Reasonable responses versus proportionality in employee dismissal cases:

A comparison between the Employment Rights Act 1996, s 98(4) and the Equality Act 2010, s 13(2), s 15(1)(b), and s 19(2)(d).

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Declaration

I declare that the work contained in this project is my own and that it has not been submitted for assessment in another programme at this or any other institution at postgraduate or undergraduate level. I also confirm that this work fully acknowledges the opinions, ideas and contributions from the work of others.

I confirm that the research undertaken for the completion of this project was based entirely on secondary material or data already in the public domain (case law, journal articles, published surveys etc.). It did not involve people in data collection through empirical research (e.g. interviews, questionnaires or as a result of observation). The ethical risk is low.

Signed: Susan B O'Brien

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Introduction

What, if any, are the differences between a dismissal that is reasonable and one that is a proportionate means of achieving a legitimate aim? That is the question at the centre of this dissertation. To answer it we start by placing both legal tests within the overall context of statute, then assess and analyse both separately. From that point the two can be fully compared. The structure of this dissertation is thus as follows:

Chapter one outlines statutory provisions regulating dismissal from employment in both the Employment Rights Act 1996 (ERA) and Equality Act 2010 (EqA). It identifies the key role of section 98(4) of the ERA in deciding unfair dismissal claims; and the likewise key roles of sections 13(2), 15(1)(b), and 19(2)(d) of the EqA in deciding some categories of discrimination claim.

Chapter two examines the application of ERA s 98(4) in depth to identify its interpretation, its impact on claimants and employers, and the likelihood of future legal developments in this area. Chapter three carries out a similar exercise for sections 13(2), 15(1)(b), and 19(2)(d) of the EqA.

Having identified the central concepts of reasonable responses and proportionality, chapter four compares them directly. It focuses particularly on dual claim situations where both tests are necessarily applied side by side to the same facts. Overall conclusions are made about both differences and similarities found. It is argued that the relationship between reasonableness and proportionality in cases of employee dismissal is not fully settled within case law, and further clarification will likely be necessary in the future. Such clarification could go to the heart of distinctions between unfair dismissal and discrimination in UK law.

Chapter 1:
An overview of unfair dismissal and discrimination law

1.0 Introduction

This chapter summarises key aspects of legislation relating to dismissal from employment and identifies the particular legal tests to be explored later within the dissertation.

1.1 Background to legislation

Under common law, an individual has limited rights of redress if they are dismissed from employment.[1] This is because under the law of contract, one party may give notice to another to terminate an agreement, subject to its specific terms.[2] Therefore, even if an employee makes a wrongful dismissal claim based on breach of contract, the maximum amount of damages awarded will be the sum of wages and/or other benefits that they would have been entitled to during the contractual period of notice.[3]

The Industrial Relations Act 1971 extended the law significantly with its introduction of a right not to be unfairly dismissed.[4] The deceptively simple wording of that statute has continued in law under various forms since, most recently within the ERA.[5]

By contrast, anti-discrimination legislation is designed for a broader range of claims in various settings.[6] Dismissal from employment has always been included in this.[7] As

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[1] H Collins, *Justice in Dismissal: The Law of Termination of Employment* (OUP 1992) 31.
[2] D Brodie, *The Contract of Employment* (W Green & Son 2008) 225.
[3] Ibid.
[4] Collins (n 1) 23, 35.
[5] S Deakin & G Morris, *Labour Law* (6th edn, Hart Publishing 2012) 594.
[6] B Hepple, *Equality: The New Legal Framework* (Hart Publishing 2011) 25.
[7] See for example the Sex Discrimination Act 1975, s 6(2)(b) and Race Relations Act 1976, s 4(2)(c).

such, since the mid 1970s it has been theoretically possible for a dismissed employee to bring dual claims of both unfair dismissal and discrimination. Importantly, the drive towards the latter statutory regulation came from the European Union (EU) in the form of various Equal Treatment Directives.[8] This has given anti-discrimination legislation a distinctly European construction as compared to that of unfair dismissal.[9]

