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SUBSTANTIVE EQUALITY

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To what extent is EC and UK equality law moving away from liberal notions of non-discrimination towards an approach based on substantive equality or equity? This article seeks to answer this question by providing a critical analysis of recent judicial and legislative developments in three areas: (1) indirect discrimination; (2) the scope of permitted positive action in favour of disadvantaged groups; and (3) the rights of part-time workers to equal treatment with full-timers, and of workers on fixed-term contracts to equal treatment with permanent workers. But first, it is necessary to restate some basic concepts which feature in the forensic and legislative arguments about equality.

I. CONCEPTS OF EQUALITY

The liberal conception of formal equality is one of consistency—likes must be treated alike. This is reflected in the concept of "less favourable treatment" ("direct discrimination") on grounds of sex[1] in the Sex Discrimination Act 1975 (SDA),[2] on racial grounds[3] in the Race Relations Act 1976 (RRA),[4] on grounds of religion or political opinion in the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO),[5] and, for a reason related to a person's disability in the Disability Discrimination Act 1995 (DDA).[6] It is also central to the principle of equal pay for male and female workers under Article 141 (ex-Art. 119) of the EC Treaty,[7] the principle of equal treatment of women and men under the Equal Treatment Directive 1976,[8] between persons irrespective

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[1] This includes discrimination against married persons on grounds of their marital status, and also gender reassignment, the latter under the Sex Discrimination (Gender Reassignment) Regulations 1999, S.I. 1102 (and in Northern Ireland, S.R. 1999/311) implementing the E.C.J.'s decision in Case C-13/94 *P* v. *S and Cornwall County Council* [1996] E.C.R. I-2143.
[2] S. 1(1)(a); Sex Discrimination (Northern Ireland) Order 1976, No.1042 (N.I.15), art. 3(1)(a).
[3] Defined as any of the following: colour, race, nationality, ethnic or national origins: RRA, s. 3(1).
[4] S. 1(1)(a); Race Relations (Northern Ireland) Order 1997, No. 869 (N.I.16), art. 3(1)(a).
[5] S.I. 3162 (N.I.21).
[6] S. 5(1)(a).
[7] See too, Equal Pay Act 1970, s.1 (equal treatment of men and women in respect of contractual terms).
[8] Council Directive 76/207/EC (OJ [1976] L 39/40).

of racial or ethnic origin under the "Race" Directive adopted in June 2000,[9] and between persons irrespective of religion or belief, disability, age or sexual orientation, by virtue of a proposed "framework" Directive, under Article 13 of the EC Treaty, for equal treatment in employment and occupation. This principle of consistency has likewise been utilised under regulations implementing EC Directives on the treatment of part-time workers[10] and workers under fixed-term contracts.[11]

The concept of consistent treatment used in all these legal instruments embodies a notion of procedural justice which does not guarantee any particular outcome. So there is no violation of the principle if an employer treats white and black workers equally badly,[12] or sexually harasses both men and women to the same extent.[13] A claim to equal treatment can be satisfied by depriving both the persons compared of a particular benefit (levelling down) as well as by conferring the benefit on them both (levelling up).[14] Moreover, the choice of comparators can be determinative of the claim. So where a travel concession was denied to the same sex partner of a woman the ECJ made the comparison with the way in which a gay man would have been treated leading to a finding that there had been no discrimination.[15] A comparison with an unmarried heterosexual would have shown a clear breach of the principle of equal treatment.[16] The need for a comparator is particularly unrealistic when a male comparator has to be sought in claims of unequal treatment on grounds of pregnancy or childbirth.[17] Moreover, it is impossible for a woman to achieve equal pay for work of equal value if there is no male comparator

[9] Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ [2000] L180/22).

[10] Council Directive 97/81/EC, (OJ [1998] L 14/9) implemented from 1 July 2000 by the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, S.I. No. 1551 ("Part-Time Work Regulations").

[11] Council Directive 1999/70/EC (OJ [1999] L175/43) which is yet to be implemented in the U.K.

[12] *E.g.*, *Zafar* v. *Glasgow City Council* [1998] I.R.L.R. 36, H.L.

[13] *E.g.*, *Balgobin* v. *London Borough of Tower Hamlets* [1987] I.R.L.R. 402, E.A.T. (requiring woman to continue to work with alleged harasser not less favourable treatment because man alleging homosexual advances would have been treated similarly); *Stewart* v. *Cleveland Guest (Engineering) Ltd.* [1994] I.R.L.R. 440, E.A.T. (display of pictures of nude women gender-neutral because hypothetical man might also have been offended); *cf. British Telecommunications plc* v. *Williams* [1997] I.R.L.R. 668, E.A.T. (sexual harassment treated as discriminatory per se without need for comparison).

[14] *E.g.*, Case C-408/92 *Smith* v. *Avdel* [1994] E.C.R. I-4435 (raising of pension age for women to the same as that for men satisfies principle of equal treatment).

[15] Case C-249/96 *Grant* v. *South West Trains* [1998] I.R.L.R. 165.

[16] See C. Barnard, "The Principle of Equality in the Community Context: *P*, *Grant*, *Kalanke* and *Marschall*: Four Uneasy Bedfellows?" (1998) 57 C.L.J. 352 at pp. 364–366.

[17] See S. Fredman, *Women and the Law*, (Clarendon Press, Oxford, 1997) pp. 179–224.

in her establishment or an establishment of the same employer with common terms and conditions of employment.[18]

These limitations of the principle of formal or procedural equality have led to attempts to develop concepts of substantive equality. Fredman[19] has identified four different, but overlapping approaches.

The first is equality of results. Apparently consistent treatment infringes the goal of substantive equality if the results are unequal. Fredman points out that this notion can itself be used in three different senses. The first focuses on the impact of apparently equal treatment on the individual. The second is concerned with the results on a group (*e.g.* women, ethnic minorities etc.), and the third demands an outcome which is equal, for example equal pay for women doing work of equal value with that of men or equal representation of women and men in the same grade. The concept of indirect discrimination is results-oriented in the first sense, in that the treatment must be detrimental to an individual, but it also involves equality of results in the second sense. The essential characteristic of indirect discrimination is that an apparently neutral practice or criterion has an unjustifiable adverse disparate impact upon the group to which the individual belongs. This concept had its origins in case law under Title VII of the US Civil Rights Act 1964, and was subsequently introduced in the UK by the SDA,[20] RRA[21] and FETO[22] (but not the DDA[23]), and into Community law through judicial interpretation of Article 141 (ex Art.119) of the EC Treaty.[24] However, the concept of indirect discrimination is not redistributive in the third sense. If there is no exclusionary practice or criterion, or if no significant disparate impact can be shown, or if there is an objective business or administrative justification for the practice, then there is no

[18] Equal Pay Act 1970, s.1(6). EC law appears to be slightly wider allowing a comparison with those in the same (public) service: *Scullard* v. *Knowles* [1996] I.R.L.R. 344, E.A.T.; cf. *Lawrence* v. *Regent Office Care Ltd.* [1999] I.R.L.R. 148, E.A.T.

[19] S. Fredman, "A Critical Review of the Concept of Equality in U.K. Anti-Discrimination Law", Independent Review of the Enforcement of U.K. Anti-Discrimination Legislation, Working Paper No. 3, (Cambridge Centre for Public Law and Judge Institute of Management Studies, November 1999), paras. 3.7–3.19.

