edn. Edinburgh University Press 2017)

Phillips, G, Scott, K, *Employment Law 2021* (College of Law Publishing 2021)

Placencia, V.M., '"Not as bad as..." the concept of disadvantage in the justification of positive action under UK anti-discrimination law' (2020) 9(1) UCL J.L. and J. 85

Ragone, S, Smorto, G, *Comparative Law: A Very Short Introduction* (Oxford University Press 2023)

Reaume, D, 'Harm and fault in discrimination law: the transition from intentional to adverse effect discrimination' (2001) 2(1) Theoretical Inquiries in Law 13

_ _ 'Dignity, Equality and Comparison' in Deborah Hellman and Sophie Moreau (eds.) *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013) 7

Reid, E *The law of delict in Scotland* (Edinburgh University Press 2022)

Raz, J, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979)

Roberts, P, 'Caring for the Disabled – New Boundaries in Disability Discrimination' (2009) 72 MLR 635

_ _ *Reflections on the first 25 years of disability discrimination legislation* (2021) 161 Emp LB 3

Roberts, P, 'Interdisciplinarity in Legal Research' in Hong Chui M, McConville, M, (eds.) *Research Methods in Law* (2nd edn. Edinburgh University Press 2017)

Rutherglen, G, 'Concrete or Abstract Conceptions of Discrimination?' in Deborah Hellman and Sophie Moreau (eds.) *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013)

Sanguiliano, A, 'Bottom-Up and Top-Down Theories of Antidiscrimination Law' (2022) 42(4) OJLS 1188

Selmi, M, 'Indirect Discrimination and the Anti-discrimination Mandate' in Deborah Hellman and Sophie Moreau (eds.) *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013)

Shiffrin, SV, 'Burdens on deliberative freedom' (2021) 12(4) Jurisprudence 575

Shin, P 'Is there a Unitary Concept of Discrimination?' in Deborah Helman and Sophie Moreau (eds.) *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013)

_ _ 'The substantive principle of equal treatment' (2009) 15 LEG 149

Siems, M*, Comparative Law* (3rd edn. Cambridge University Press 2022)

Smith, J, 'Diversity in the Legal Profession' Prospects Magazine (University of Law) July 2023 edition

<https://www.prospects.ac.uk/jobs-and-work-experience/job-sectors/law-sector/diversity-in-the-legal-profession#:~:text=the%20HR%20department.-,Gender,female%20only%2035%25%20are%20partners> accessed 27 December 2023

Solanke, I, *Discrimination as Stigma: A Theory of Anti-Discrimination Law* (Hart Publishing 2017)

Solicitors' Regulation Authority, 'Diversity in Law Firms' Workforce, Report from the SRA' Updated January 2024. <https://www.sra.org.uk/sra/equality-diversity/diversity-profession/diverse-legal-profession/> (accessed 29 February 2024)

Taekema, S 'Theoretical and Normative Frameworks for Legal Research for Legal Research: Putting Theory into Practice' Law and Method, 7 March 2018

<https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2018/02/lawandmethod-D-17-00010> accessed 15 January 2024

Taylor, A, *interpreting Discrimination Law Creatively: Statutory Discrimination Law in the UK, Canada and Australia* (Hart Publishing 2023)

University College London Historical Archives – *Women and Education* <https://www.ucl.ac.uk/library/collections/special-collections/our-collections/archives-and-manuscripts/ioe-archives/women-and> accessed 27 December 2023

Van Hoeke, M, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' In Van Hoeke, M (ed.) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Bloomsbury 2013)

Waldron, J, 'How law protects dignity' (2012) 71(1) CLJ 200 – 222

Ward, A, 'Abolition of guardianship? "Best interests" versus "best interpretation" (2015) 32 SLT 150

Wasserman, M, 'Is disability discrimination different?' in Deborah Hellman and Sophie Moreau (eds.) *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013)

Wells, K, 'The impact of the Framework Employment Directive on UK disability discrimination law' (2003) 32(4) ILJ 253

Westen, P, 'The Empty Idea of Equality' (1982) 95 Harv L Rev 537

Whitman, 'Human dignity: comparative and conceptual debates' (2010) 6(2) Int JLC 117

Wilson, G, 'Comparative Legal Scholarship' in Hong Chui M, McConville, M, (eds.) *Research Methods in Law* (2nd edn. Edinburgh University Press 2017)

Wintemute, R, ‘Sex Discrimination in MacDonald and Pearce: Why the Law Lords chose the Wrong Comparators’ (2003) 14(2) KCLJ 267

Zak, Sean, “*At Muirfield, the most symbolic major in years, things are still complicated*” <https://golf.com/news/muirfield-womens-open-still-complicated> accessed 27 December 2023