The EqA was designed to consolidate, standardise and replace most previous anti-discrimination legislation.[10] It provides protection against discrimination for those in or seeking employment.[11] This again includes situations where an employee is dismissed.[12]

1.2 Purposes behind statutory regulation of dismissal

Collins has conducted an analysis of the purpose behind unfair dismissal legislation.[13] His conclusion is that statutory regulation of an employer's decision to dismiss is connected to a desire for autonomy and human dignity in the workplace.[14] Losing a job has not only an economic impact – which can be remedied by a flexible labour market – but also has a psychological and emotional impact on the individual.[15] This, Collins argues, is why unfair dismissal legislation regulates the behaviour, actions, and processes of employers when they consider dismissal.[16] Other commentators have supported this assessment.[17] The legislation seeks to promote fairness in the workplace, whilst limiting any restriction on the ability of employers to make business

[8] The most recent of these is Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.
[9] M Connolly, *Discrimination Law* (2nd edn, Sweet & Maxwell 2011) 183.
[10] Ibid 16.
[11] Equality Act 2010 (EqA 2010) s 39.
[12] EqA 2010, s 39(2)(c).
[13] Collins (n 1) 11-22.
[14] Ibid 22.
[15] Ibid 16.
[16] Ibid 17.
[17] T Brodtkorb 'Employee Misconduct and Unfair Dismissal law: Does the range of reasonable responses test require reform?' (2010) 52 Int JLM 434.

decisions.[18]

The purpose of anti-discrimination law has likewise been linked to notions of individual human dignity.[19] However, anti-discrimination law also has a more general societal purpose.[20] Commentators view this broader motivation through different perspectives such as ethical (equal opportunities), political/democratic (free participation in society), or economic (benefits of merit-based recruitment and advancement);[21] but all ultimately regard statutory intervention to prevent workplace discrimination as fulfilling a societal, as well an individual, need.[22] Because of this over-arching purpose, anti-discrimination law positively requires employers 'to operate employment practices that are sufficiently sensitive to the needs of the vulnerable group to eradicate unequal treatment caused by prejudice, stereotyping and other tangible and intangible barriers to the workplace'.[23] As such, it potentially involves greater judicial input in the way that employers run their businesses than unfair dismissal law.[24]

1.3 Defining dismissal

The ERA and EqA define dismissal in similar terms. This includes dismissal by notice (or otherwise), non-re-engagement of a fixed-term contract, and constructive dismissal.[25] The latter occurs when an employee resigns in circumstances where they would have been entitled to terminate the contract without notice due to employer conduct.[26] In other words, where an employer's actions constitute a repudiatory breach of contract and the employee resigns in response to this breach, this will be

[18] Deakin & Morris (n 5) 597.
[19] K Monaghan, *Monaghan on Equality Law* (2nd edn, OUP 2013) 16.
[20] Hepple (n 6) 16.
[21] Deakin & Morris (n 5) 601; Monaghan (n 19) 13-16.
[22] Hepple (n 6) 17.
[23] J Davies, 'A Cuckoo in the nest? A "range of reasonable responses" justification and the Disability Discrimination Act 1995' (2003) 32 ILJ 164, 177.
[24] Ibid 178; Deakin & Morris (n 5) 596-7.
[25] Employment Rights Act 1996 (ERA 1996) s 95(1); EqA 2010, s 39(7).
[26] ERA 1996, s 95(1)(c); EqA 2010, s 39(7)(b).

classed as a dismissal under both pieces of legislation.[27]

1.4 Entitlement to claim

In order to claim unfair dismissal, the individual must be working under a contract of employment.[28] Defining a contract of employment is a complex area of law beyond the immediate scope of this dissertation, but it excludes both the self-employed, and those who work on contracts that do not involve a close mutuality of obligation in terms of hours offered or accepted.[29] Individuals working under an employment contract must have had (in most circumstances) at least two years' service prior to their dismissal.[30]