[20] S. 1(1)(b).

[21] S. 1(1)(b).

[22] Art. 3(2)(b).

[23] The DDA defines discrimination in two ways: (1) less favourable treatment which cannot be justified, and (2) a failure to comply with the duty to make reasonable adjustments for a disabled person. It is not clear that all indirect discrimination will be caught by the latter: see B. Hepple, M. Coussey, T. Choudhury, *Equality: a New Framework*. Report of the Independent Review of the Enforcement of U.K. Anti-Discrimination Legislation, (Oxford, Hart Publishing, 2000), paras. 2.32–33.

[24] See C. Barnard and B. Hepple, "Indirect Discrimination: Interpreting *Seymour-Smith*" (1999) 58 C.L.J. 399, 401–402.

violation. The recent development of indirect discrimination is discussed in the next section.

Even if indirect discrimination can be established, the outcome is usually compensation for an individual and not a duty to remove the offending practice or criterion. An approach which is more results-oriented in a redistributive sense is to define equality in terms of "fair" (sometimes referred to as "full") participation of groups in the workforce, and fair access of groups to education and training and to goods facilities and services. This aims to overcome under-representation of disadvantaged groups in the workplace and to ensure their fair share in the distribution of benefits. This may involve special measures to overcome disadvantage. Thus in Northern Ireland, "affirmative action" has been a cornerstone of the legislation against religious discrimination since the Fair Employment Act 1989. The current FETO defines "affirmative action" as—

> Action designed to secure fair participation in employment by members of the Protestant, or members of the Roman Catholic, community in Northern Ireland by means including—
> (a) the adoption of practices encouraging such participation; and
> (b) the modification or abandonment of practices that have or may have the effect of restricting or discouraging such participation.[25]

The FETO does not define "fair participation". The Fair Employment Commission (now merged in the Equality Commission for Northern Ireland), which administered the legislation, adopted an interpretation which involves redressing imbalances and under-representation between the two communities in Northern Ireland. The aims are to secure greater fairness in the distribution of jobs and opportunities and to reduce the relative segregation of the two communities at work.[26] A similar redistributive approach is taken by the Canadian Employment Equity Act 1995, which utilises the concept of "employment equity" to indicate that equality "means more than treating persons in the same way but requires special measures and the accommodation of differences".[27] There is no comparable legislation in Great Britain.

A second way of characterising substantive equality is in terms of equality of opportunity. Fredman points out that "using the graphic metaphor of competitors in a race, [this approach] asserts

[25] FETO, Art. 4(1); based on the White Paper, Northern Ireland Office, *Fair Employment in Northern Ireland* (HMSO, London, 1988, Cm. 3890).
[26] House of Commons, Northern Ireland Affairs Committee, Fourth Report, *The Operation of the Fair Employment (Northern Ireland) Act 1989: Ten Years On*, Session 1998–99, HC 98 (1999).
[27] Employment Equity Act 1995 [Can.], s. 2.

that true equality cannot be achieved if individuals begin the race from different starting points. An equal opportunities approach therefore aims to equalise the starting point ...".[28] This is the model adopted by the EU.[29] The FETO in Northern Ireland goes further by imposing a positive duty on employers to "promote equality of opportunity"[30] and provides that a person of any religious belief has equality of employment opportunity with a person of any other religious belief if he or she "has the same opportunity ... as that other person has or would have ... due allowance being made for any material difference in their suitability." Section 75 of the Northern Ireland Act 1998 requires public authorities in carrying out their functions relating to Northern Ireland to "have due regard" to equality of opportunity between a wide range of groups, as does legislation in respect of the Scottish Parliament,[31] the Welsh Assembly,[32] and the Greater London Authority.[33] The Race Relations (Amendment) Bill 2000 does so in respect of racial equality in Great Britain, and the government has undertaken to extend the duty to promote equality of opportunity between women and men and for disabled persons "when legislative time permits".[34]

However, none of these measures makes it clear whether the promotion of equality of opportunity is a narrow procedural obligation, or a broader substantive one. The procedural view of equal opportunities involves the removal of obstacles or barriers, such as word-of-mouth recruitment or non-job-related selection criteria. This opens up more opportunities but does "not guarantee that more women or minorities will in fact be in a position to take advantage of those opportunities" because their capacities have been limited by the effects of social disadvantage.[35] A more substantive approach to equality of opportunity would require a range of other special measures, usually referred to as "positive action", to compensate for disadvantages. They are considered in section III below. Measures which tackle inequality in the labour market, such as specific rights for part-time workers and workers on fixed-term contracts (predominantly women) may also be substantive in nature, but as we shall see in section IV, they have

[28] Fredman, Working Paper (n. 19 above), para. 3.12.
[29] See Art. 2(4) of Directive 76/207 considered further below and Case C-450/93 *Kalanke* v. *Freie und Hansestadt Bremen* [1995] E.C.R. I-3051, para. 23.
[30] FETO, art. 5; art. 5(4) sets out the kinds of opportunity encompassed by the duty.
[31] Scotland Act 1998, sched. 5, Part II.1.2.
[32] Government of Wales Act 1998, s. 48, and Standing Order 14 of the Welsh Assembly.
[33] Greater London Authority Act 1999, s. 33.
[34] Cabinet Office, Equality Statement, 30 November 1999.
[35] Fredman, Working Paper (n. 19 above), para. 3.13.

been framed in EC Directives and UK law in terms of a principle of formal equality.

A third approach to substantive equality identified by Fredman treats equality as auxiliary to substantive rights. This is exemplified by Article 14 of the European Convention on Human Rights (ECHR) which requires non-discrimination on specified grounds in the exercise of Convention rights. Although this prevents levelling-down of substantive human rights, it confines equality to a subsidiary role, and it applies only to state action. The incorporation of the ECHR into domestic law by the Human Rights Act 1998, will not in itself enable UK courts and tribunals to deal with more deeply entrenched institutional discrimination, unless they choose a standard of review of state action which is consciously stricter than that applied by the European Court of Human Rights.[36]

A final approach to substantive equality is what Fredman calls "a broad value driven approach". One set of values emphasises the dignity, autonomy and worth of every individual. Such an approach is found in the constitutional provisions of several other EU Member States,[37] and in case law in other jurisdictions such as Canada.[38] Another value-driven approach emphasises fair participation in society, as exemplified in Northern Ireland legislation, or "full equality in practice" as in Article 141(4) EC considered below. Values such as these are not yet explicit in the law of Great Britain but did influence the Court of Justice in *P* v *S* where the Court said that to tolerate discrimination on the grounds of gender reassignment would be "tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard".[39]

II. Indirect Discrimination

The case law of the Court of Justice has recently been codified in relation to sex discrimination in the Burden of Proof Directive 97/80.[40] This provides that:

[36] See S. Fredman, "Equality Issues" in B.S. Markesinis ed., *The Impact of the Human Rights Bill on English Law*, (Oxford University Press, Oxford, 1998) 111–132 at pp. 115–118. On 26 June 2000, the Committee of Ministers of the Council of Europe adopted Protocol No. 12 to the ECHR, which extends the non-discrimination principle to all "rights set forth by law" and requires public authorities not to discriminate on the specified grounds. This opens for signature and ratification in November 2000.