There is no length of service requirement for a discrimination claim, and the EqA's definition of employee is considerably wider than that of the ERA; encompassing those on casual or 'zero hour' contracts, though still excluding the genuinely self-employed.[31] The protected characteristics under which protection from discrimination is potentially provided are race, age, disability, sex, sexual orientation, pregnancy, marital status, religion or belief, and gender reassignment.[32]

1.5 Stages of an unfair dismissal claim

Despite the large amount of case law it inspires, unfair dismissal is at its heart a statutory concept and any claim must meet the tests laid out in what is today ERA s 98.[33] Section 98(1) requires the employer to show the reason for the dismissal, and demonstrate that it fell within one of the prescribed categories listed in section

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[27] *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761 (CA).
[28] ERA 1996, s 230(1).
[29] For further discussion on this point, see I Smith & others, *Smith and Wood's Employment Law* (13th edn, OUP 2017) 47-54.
[30] ERA 1996, s 108. This service requirement is removed in some limited circumstances; usually where the dismissal is directly connected to the employer's assertion of a statutory right.
[31] EqA 2010, s 83(2)(a).
[32] EqA 2010, s 4.
[33] Smith & others (n 29) 511.

98(2).[34] If it does, and the tribunal is satisfied that this was the genuine reason, then the dismissal is considered potentially fair.[35]

1.5.1 Potentially fair reasons for dismissal

The precise categories of potentially fair dismissals are; conduct of the employee, capability or qualifications, redundancy, contravention of statute, or some other substantial reason.[36] They are broadly defined and it is rare that any reason for dismissal other than those directly forbidden in sections 98-104F of the ERA will fail this first stage.[37] However, if more than one reason is given, or the employee disputes that the reason given is correct; the tribunal will consider what was the chief motivating factor of the employer when making the decision to dismiss.[38]

A conduct dismissal occurs where an employee has breached the employer's rules or procedures; or has otherwise behaved in a manner that is incompatible with the employer's business interests.[39] Such a dismissal may be summary in nature, caused by a single act of gross misconduct that creates a repudiatory breach of contract.[40] Alternatively the employee may have carried out numerous smaller acts of misconduct prior to dismissal.[41]

For an employer to dismiss for capability or qualifications, they need to demonstrate a genuine belief that the employee's lack of ability, skill, knowledge or formal qualification justifies a decision to end their employment in that role.[42] This is often the case if an employee has been absent due to sickness for a prolonged period and

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[34] ERA 1996, s 98(1) & (2).
[35] *Beedell v West Ferry Printers Ltd* [2000] ICR 1263 (EAT); Deakin & Morris (n 5) 525-26.
[36] ERA 1996, s 98(1) & (2).
[37] ERA 1996, s 98(6).
[38] *Maund v Penwith District Council* [1984] ICR 143 (CA); Smith & others (n 29) 517.
[39] S Honeyball, *Honeyball & Bower's Textbook on Employment Law* (14th edn, OUP 2016) 178-81.
[40] Smith & others (n 29) 534-35.
[41] Ibid 536.
[42] ERA 1996, s 98(3).

there is little likelihood of them returning in the near future.[43] It can also cover situations where poor performance of an employee has a negative impact on the employer's business, or where the employer has genuine reasons to believe that the holding of a particular qualification is necessary for the employee's job role.[44]

Redundancy arises when an employee's role is no longer required by their employer's business due to either a reduction in available work or the closure of a work location.[45] In practice, redundancy situations can be complicated due to re-structuring of particular departments, locations or roles.[46] Where the employer has dismissed for reason of redundancy, a tribunal must be satisfied that the circumstances fit within definitions given in ERA s 139.