[37] *E.g.* Belgian Constitution, Art. 23; German Basic Law, Art. 1, Greek Constitution, Art. 2, Italian Constitution, Art. 2.

[38] *Miron* v. *Trudel* [1995] S.C.R. 418 at p. 489.

[39] [1996] E.C.R. I-2143, para. 22.

[40] Art. 2(2). OJ [1998] L14/6, amended by Directive 98/52/EC (OJ [1998] L205/66). This awaits implementation: see Hepple *et al.* (n. 23 above), paras. 4.37 to 4.39, as to how this should be done. For further details see C. Barnard, *EC Employment Law*, 2nd ed. (OUP, Oxford, 2000), ch. 4.

> indirect discrimination exists where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex, unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.

Four recent developments threaten to undermine the capacity of this notion—which is designed to target those measures which are discriminatory in *effect*, whether intentionally[41] or unintentionally[42]—to achieve equality of results. The first is the suggestion in the draft Race Directive, and Framework Directive, proposed under Article 13 of the EC Treaty, that there could be indirect discrimination where an apparently neutral provision, criterion or practice "is liable to adversely affect [an individual] person or persons," rather than on an individual as a member of a group. The US case law, from which, as we have seen, the concept derives, as well as the settled case law of the Court of Justice,[43] as codified in the Burden of Proof Directive, makes it clear that the adverse impact must be on members of a group, not simply an individual. The drafts came under much criticism.[44] The final version of the Race Directive now requires the provision to "put persons of a racial or ethnic origin at a particular disadvantage compared with other persons ...".[45] This loses the crucial objective of equality of results in favour of the notion of formal equality between individuals. Despite the omission of "person" in the singular, this still does not make it clear that the disadvantage must be suffered by a group of persons of a particular racial or ethnic origin in comparison with persons not of that group.[46] The focus of the definition in the Race Directive is on the disadvantage suffered by individuals rather than by a particular racial or ethnic group to which an individual belongs. Literally interpreted, there will be discrimination if two or more individuals "of a racial or ethnic origin" (presumably the same origin) suffer a particular disadvantage, even without evidence that the racial or ethnic group as such suffers from that disadvantage. This interpretation would assimilate the concepts of direct and indirect discrimination,

[41] Case 96/80 *Jenkins* v. *Kingsgate* [1981] E.C.R 911.
[42] See *e.g.* Case 170/84 *Bilka-Kaufhaus* [1986] E.C.R 1607. In the case of sex discrimination, but not race discrimination, damages can be obtained even if the indirect discrimination is unintentional: Sex Discrimination and Equal Pay (Remedies) Regulations 1993, S.I.1993/2798; *cf.* RRA, s. 57(3).
[43] In Case C-237/94, *O'Flynn* v. *Adjudication Officer* [1996] E.C.R. I-2617, to which the Explanatory Memorandum COM(99)566 final, refers but appears to misinterpret.
[44] See esp. House of Lords Select Committee on the European Union, *EU Proposals to Combat Discrimination*, HL Paper 65, Session 1999–2000, 9th Report, paras. 79–83.
[45] Art.2(b).
[46] See RRA, s.1(1)(b)(i); and see Memorandum by JUSTICE to the House of Lords Committee (n. 44 above), p. 113.

because the former occurs where the effect of the defendant's action is to put an individual at a disadvantage on racial grounds, even without any conscious motivation on the part of the discriminator.[47] A purposive interpretation, in keeping with the decision of the Court of Justice in *O'Flynn*[48] (discussed below) would make the comparison between persons of the same racial or ethnic origin as the complainant and all other persons.

A second threat to the concept of indirect discrimination has come from the decision of the majority in the House of Lords in *Barry* v. *Midland Bank*[49] that those claiming indirect discrimination must show "a difference in treatment between two groups of employees". The case concerned a voluntary redundancy scheme which compensated redundant staff by reference to years of service and final pay. Mrs Barry worked 11 years full time and then switched for $2\frac{1}{2}$ years to part-time work. Her redundancy payment was based on the whole $13\frac{1}{2}$ years service but was calculated on her final part-time salary. She received £5,806.08. Had the full-time salary of her final post been taken into account, but treating the part-time service as $1\frac{1}{4}$ years full-time, she would have received £8,080.80. She claimed that this did not reward her fully for her service. In order to decide whether Mrs Barry could establish indirect discrimination, the first question asked by the House of Lords was whether she belonged "to a group of employees which is differently and less well treated".[50] Noting that the purpose of the payment was to provide support for lost income and to cushion employees against unemployment and job loss, the majority held that there was no relevant difference in treatment because all employees, men and women, full-time and part-time, of all ages, received a payment based on final salary.[51] Accordingly, there was no prima facie case of discrimination. Lord Nicholls, in a minority on this issue, asked the same question but held that the evaluation of the legitimacy of a severance pay scheme which has a disparate adverse impact on women is better made at the objective

[47] See *Nagarjan* v. *London Regional Transport* [1999] I.C.R. 977, H.L.

[48] n. 77 below.

[49] [1999] I.R.L.R.581, H.L. One welcome aspect of the definition in both the Burden of Proof Directive and the Race Directive is that, by referring to "an apparently neutral provision, criterion or practice" it puts beyond doubt that the need under U.K. legislation to satisfy the more stringent test of a "requirement or condition" is incompatible with EC law: *cf. Perera* v. *Civil Service* [1983] I.R.L.R. 166, C.A., and *Bhudi* v. *I.M.I.* [1994] I.R.L.R. 204.

[50] *Per* Lord Slynn, 583. *Cf.* the approach adopted by the Industrial Tribunal in *London Underground* v. *Edwards (No. 2)* [1998] I.R.L.R. 364, 366 which was subsequently approved by the Court of Appeal: (a) What was the relevant "requirement or condition" which was applied to the applicant? (b) Could she comply with it? (c) If not, was it one which "a considerably smaller proportion of female train operators than of male operators could comply"? (d) If so, was it justifiable?

[51] Lord Slynn at p. 583, Lord Hoffmann at p. 588, Lord Clyde at p. 589. Lord Steyn at p. 588 limited the decision on this "difficult issue" to "the special facts of this case."

justification stage, because a "responsible employer takes into account such disparate impact, if there be any, when considering which scheme to adopt" and, at the justification stage, the employer has to discharge the burden of proof.[52]

The majority's approach was based on the much criticised decision of the ECJ in *Helmig*,[53] a case where part-timers did not receive the higher rate of overtime pay until they worked in excess of the normal working hours for full-timers. The Court said that, since hour for hour, part-timers and full-timers were treated the same no discrimination occurred.[54] The application of the formal equality principle in this context has the result of treating all women uniformly, ignoring the substantial differences between those who work full-time and those who work part-time. For example, working more than the agreed part-time hours is likely to be particularly disruptive of the family arrangements of part-timers.[55]

The fundamental error in both the *Barry* and *Helmig* decisions was to apply the criteria for establishing direct discrimination to a case where only indirect discrimination was at issue. In direct discrimination, similar situations are treated differently; in indirect discrimination different situations are treated in the same way but with a significant disparate impact on the protected group. In *Barry* the majority regarded the key question as being the one formulated by counsel: "did the women who switched [to part-time work] suffer less favourable treatment?".[56] This conflates the two conceptually distinct notions of direct and indirect discrimination into a "single diluted concept".[57] It cannot be reconciled with the Court of Justice's decision in *Enderby*[58] which made clear the distinction between "cause" or direct discrimination and "effects" or indirect discrimination.

A third threat to the concept of indirect discrimination arises

[52] At p. 581.

[53] Cases C-399/92, C-409/92, C-425/92, C-34/93 and C-50/93 *Stadt Lengerich* v. *Helmig* [1994] E.C.R. I-5727. *Cf.* the Court of Justice's decisions in Case C-360/90 *Arbeiterwohlfahrt der Stadt Berlin eV* v. *Bötel* [1992] E.C.R. I-3589; Case C-457/93 *Kuratorium für Dialyse und-Nierentransplantation eV* v. *Lewark* [1996] E.C.R. I-243; and Case C-278/93 *Freers and Speckmann* v. *Deutsche Bundespost* [1996] E.C.R. I-1165.

[54] The Part-Time Work Directive and Regulations (section IV below) adopt the same approach to overtime pay.

[55] Rubenstein [1995] I.R.L.R. 183. See also C. Hakim, *Key Issues in Women's Work* (Athlone, London, 1996), pp. 198–200; T. Hervey and J. Shaw, "Women, work and care: women's dual role and double burden in EC sex equality law" (1998) 8 Journal of European Social Policy 43.

[56] This is how the question is formulated by the Hon. Mr Justice Elias (who was counsel for the employer) in *Equal Pay and Sex Discrimination: Some Conceptual Puzzles*, (Employment Lawyers' Association, London, 1999), p. 24.

[57] Lord Lester of Herne Hill QC and Dinah Rose, "Sorting out Mr Justice Elias' Conceptual Puzzles" (2000) 7 *ELA Briefing* 43 at p. 44.

[58] Case C-127/92 *Enderby* [1993] E.C.R. I-5535; criticised by Elias J. (n. 56 above) and defended by Lester and Rose (n. 57 above).

from continuing uncertainty in E.C. law as to how disparate impact is to be established. This involves answering two questions: (i) what is the appropriate pool of comparators who "can comply" with the provision and (ii) is it a provision with which a "considerably smaller" proportion of women than men "can comply" (the "disparate impact" question)? In answer to the first question the courts have asked how many men and women in the workplace or a particular section of the workplace[59] (in the case of an individual employer) or the workforce as a whole (especially where legislation is being challenged) can comply[60] with the requirement?

The second question produced an equivocal response by the Court of Justice in *Seymour-Smith*[61] on which we commented in an earlier article.[62] It will be recalled that this case raised the issue whether a two-year service requirement[63] prior to bringing a claim for unfair dismissal in the UK was indirectly discriminatory against women contrary to Article 119 (new Art. 141). Over the period from 1985 to 1991, the proportion of men who had two or more years' service at 16 hours or more per week with their current employer ranged from 72% to 77.4%. The proportion of women in this category ranged between 63.8% to 68.9%. The female percentage as a percentage of the male percentage averaged 89.1. It was accepted that the differences found in the impact of the qualifying period on the sexes were statistically significant, *i.e.* they could confidently be said to be due to social facts and not to chance.

The Court suggested two approaches to disparate impact. The first can be found at paragraph 60 where it said that the test is whether a "considerably smaller proportion of women than men" was able to satisfy the two-year requirement. This reflects the (more impressionistic) test adopted in UK law that the difference in impact must be "considerable". However, in paragraph 61 the Court observed that statistical evidence revealing "a lesser but persistent and relatively constant disparity over a long period" could also be evidence of apparent indirect discrimination calling

[59] See also s. 5(3) SDA: the pool must be comprised of people whose relevant circumstances are the same or not materially different. For example, in *London Underground Ltd* v. *Edwards (No. 1)* [1995] I.R.L.R. 355 (approved in [1998] I.R.L.R. 364, 369 (CA)) the pool was all train operators to whom the new rostering arrangements applied as opposed to employees who were single parents.

[60] This has been interpreted to mean can "in practice" comply: *Price* v. *Civil Service Commission* [1977] IRLR. 291; *Mandla* v. *Lee* [1983] I.R.L.R. 209.

[61] Case C-167/97, *R* v. *Secretary of State for Employment, ex parte Seymour-Smith and Perez* [1999] E.C.R. I-623.

[62] See Barnard and Hepple (n. 24 above), at pp. 405–409.

[63] The two-year service requirement has now been reduced to one year by the Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 1999, S.I. 1999/1436.

for justification. The ECJ did not have the evidence to propose an answer to the paragraph 61 test but it did suggest an answer to the paragraph 60 test. It said that the statistics in this case "do not appear, on the face of it, to show that a considerably smaller proportion of women than men is able to fulfil the requirement imposed by the disputed rule".[64] Not surprisingly, in the light of this guidance, when the matter returned to the House of Lords[65] it was unanimously found that there was no disparate impact under the paragraph 60 criteria. However, in a liberal interpretation of the Court's decision, the majority found that there was disparate impact under the paragraph 61 criteria.[66] Lord Nicholls and Lord Goff (with whom Lord Jauncey agreed) reconciled paragraphs 60 and 61 as meaning that if the statistical evidence covers a long period and the figures show a persistent and relatively constant disparity, this makes it easier to show that the difference is "considerable". On that basis, they held that the difference in this case met the criterion of "considerably smaller". Lord Nicholls stressed that the "figures are in borderline country", but such a disparity "of the entire male and female labour forces of the country over a period of seven years cannot be brushed aside and dismissed as insignificant or inconsiderable."[67]

In this instance, the majority in the House of Lords has taken a flexible and purposive approach to the meaning of "considerably smaller". But one issue which the House side-stepped is whether, in addition to making a comparison between the proportions of men and women able to satisfy (or "can comply" with) the requirement (the qualifiers), a comparison should also be made of the proportion of men and women who are unable to satisfy the requirement (the non-qualifiers). The latter comparison might produce a very different statistical result from the former.[68] In *Barry*[69] Lord Nicholls, took the example of an employer whose workforce of 1,000 employees comprised an equal number of men and women. In his example, 10% of the staff worked part-time and of these 90% were women. A scheme which favours full time workers would mean that 98% of men (490/500) and 82% of women (410/500) could comply with the requirement. Lord Nicholls instead focused on the question of disadvantage. He said that 2% of men (10/500) compared with 18% of women (90/500) would be

[64] Para. 64.
[65] [2000] I.R.L.R. 263
[66] Following the approach of the Court of Appeal [1995] I.C.R. 889, 953B.
[67] At p. 270.
[68] See S. Deakin and G. Morris, *Labour Law* (Butterworths, London, 1998), 582–583; and the remarks of Simon Brown L.J. in *London Underground* v. *Edwards (No. 2)* [1998] I.R.L.R. 364 at p. 370.
[69] [1999] I.R.L.R. at p. 586.

disadvantaged, a ratio of 1:9. Putting it another way, of those who were non-qualifiers 10% were men and 90% were women. In *Seymour-Smith*.[70] the ECJ seemed to accept that the two comparisons should be made,[71] but later in its judgment the Court considered only the proportions of men and women who were qualifiers.[72] When the case returned to the House of Lords, Lord Nicholls observed: "I do not understand the European Court to have rejected use of the figures relating to the non-qualifiers in a suitable case".[73] Although the point was not decided, it seems that a comparison of both qualifiers and non-qualifiers will be appropriate in future cases.