Should an employee's continued employment in a job role contravene another statute, the dismissal is also potentially fair.[47] This might occur for example if the employee did not have the right to work legally within the UK.[48]

Some other substantial reason (SOSR) is the remaining category of potentially fair dismissals and has been defined widely in case law; so much so, that some argue that it removes any check on employers imposed by ERA s 98(1).[49] SOSR has been judged to cover economic motivations of the employer to re-structure work,[50] refusal to accept a restrictive covenant,[51] rejection of the employee by a major client,[52] and many other situations that have led to an employee's (intentional or constructive) dismissal.[53]

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[43] Honeyball (n 39) 175-76.
[44] Honeyball (n 39) 173.
[45] ERA 1996, s 139.
[46] Smith & others (n 29) 583.
[47] Honeyball (n 39) 188.
[48] *Kelly v University of Southhampton* [2008] ICR 357 (EAT).
[49] Deakin & Morris (n 5) 525-6.
[50] *Chubb Fire Security Ltd v Harper* [1983] IRLR 311 (EAT).
[51] *RS Components Ltd v Irwin* [1974] 1 All ER 41 (NIRC).
[52] *Henderson v Connect (South Tyneside) Ltd* [2010] IRLR 466 (EAT).
[53] See Honeyball (n 39) 189 for further examples.

1.5.2 The significance of section 98(4)

Once the dismissal has met the criteria for being potentially fair, section 98(4) requires the tribunal to determine whether it is fair or unfair overall.[54] This decision should take aspects of the employer's business, including size and administrative resources, into consideration.[55] Then, being mindful of equity and the substantial merits of each case, the tribunal decides whether the employer's actions were reasonable or unreasonable.[56] This assessment is the critical point in most unfair dismissal claims.[57] Chapter two of this dissertation will examine its interpretation in detail.

1.6 Stages of a discrimination claim

Under the EqA, the first stage of a discrimination claim is to identify the protected characteristic under which discrimination occurred.[58] The second stage identifies the type of discriminatory conduct.[59] The third step is to place this conduct within the context of one or more of the specifically prohibited circumstances outlined within the EqA.[60]

This creates a wide range of potential routes for a discrimination claim. This dissertation will focus on those that can both relate to dismissal from employment and be potentially justified by an employer on grounds of proportionality.[61] The three categories of potentially discriminatory conduct that meet these criteria are indirect discrimination,[62] discrimination arising from disability,[63] and direct discrimination on

[54] ERA 1996, s 98(4).
[55] ERA 1996, s 98(4)(a).
[56] ERA 1996, s 98(4)(a) & (b).
[57] Deakin & Morris (n 5) 505-06.
[58] EqA 2010, pt 2 ch 1.
[59] EqA 2010, pt 2 ch2.
[60] EqA 2010, pt 5 ch 1.
[61] Other forms of discrimination that do not meet this criteria such as direct discrimination that is not age-related, or failure to provide reasonable adjustments for a disabled employee, will not be considered within this dissertation.
[62] EqA 2010, s 19.
[63] EqA 2010, s 15.

grounds of age.[64]

1.6.1 Indirect Discrimination

The prohibition of indirect discrimination is intended to promote equality of outcomes rather than merely equal treatment.[65] It can occur where an employer applies an apparently neutral provision, criterion or practice (PCP) to the employee.[66] This could be an organisational rule, policy, performance target, or less formal expectation of conduct or appearance in the workplace.[67] For a claim to succeed, the employee must demonstrate that this PCP places both them, and other members of a (real or hypothetical) group with whom they share a protected characteristic at a particular disadvantage.[68] This requires comparison with a different group who do not share the same characteristic.[69] Examples of indirect discrimination in dismissal situations often relate to an employee's refusal to comply with standard organisational policies including working hours[70] or dress codes.[71] However, if the employer successfully argues that the PCP was a proportionate means of achieving a legitimate aim, no unlawful discrimination will have occurred.[72]

1.6.2 Discrimination arising from disability

Discrimination arising from disability is a separate category of prohibited conduct that was created by the EqA, though it has origins in a similar claim for disability-related discrimination formerly within the Disability Discrimination Act 1995.[73] Here the focus is on the disabled employee as an individual and there is no requirement for a

[64] EqA 2010, s 13(1) & (2).
[65] Hepple (n 6) 64.
[66] EqA 2010, s 19(1).
[67] Honeyball (n 39) 258.
[68] EqA 2010, s 19(2)(b) & (c).
[69] EqA 2010, s 19(2)(a).
[70] *Mba v Merton London Borough Council* [2013] EWCA Civ 1562; [2014] 1 WLR 1501.
[71] *Ladele v Islington London Borough Council* [2009] EWCA Civ 1357; [2010] 1 WLR 955.
[72] EqA 2010, s 19(2)(d).
[73] Smith & others (n 29) 344.

comparator.[74] Instead the employee must demonstrate that their treatment by the employer was unfavourable, and that this is due to something arising in consequence of their disability.[75]

Tribunals have applied a loose test of causation between the employee's disability and the treatment they have received, meaning that it can be a powerful and wide-ranging claim for a dismissed employee to make.[76] However, again, if the employer successfully argues that their actions were a proportionate means of achieving a legitimate aim, no unlawful discrimination will have occurred.[77]

1.6.3 Direct age discrimination

Direct discrimination occurs when an employee is treated unfavourably in comparison with others because of a protected characteristic.[78] A justification defence is unavailable unless the discrimination is based on age.[79] In situations involving the latter, the employer may argue that their actions were a proportionate means of achieving a legitimate aim.[80]

1.6.4 Significance of a justification defence

Indirect discrimination, discrimination arising from disability, and direct age discrimination claims can all potentially be applied to workplace dismissals.[81] It is not necessary to prove any deliberate intention of the employer to discriminate when a *prima facie* case for discrimination is made by the employee.[82] An employer is likely to argue that their PCP or other actions were instead motivated by factors such as

[74] Hepple (n 6) 74.
[75] EqA 2010, s 15(1)(a).
[76] For example, in *Risby v Waltham Forest London Borough Council* (EAT, 18 March 2016) an employee successfully argued that their dismissal for shouting at colleagues using racist and inappropriate language was related to pain and frustration caused by his disability.
[77] EqA 2010, s 15(1)(b).
[78] EqA 2010, s 13(1).
[79] EqA 2010, s 13(2).
[80] EqA 2010, s 13(2).
[81] EqA 2010, s 39(2)(c).
[82] Connolly (n 9) 154.

business need.[83] For these reasons, the justification defence (under which the burden of proof shifts to the employer) is highly significant to the operation of the law in this area.[84] Chapter three will examine it further.

1.7 Chapter conclusion

This chapter has attempted to summarise the law on unfair dismissal, indirect discrimination, discrimination arising from disability, and direct age discrimination as they relate to dismissal from employment. Methods for justification applying to these claims have been identified as pivotal aspects of an employer's defence. Therefore, even if an employee has the right to protection against unfair dismissal, they may still be lawfully dismissed so long as the employer's actions are considered reasonable. Likewise, even if an employee is able to demonstrate that their dismissal was indirectly discriminatory, arose from reasons connected to disability, or was direct age discrimination, the employer will not have acted unlawfully if their actions were a proportionate means of achieving a legitimate aim. The following chapters will examine these tests closely.

This chapter has also looked briefly at the underlying purposes behind these areas of statutory protection. The concepts of individual dignity and autonomy are crucial to all. However, anti-discrimination law is also based on concepts of broader societal benefit that are wider than and go beyond the aims of unfair dismissal. This may prove an important point of consideration further on in this dissertation when the tests of reasonableness and proportionality are compared.

[83] Deakin & Morris (n 5) 645.
[84] Connolly (n 9) 182.