A striking feature of the ECJ's approach is that it places so much weight on statistics which may be difficult to collect (particularly in the absence of a statutory duty to monitor) and to interpret. *In London Underground* v. *Edwards (No. 2)*,[74] by contrast, the Court of Appeal upheld the use by an industrial tribunal of their general knowledge to look outside the pool of comparison to take account of social facts, such as the fact that women are ten times more likely to be single parents than men.[75] This led to a finding that a "considerably smaller" number of females could comply with the rostering requirement.[76] Potter L.J. emphasised that an industrial tribunal does not sit in blinkers, that the high preponderance of single mothers having the care of a child is common knowledge, and that the tribunal was entitled to have regard to the large discrepancy in numbers between male and female operators making up the pool for its consideration.

The emphasis on the need for statistical evidence in *Seymour-Smith* contrasts with the approach adopted by the ECJ to the concept of indirect discrimination in the field of free movement of persons. In *O'Flynn*[77] the Court said:

> [C]onditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers or the great majority of those affected are migrant workers, where they are indistinctly applicable but can be more easily satisfied by national workers than by migrant workers or where there is

[70] Case C-167/97 [1999] E.C.R I-623, considered in detail in Barnard and Hepple, above, n. 24.
[71] Para. 59.
[72] Para. 60.
[73] He then cited three cases where the Court looked at the composition of the disadvantaged group: Case 170/84 *Bilka-Kaufhaus* [1987] E.C.R 1607, para. 31, Case C-184/89 *Nimz* v. *Freie und Hansestadt Hamburg* [1991] E.C.R. I-297, para. 12, and Case C-33/89 *Kowalska* v. *Freie und Hansestadt Hamburg* [1990] E.C.R. I-2591, paras. 13–16.
[74] [1998] I.R.L.R. 364; see Barnard and Hepple (n. 24 above), 406.
[75] [1998] I.R.L.R. 364, 369.
[76] Para. 10 of the IT's decision, reproduced at [1998] I.R.L.R. 364, 367.
[77] Case C-237/94 *O'Flynn* v. *Adjudication Officer* [1996] E.C.R I-2617, paras. 18–19.

> a risk that they may operate to the particular detriment of migrant workers.

Therefore, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a *risk* that it will place migrant workers at a particular disadvantage. The Court added that it is not necessary to find that the measure in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect.[78] This was the approach that the applicants had unsuccessfully argued for in *Seymour-Smith*.[79] The Race Directive has now adopted the approach in *O'Flynn* by requiring only that the provision, criterion or practice would put the affected persons at a "particular disadvantage". This was justified by the European Commission on the ground that it was "extremely complicated" to develop statistical assessments in fields other than sex discrimination.[80] However, as the House of Lords Select Committee on the European Union has said, a separate definition in the case of race discrimination different from that in respect of sex discrimination under the Burden of Proof Directive, "can only create confusion and increase the burden of litigation on the courts and on employers".[81] In view of the willingness of UK courts and tribunals to interpret the notion of "considerably smaller" without elaborate statistical evidence, taking account of social facts, it should be sufficient to implement the Burden of Proof Directive in respect of all grounds of unlawful discrimination.

A fourth potential threat to the concept of indirect discrimination is the dilution of the test of objective justification. The Burden of Proof Directive provides in effect that once a *prima facie* case of indirect discrimination has been established, the burden then shifts to the employer to show that the provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.[82] This codifies the strict *Bilka* test for indirectly discriminatory conduct by employers, affirmed in *Krüger*.[83] This approach was applied by Lord Nicholls

[78] For recent examples see Case C-15/96 *Kalliope Schöning-Kougebetopoulou* v. *Freie und Hansestadt Hamburg* [1998] E.C.R I-47. See also Case C-187/96 *Commission* v. *Greece* [1998] E.C.R I-1095; Case C-350/96 *Clean Car Autoservice* v. *Landeshauptmann von Wien* [1998] E.C.R I-2521.

[79] Para. 54.

[80] House of Lords Select Committee (n. 44 above), para. 80. In some Member States, such as France, there is strong resistance to the collection of statistical data of racial groups etc.

[81] House of Lords Select Committee (n. 44 above), para. 83.

[82] Art. 2(2).

[83] Case C-281/97 *Krüger* v. *Kreiskrankenhaus Ebersberg*, judgment of 9 Sept. 1999. See also Case C-243/95 *Hill and Stapleton* v. *Revenue Commissioners* [1998] E.C.R. I-3739.

in *Barry* who found that the bank's scheme could be objectively justified.[84]

The critical question for the courts, once the Burden of Proof Directive is implemented, is whether the weaker *Seymour-Smith* test for indirectly discriminatory employment legislation can be maintained. It will be recalled that the ECJ held in that case that the test is whether the "rule reflects a legitimate aim of its social policy, that that aim is unrelated to any discrimination based on sex, and that it could reasonably consider that the means chosen were suitable for attaining that aim".[85] The Court of Appeal and Divisional Court had both found that the Secretary of State had failed to discharge the burden of showing that the 1985 Order, which introduced the two-year qualifying period, was justified, applying the stricter test of "suitable and requisite means to achieve the legitimate objective of encouraging employment".[86] In the light of the ECJ's ruling, Lord Nicholls recognised that this test was "too stringent" and so applied the weaker test. He found that the aim of the Order was legitimate, namely to encourage recruitment by employers, and that aim was unrelated to any sex discrimination. On balance, he also found that the Secretary of State's view was reasonable both in 1985 and subsequently. This approach comes very close to a third, very dilute test, for objective justification which was applied in the case of social security legislation in *Nolte and Megner*[87] namely that, in exercising its competence, the national legislature was "reasonably entitled to consider that the legislation in question was necessary in order to achieve [its] aim".[88]

Seymour-Smith was decided on facts which arose before the Burden of Proof Directive came into force. That Directive, and the Race Directive, appear to require a single standard of objective justification which should be applied, without dilution, in all cases of indirect discrimination. It is submitted that, following the new Directives, employment legislation[89] must be "appropriate and necessary" to achieve a legitimate aim, and not simply one of a number of "reasonable" courses of action.

[84] Lords Slynn and Clyde agreed *obiter*. By contrast, Lord Steyn said *obiter* that he had "no difficulty in ruling that the bank should fail on objective justification".
[85] Para. 77; Barnard and Hepple (n. 24), at pp. 409–411.
[86] Case 171/88 *Rinner-Kühn* v. *FWW Spezial-Gebäudereinignung* [1989] E.C.R 2743.
[87] Case C-317/93 *Nolte* v. *Landesversicherungsanstalt Hannover* [1995] E.C.R. I-4625 and Case C-444/93 *Megner and Scheffel* v. *Innungskrankenkasse Vorderpfalz* [1995] E.C.R. I-4741.
[88] The Court reached similar conclusions in Case C-8/94 *Laperre* v. *Bestuurcommissie beroepzaken in de provincie Zuid-Holland* [1996] E.C.R. I-273, and Case C-280/94 *Posthuma-van Damme* v. *Bestuur van de Bedrijfsvereniging voor Detailhandel* [1996] E.C.R. I-179.
[89] The Directive does not apply to Directive 79/7 on equal treatment in social security.