Chapter 2:
Unfair dismissal and the test of reasonableness

2.0 Introduction

Chapter one highlighted the pivotal importance of ERA s 98(4) in deciding claims for unfair dismissal. That subsection will be examined in depth here to identify the legal tests it creates, understand how these are applied in different types of dismissal, and to evaluate criticisms. The chapter will also explore the implications of recent comments from the Supreme Court in *Reilly v Sandwell Metropolitan Borough Council*.[85]

2.1 Established interpretations of section 98(4)

When adjudicating on the fairness or unfairness of any dismissal, a tribunal will make an error of law if it does not explicitly bear in mind the wording of this subsection as follows: [86]

> Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.[87]

This wording has remained substantially unchanged since the Industrial Relations Act 1971 and as such, case law dating from that Act and its successors can still be relevant

[85] *Reilly v Sandwell Metropolitan Borough Council* [2018] UKSC 16; [2018] 3 All ER 477.

[86] *Conlin v United Distillers* [1994] IRLR 169 (IH).

[87] Employment Rights Act 1996 (ERA 1996) s 98(4).

today.[88] The burden of proof is neutral.[89]

Firstly of note is the interaction between sections 98(1) and 98(4).[90] Simply put, section 98(1) requires the employer to establish a reason that potentially justifies dismissal of an employee.[91] It is the purpose of section 98(4) to establish whether that reason justified the dismissal of the particular employee in question.[92]

Moving on to paragraph (a), this demands that the tribunal asks itself whether the employer acted reasonably or unreasonably.[93] Focus is thus laid on the employer's actions and its justification for them, rather than considering matters from the employee's perspective.[94] This is emphasised by the highlighting of employer size and administrative resources as relevant concerns, without any explicit mention of matters such as injustice to the individual employee.

The use of the phrase 'reasonably or unreasonably' at first might suggest a simple dichotomy of response in which the tribunal decides whether the employer's behaviour fell into one or other category.[95] However, when interpreting these words, judges must apply a high degree of restraint in their decision-making, and this makes the test less straightforward. As Phillips J in *Watling & Co Ltd v Richardson* explained:

> [T]he fairness or unfairness of the dismissal is to be judged not by the hunch of the particular industrial tribunal, which (though rarely) may be whimsical or eccentric, but by the objective standard of the way in which a reasonable employer, in those circumstances, in that line of business, would have behaved. It has to be recognised that there are circumstances where more than one course of action may

[88] A full summary of developments in wording for this subsection is given in *Orr v Milton Keynes Council* [2011] EWCA Civ 62; [2011] 4 All ER 1256, Appendix to judgement.

[89] *Hackney London Borough Council v Usher* [1997] ICR 705 (EAT).

[90] ERA 1996, s 98(1) & s 98(4).

[91] ERA 1996, s 98(1); *Gilham v Kent County Council (No. 2)* [1985] ICR 233 (CA).

[92] ERA 1996, s 98(4); *Orr* (n 88).

[93] ERA 1996 s 98(4)(a).

[94] *Orr* (n 88).

[95] ERA 1996, s 98(4)(a).

be reasonable.[96]

This concept, later described in *British Leyland v Swift* as the 'band of reasonableness',[97] means that employer actions ranging from informal warning to summary dismissal in the same set of circumstances can potentially be seen as reasonable. [98] As this quote from the above case describes:

> An employer might reasonably take the view, if the circumstances so justified, that his attitude must be a firm and definite one and must involve dismissal in order to deter other employees from like conduct. Another employer might quite reasonably on compassionate grounds treat the case as a special case.[99]

Reasonableness within the context of ERA s 98(4) is therefore a flexible, rather than static concept. This has had a far-reaching impact on the development of unfair dismissal law that will be explored further in this chapter.

In the House of Lords case, *W Devis & Sons v Atkins,* the exact meaning of the 'it' in section 98(4)(a) was settled as referring to the reason decided on in section 98(1).[100] This is significant because it forces the tribunal to consider the reasonableness of the employer's actions at the time the dismissal took place, rather than allowing for consideration of later evidence or events.[101]

It is also worthwhile noting section 98(4)(a)'s use of the phrase 'sufficient reason for dismissing the employee'.[102] There is no suggestion here that an employer must have found dismissal necessary under the circumstances, or even that dismissal is the best option available to them. All that is required is that the employer's reasoning for the decision is not insufficient overall.

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[96] *Watling & Co Ltd v Richardson* [1978] ICR 1049 (EAT) 1056 (Phillips J).

[97] *British Leyland (UK) Ltd v Swift* [1981] IRLR 91 (CA) [11] (Lord Denning MR).

[98] *Rolls-Royce v Walpole* [1978] IRLR 343 (EAT).

[99] *British Leyland* (n 97) [17] (Ackner LJ).

[100] *W Devis & Sons Ltd v Atkins* [1977] AC 931 (HL).

[101] Ibid.

[102] ERA 1996, s 98(4)(a).

Section 98(4)(b) sets the tone by which the rest of this subsection is measured.[103] According to the Court of Appeal, the terms 'equity and substantial merits of the case' signify that reasonableness is not to be measured by technical argument or legal jargon, but in straightforward analysis of each individual situation.[104] In addition, the word 'equity' can be viewed as implying an expectation of reasonable consistency in employer behaviour.[105]

2.2 Summarising the test

Section 98(4) is thus deceptively complex in its formation and impact. Its key concepts were summarised by Browne-Wilkinson J in *Iceland Frozen Foods Ltd v Jones* as follows:

> (1) [T]he starting point should always be the words of [the] section […] themselves; (2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair; (3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer; (4) in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another; (5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.[106]

This particularly powerful breakdown of principles has proven so significant within the field of unfair dismissal law that it is often referred to simply as the *Iceland* test and

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[103] *Orr* (n 88).

[104] *Union of Construction, Allied Trades and Technicians v Brain* [1981] ICR 542 (CA) 550 (Donaldson LJ); *Orr* (n 88).

[105] *Post Office v Fennell* [1981] IRLR 221 (CA).

[106] *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 (EAT) 24-25 (Browne-Wilkinson J).

has been explicitly approved by the Court of Appeal on multiple occasions.[107]

The Court of Appeal is also of the opinion that, where appropriate, the test from *British Homes Stores v Burchell*[108] similarly forms an aspect of section 98(4) in identifying the reasonableness of an employer's decision to dismiss.[109] *Burchell* considered the level of proof required by an employer when dismissing for misconduct and set a three-stage test as follows:

1. Did the employer have a genuine belief in the employee's misconduct?
2. Was this belief based on reasonable grounds?
3. Had a reasonable level of investigation been carried out in order to discover these grounds?[110]

Where these three questions are answered in the affirmative, dismissal will usually be considered a reasonable response in the circumstances.[111] The cases of *Iceland* and *Burchell* therefore form the foundation of tribunals' interpretation of ERA s 98(4), and have impacted significantly on unfair dismissal law.

Firstly, they give wide-ranging power to tribunals, as the question of reasonableness will depend on findings of fact that can rarely be challenged on appeal.[112] The reasonable responses test is based purely upon an analysis of hypothetical employer behaviour by first instance judges.[113]

Secondly, because both *Iceland* and *Burchell* stress the importance of judging the employer by its own actions at the time of dismissal, this has led to a great focus on

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[107] *Post Office v Foley; HSBC Bank Plc (formerly Midland Bank Plc) v Madden* [2001] 1 All ER 550 (CA); *Orr* (n 88); I Smith & others, *Smith and Wood's Employment Law* (13th edn, OUP 2017) 527.
[108] *British Home Stores Ltd v Burchell* [1980] ICR 303 (EAT).
[109] *Post Office; HSBC* (n 107).
[110] *Burchell* (n 108).
[111] Ibid.
[112] Smith & others (n 107) 522.
[113] Ibid 529.