III. Positive Action

UK law does not permit "reverse discrimination" in favour of women or members of ethnic minorities.[90] However, as an exception to the general principle of non-discrimination certain positive measures to afford access to training and to encourage under-represented groups to take up employment are permitted.[91] Research in 1999 for the Independent Review of the Enforcement of UK Anti-Discrimination Legislation revealed that these provisions are out of date and little used.[92] Positive action has to be for "particular work". This is "no longer an appropriate concept because employers' training programmes are linked to giving people specific competencies which may be needed for a variety of positions."[93] Moreover, the positive action provisions do not allow positive action for categories such as New Deal and Work Experience trainees because they are not "employees".

These provisions, framed in the 1970s, have also been overtaken by developments in EC law. The earliest EC positive action provision, Article 2(4) of the Equal Treatment Directive, provides that the Directive shall be "without prejudice to measures which promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities".[94] The ECJ has regarded this as a derogation from the principle of equal treatment contained in Article 2(1) of the Directive, which must be narrowly construed.[95] Member States must opt to take advantage of this derogation. However, Article 141(4) of the EC Treaty, inserted by the Treaty of Amsterdam amending the former Article 119, recognises the limitations of the equal treatment principle by explicitly stating the aim of "full equality in practice." It states that "with a view to ensuring" this, the principle of equal treatment "shall not prevent any Member States from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers".[96] The Race Directive likewise allows "specific measures to prevent or compensate for disadvantages related to racial or ethnic origin."[97] These new provisions cannot be described as derogations from the principle of

[90] See Fredman, Working Paper (n. 19 above) for a comparative discussion.
[91] SDA, ss. 47–48; SD (NI) O, arts. 48–49; RRA, ss. 35,38; RR(NI)O, art.37.
[92] Hepple *et al.* (n. 23 above), Appendix 1.
[93] *Ibid.*, para. 2.48.
[94] See also the soft law Recommendation 84/635/EEC (OJ [1984] L331/34).
[95] See *e.g.* Case C-450/93 *Kalanke* v. *Freie und Hansestadt Bremen* [1995] E.C.R. I-3051.
[96] COM(2000)334 envisages that Article 141(4) should replace Article 2(4).
[97] Art. 5.

equal treatment in a formal sense. They are framed as essential to the achievement of "full equality in practice", that is substantive equality. For political reasons, however, it has been left to Member States to determine whether they wish to go beyond the principle of formal equality.

The provisions of Article 141(4) appear to codify the ECJ's decision in *Marschall*,[98] which has been discussed in an earlier article.[99] This upheld, as compatible with Article 2(4) of the Equal Treatment Directive, a state law which gave preference to a woman in a tie-break situation, so long as the apparently equally-qualified man was considered on his individual merits. The Court recognised that:

> ... even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding.[100] For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances.[101]

This is the closest the Court has come to recognising a substantive approach to equality. In the earlier case of *Kalanke*,[102] adopting a narrow procedural approach to equality of opportunity, the Court had said that that a rule which *automatically* gave priority to women when they were equally qualified to men did involve discrimination on grounds of sex. More recently, in *Abrahamsson*[103] the Court said that a national rule which gave automatic priority to a person of the under-represented sex who had adequate qualifications but which were inferior in minor respects from those of the person who would otherwise have been appointed, failed to satisfy the requirements of Article 2(4) of the Directive and Article 141(4) EC.[104]

[98] Case C-409/95 *Marschall* v. *Land Nordrhein-Westfalen* [1997] E.C.R. I-6363.
[99] Barnard (n. 16 above) at pp. 366–372.
[100] See also the views of the Federal Labour Court when the *Kalanke* case returned to it (Nr 226), Urteil; vom 5.3.1996–1 AZR 590/92 (A). It said that it was impossible to distinguish between opportunity and result, especially in the case of engagement and promotion because the selection itself was influenced by circumstances, expectations and prejudices that typically diminish the chances of women.
[101] Paras. 29 and 30.
[102] Case C-450/93 [1995] E.C.R I-3051.
[103] Case C-407/98 *Abrahamsson* v. *Fogelqvist*, judgment of 6 July 2000.
[104] This outcome was not affected by the limited number of posts to which the rule applied nor the level of the appointment.

On the other hand, the *Marschall* approach is also reflected in recent case law. In *Badeck*[105] the ECJ held that Article 2(1) and (4) of Directive 76/207/EEC did not preclude state rules rule which encouraged "fair" participation in the workplace by allocating at least half the places for training in public administration to women, subject to certain safeguards. The Court also considered the legality of the so-called "flexible result quota" in the state of Hessen ("flexible Ergebnisquote"). This is a rule applying to sectors of the public service in which women are under-represented. It gives priority to female candidates where male and female candidates for selection have equal qualifications, if this is necessary for complying with the binding targets in the women's advancement plan, provided that there are no reasons of "greater legal weight".[106] The Court said that the priority rule introduced by the Hessen law was not "absolute and unconditional" in the *Kalanke* sense. It was lawful so long as it guaranteed that candidatures were the subject of an objective assessment which took account of the specific personal situations of all candidates. The Court recognised that capabilities and experience acquired by carrying out work in the home were to be taken into account in so far as they were of importance for the suitability, performance and capability of candidates. By contrast, seniority, age and the date of last promotion were to be taken into account only in so far as they were of importance to the job. The family status or income of the partner were immaterial. Further, part-time work, leave and delays in completing training as a result of looking after children or other dependants could not have a negative effect on the selection process. Thus, the Court seems to allow some (indirect) discrimination against men in the application of the selection criteria. Only if a female candidate and a male candidate could not be distinguished on the basis of their qualifications could the woman be chosen according to the flexible quota.

Perhaps the most interesting aspect of the case concerned the Hessen rule which prescribed binding targets for women for temporary posts in the academic service and for academic assistants where women were equally qualified to the men. These targets required that the minimum percentage of women be at least equal

[105] Case C-158/97 *Badeck* v. *Hessischer Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen*, judgment of 28 March 2000 [2000] I.R.L.R. 432.

[106] These reasons of "greater legal weight" concern five rules of law, described as "social aspects", which make no reference to sex. Preferential treatment is given first, to former employees in the public service who have left the service because of family commitments; second, to individuals who worked on a part-time basis for family reasons and now wish to resume full-time employment; third, to former temporary soldiers; fourth, to seriously disabled people; and fifth, to the long-term unemployed. See generally C. Barnard *EC Employment Law*, 2nd ed. (OUP, Oxford, 2000) pp. 241–248.

to the percentage of women among graduates, holders of higher degrees and students in each discipline. The *Land* Attorney noted that this minimum quota system came very close to equality as to results, a principle which had been rejected in *Kalanke*. Nevertheless, the Court said that this rule was compatible with Community law. It pointed out that this system did not fix an absolute ceiling but only one relative to the number of persons who had received appropriate training. It said that this amounted to using an actual fact as a quantitative criterion for giving preference to women. This type of "roll-over" quota comes very close to achieving "full equality in practice." Its success depends, however, on the state developing such policies. This would not be possible in the UK, without substantial amendment of the present positive action provisions.

IV. Equal Treatment for Part-Time and Fixed-Term Workers

The concept of indirect sex discrimination has been important in challenging some barriers to women's equality in the labour market and therefore widening equality of opportunity. In an industrial tribunal case heard in Cambridge soon after the SDA came into force, the possibility was revealed of applying the concept to the unequal treatment of part-time workers, about 80 per cent of whom in the UK are women.[107] This was followed by over twenty years of case law, culminating in the decisions of the House of Lords in the *EOC* case,[108] and, in relation to short-term workers, who are also predominantly women, in the *Seymour-Smith* case (above).[109] However, part-time and temporary female workers can still only benefit from the SDA read with Article 141 of the EC Treaty and the Equal Treatment Directive, if they can find a male comparator, a problem which is particularly acute where there is a predominantly female workforce. Moreover, as we have seen, the proof of a significant disadvantage to women, which may itself be difficult,[110] does no more than raise a *prima facie* case of indirect discrimination. The employer or (as in *Seymour-Smith*) the government may still provide evidence of objective justification.[111]

These limitations of sex discrimination law were among the reasons which led to a campaign for the EC to create rights for part-time workers and those on fixed-term contracts. It was argued

[107] *Meeks* v. *National Union of Agricultural and Allied Workers* [1976] I.R.L.R. 198 (Chair: B.A. Hepple).
[108] [1994] I.R.L.R.176, H.L.
[109] [2000] I.R.L.R. 263, H.L.
[110] See above, nn. 59–81.
[111] See B. Hepple, "Equality and Discrimination" in P. Davies *et al.*, eds., *European Community Labour Law* (Oxford: Clarendon Press, 1996), at pp. 246–253.

that greater progress could be made towards removing structural barriers by focusing on specific rights for these workers per se, instead of relying on a generalised principle of gender equality.[112] In order to achieve this objective in respect of part-timers the EC could have followed the I.L.O. Convention No. 175 of 1994, and the accompanying Recommendation No. 182, which contemplates specific rights,[113] with some closely-defined exceptions. However, instead of specific rights, the agreement between the social partners at European-level which was given effect by the Directive on part-time work relies on a general principle of non-discrimination between part-time and full-time workers which is subject to a defence of objective justification. This is accompanied by a series of precatory provisions aimed at improving the quality of part-time work and facilitating the development of voluntary part-time work. The result is that the Directive on part-time work is significantly weaker than the I.L.O. Convention and Recommendation.[114] The Directive on fixed-term contracts similarly relies on the principle of non-discrimination with permanent workers, unless the different treatment is justified on objective grounds. It leaves it to Member States and/or the social partners to introduce measures to prevent abuse arising from the successive use of fixed-term contracts, such as objective reasons justifying renewal and the total duration and number of such renewals.

The Part-Time Work Regulations (which implement the Directive in the UK), create a right to be treated not less favourably in certain respects than a comparable full-timer.[115] There is no general definition of who is a "part-time worker" and who is "full-time": this is to be determined having regard to the "custom and practice of the employer".[116] A major limitation on the effectiveness of the Regulations in reducing inequality is that the part-timer must identify a comparable full-timer who has been more favourably treated. Unlike sex discrimination law this need not be a person of the opposite gender, but there must be an actual comparator—in contrast to the SDA under which a woman can

[112] S. Fredman, *Women and the Law*, p. 312.

[113] These include the same rights in respect of organisation and representation, health and safety and anti-discrimination, proportional pay and equivalent rights in respect of social security, dismissal, maternity and other matters.

[114] See M. Jeffrey, "Not Really Going to Work? Of the Directive on Part-Time Work, Atypical Work and Attempts to Regulate it" (1998) 27 I.L.J. 193–213, esp. at p. 200.

[115] Reg. 5(1) and 5(2)(a). In determining whether a part-timer has been treated "less favourably" than a comparable full-timer, the "pro rata" principle is to be applied "unless it is inappropriate" (Reg 5(3)). A part-timer paid at a lower overtime rate than a full-timer is not to be regarded as less favourably treated if the total number of hours worked by the part-timer, including overtime, is less than or equal to the total number of hours, disregarding overtime, which the comparable full-timer is required to work in the period (Reg. 5(4)).

[116] Reg. 2(1).

compare herself to a hypothetical male. So if there are no full-timers there can be no claim.[117] Moreover, the comparator must be currently employed by the same employer[118]—unlike the Equal Pay Act read with Article 141 EC—where a predecessor or successor employee may be used as a comparator.[119] The comparator must also be employed "under the same type of contract",[120] so that some casual workers employed at a lower hourly rate for doing exactly the same work as permanent workers will apparently have no claim. The Regulations (but not the Directive) even deny a comparison in respect of any description of worker that "it is reasonable for an employer to treat differently from other workers on the ground that workers of that description have a different type of contract."[121] Furthermore, the comparator must be engaged on the same or broadly similar work having regard, where relevant, to whether the comparator has a similar level of qualification, skills and experience.[122] Unlike the Equal Pay Act read with Article 141 and the Equal Pay Directive 75/117,[123] there can be no comparison with a person doing work of equal value, or work rated as equivalent under a job evaluation study. Not surprisingly, the DTI's regulatory impact assessment for the Regulations estimated that only one million of Britain's six million part-time workers had a comparable full-time worker, and that fewer than five per cent of those with a comparator were expected to benefit directly from the Regulations.

The Part-Time Work Directive and Regulations apply the general principle only to direct discrimination against part-timers.[124] The less favourable treatment must be "on the grounds" that the

[117] The Directive (Agreement, clause 3(2)) envisages a comparison where there is no full-time worker "in the same establishment" where this can be done by reference to "the applicable collective agreement, or where there is no applicable collective agreement, in accordance with national law, collective agreements or practice." The Regulations (Reg. 2(4)(b)) allow a comparison with a full-timer under the same type of contract at another establishment of the same employer where there is no comparable full-timer at the same establishment as the part-timer. There can be no comparison with a full-timer employed by an "associated employer" or in the same public service.

[118] Reg. 2(4). The Directive (Agreement Clause 3(2)) requires a full-timer who is "engaged in" the same or similar work. Arguably, this connotes contemporaneity. There are two exceptions in the Regulations: (1) a full-timer who becomes a part-timer may make a comparison with the terms under which she was employed as a part-timer (Reg. 3); and (2) a full-timer who returns to part-time work in the same job or at the same level after a break of up to 12 months may make a comparison with the terms under which she was employed as a full-timer (Reg. 4). In these two cases the comparison can be made even if the part-time contract is of a different type (*e.g.* fixed-term or temporary) from the full-time contract.

[119] Case 129/79 *Macarthys Ltd* v. *Smith* [1980] E.C.R. 1275.

[120] Reg. 2(3). The Directive (Agreement clause 3(2)) refers to "the same type of contract or employment relationship").

[121] Reg. 2(3)(f).

[122] Reg. 2(4)(a)(ii).

[123] OJ 1975 L45/19.

[124] The Regulations are therefore asymmetrical: full-timers cannot claim direct discrimination against part-timers.

worker is a part-timer,[125] which may be contrasted with treatment that is "related to" or "connected with" their status in the case of discrimination against disabled persons[126] or pregnancy rights.[127] Unlike UK sex discrimination law, a defence of objective justification is allowed.[128] The Guidance Notes issued by the DTI with the Regulations suggest a test similar to that which applies to *indirect* sex discrimination, namely that the less favourable treatment (1) is to achieve a legitimate objective, for example a genuine business objective; (2) is necessary to achieve that objective; and (3) is an appropriate way to achieve that objective. Arguably, the test should be more stringent in the case of direct discrimination where the treatment is likely to be deliberate. However, the threshold for justifying direct disability discrimination has been described by the President of the EAT as being "very low".[129] Tribunals may be tempted to adopt a similar approach to the Part-Time Work Regulations. This would be unfortunate, because the low threshold for justification in the case of disability is offset in part by the duty to make reasonable adjustments to arrangements which place a disabled person at a substantial disadvantage in comparison with those who are not disabled.[130] No comparable duty exists to facilitate access to part-time work. The Directive[131] (but not the Regulations) requires employers to give "consideration", "as far as possible", to measures to facilitate such access. But this applies only to jobs that "become available in the establishment". There is no obligation to create part-time jobs or job shares. Even if the Directive is directly enforceable against public authorities (which is doubtful) it would be difficult to prove a breach of this ambiguous requirement. Women who want to return to part-time employment after confinement will, therefore, continue to have to rely on indirect sex discrimination which may be justified where part-time work or a job share is costly or administratively inefficient.[132]

Regulations had not been made at the time of writing to give effect to the Fixed-Term Contracts Directive. This Directive has been the subject of some criticism. Given the differences between the nature of fixed-term and part-time work, Murray argues,[133] the

[125] Reg. 5(2).
[126] DDA, s. 5(1)(a).
[127] Employment Rights Act 1996, s. 99.
[128] Reg. 5(2)(b). *Cf.* DDA, s. 5(1)(b).
[129] *H.J. Heinz Co.* v *Kenrick* [2000] I.R.L.R. 144, E.A.T., at p. 146.
[130] DDA, s. 6(1).
[131] Agreement, clause 5(3)(d).
[132] This approach itself is not straightforward *cf. Clymo* v. *Wandsworth BC* [1989] I.R.L.R. 241(EAT) with *Briggs* v. *North Eastern Education and Library Board* [1990] I.R.L.R. 181 (NICA).
[133] Murray, "Normalising Temporary Work" (1999) 28 I.L.J. 269.

protection that temporary workers need is a full-fledged scheme of portability of entitlements which recognises all relevant working experience, even if undertaken with different employers and with breaks in between, to qualify for employment rights. This, rather than the principle of non-discrimination, would provide security for fixed-term workers which would balance the flexibility offered by fixed-term contracts to employers. If the Directive is implemented along similar lines to the Part-Time Work Regulations in applying the principle of non-discrimination, it will also make little contribution to changing labour market inequality. Both Directives apply an individualised liberal principle of non-discrimination which is not sufficient in order to promote substantive equality.

V. Conclusions

The answer to the question posed at the beginning of this article must be that the case law and EC legislation are not moving in any clear direction. There is still deep-seated conceptual confusion and a lack of consistency. While EC law is beginning to extend its scope to cover new grounds of discrimination, the recent Race Directive and the draft framework Directive on employment and occupation show a remarkable lack of understanding of indirect discrimination as a concept which is concerned with the effects of apparently neutral provisions on the group to which an individual belongs, in comparison with other groups. A majority of the House of Lords in *Barry*, following the ECJ in *Helmig*, erred in applying the criteria for establishing direct discrimination in a case where only indirect discrimination was in issue. But a majority in the House of Lords in *Seymour-Smith* has resolved the ambiguities in the ECJ's decision and, in doing so has made the approach to measuring disparate impact more flexible, as well as encouraging the use of a wider pool for comparison. The UK courts have also shown themselves capable of avoiding a purely statistical approach, and a willingness to consider social facts. However, the ECJ has diluted the defence of objective justification, when applied to legislative measures, in a way which now seems to be incompatible with the Burden of Proof Directive.

On the other hand, EC law has moved closer to the aim of substantive equality than UK legislation in relation to the permitted scope of positive action. UK law has tempered a strict test of direct discrimination, which cannot be justified, with a flexible test of indirect discrimination, which can be justified, as a vehicle for removing obstacles to equality of results. In Continental countries, on the other hand, a much more generalised concept of

"disadvantageous treatment" is familiar. This requires comparability of situations and also a lack of justification. Positive action is permitted to the extent that it corrects the inequality of situations of those being compared.[134] The only example in UK law of such an approach is the defence of justification of direct discrimination related to disability[135] coupled with the positive duty to make reasonable adjustments in relation to disabled persons.[136] Unlike race and sex, disability can justifiably make a difference to the way in which a person is treated, but the right to formal equality would be empty if there were no positive duty as well. Arguably, the different situations of disabled and non-disabled persons would be better recognised by applying the concept of indirect discrimination, but with a qualification of the defence of objective justification that a provision should not be treated as appropriate and necessary unless the needs of the disabled person cannot be reasonably accommodated without causing undue hardship to the person responsible for accommodating those needs.[137] In other words, a flexible concept of indirect discrimination coupled with an obligation to make reasonable adjustments, offers an alternative approach towards equality of results.[138]

Such an approach is lacking in the Directives on Part-Time and Fixed-Term work, which rely almost entirely on a generalised principle of formal equality, subject to a defence of justification. The UK Regulations on Part-Time Work do not impose any positive duty to facilitate access to part-time work or job-shares. Accordingly, they are unlikely to lead in any significant way to greater substantive equality for those, mainly women, who choose to work part-time because of family responsibilities.

The conclusion must be that the present frameworks of EC and UK legislation—as well as measures envisaged by the European Commission under Article 13—are not in themselves capable of leading to greater substantive equality. For this a new framework is needed. This would encourage fair participation of under-represented groups and fair access to goods, facilities and services,

[134] See Hepple (n. 111 above), at p. 252.
[135] DDA, s. 5.
[136] See Disability Rights Task Force, *From Exclusion to Inclusion*, (DfEE, London, 1999) recommendations 5.5–5.6 as to problems with this duty.
[137] See Hepple *et al.*, (n. 23 above), para. 2.33.
[138] A step in this direction, but at present only soft law, are Council Resolution of 27 March 1995 (OJ [1995] L168/3) and Council Recommendation 96/694/EC (OJ [1996] L319/11) on the balanced participation of women and men in the decision-making process; Resolution of the Council and of the Ministers for employment and social policy, meeting within the Council of 29 June 2000 on the balanced participation of women and men in family and working life (OJ [2000] C218/2).

through measures such as a duty on public authorities to promote equality, and employment and pay equity plans.[139]

[139] See the detailed proposals in Hepple *et.al.* (n. 23 above) and McCrudden, "Mainstreaming Equality in the Governance of Northern Ireland" (1999) 22 Fordham International Law Journal 1696.