procedural fairness.[114] The leading case on procedural matters, *Polkey v AE Dayton Services Ltd,* considered the problem of inadequate employer procedure preceding a dismissal.[115] It concluded that even if following a fair procedure would have led to the employee's dismissal, dismissing without proper procedure is still unfair in most cases. Subsequent cases have clarified that all such internal employer procedures and investigations must be judged as part of the reasonable responses test.[116] This potentially reduces industrial conflict by promoting opportunities for conciliation and internal review of decisions.[117] However, as will be discussed further in this chapter, some argue that it has led to insufficient emphasis on substantive justice for employees.[118]

As interpreted, ERA s 98(4) therefore contains a mixture of both objective and subjective elements.[119] For example, in *Alidair Ltd v Taylor* the Court of Appeal argued that it was a subjective test, focussing on the employer's right to decide its own standards of acceptable competence at work,[120] whereas *Post Office v Foley* highlighted the objectivity of the tribunal when assessing whether such a decision was within the band of reasonable responses.[121]

2.3 Application of the reasonable responses test

The reasonable responses (or *Iceland*) test has been applied to all categories of dismissal contained within sections 98(1) and (2), meaning that the principles of unfair

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[114] S Honeyball, *Honeyball & Bower's Textbook on Employment Law* (14th edn, OUP 2016) 197; Smith & others (n 107) 522.

[115] *Polkey v AE Dayton Services Ltd* (1988) AC 344 (HL).

[116] *Whitbread Plc (t/a Whitbread Medway Inns) v Hall* [2001] EWCA Civ 268; [2001] ICR 699; *Sainsbury's Supermarkets Ltd v Hitt* [2002] EWCA Civ 1588; [2003] ICR 111.

[117] Honeyball (n 114) 196-7.

[118] S Deakin & G Morris, *Labour Law* (6th edn, Hart Publishing 2012) 546.

[119] Smith & others (n 107) 525.

[120] *Alidair Ltd v Taylor* [1978] ICR 445 (CA).

[121] *Post Office; HSBC* (n 107). It could be argued alternatively that the employer's need to act on evidence gained by investigation is an objective aspect of the test, and the tribunal's assessment of whether their decisions were reasonable is subjective – Smith & others (n 107) 525-6.

dismissal remain similar whether that dismissal is for conduct, capability, redundancy, contravention of statute, or SOSR. Some general areas of consideration for tribunals have been established. The need to comply with proper procedure, as established in the section above, is one of these. Issues such as organisational consistency, length of service of the dismissed employee, and the size of the employer, are all likewise relevent.

Employers are expected to act consistently towards their workers. Parallel actions that attract a minor sanction towards one employee should not normally lead to the dismissal of another without good reason.[122] Arbitrary decisions and behaviour by employers cannot be supported by the reasonable responses test.[123] However, given the need to consider dismissal situations from the perspective of an employer, tribunals place significant weight on their reasoning behind any such inconsistency.[124] Thus, so long as motives for inconsistency (including individual instances of mitigation, or conscious recognition that previous organisational decisions have been unduly lenient) fit within the band of reasonable responses, the dismissal may still be fair.[125]

As required by statute, tribunals will also consider an employer's individual size and resources.[126] For example, expectations of proper investigation, procedure, or consultation for a small business will be different from those applied to a large-scale multinational organisation.[127] This highlights how unfair dismissal law rarely sets out restrictive rules or expectations for all employers.[128]

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[122] *Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352 (EAT); *Post Office* [n 105].

[123] *Securicor Ltd v Smith* [1989] IRLR 356 (CA).

[124] *Hadjioannou* (n 122).

[125] *Proctor v British Gypsum Ltd* [1992] IRLR 7 (EAT); *Conlin* [n 86].

[126] ERA 1996, s 98(4)(a).

[127] *MacKellar v Bolton* [1979] IRLR 59 (EAT); *Royal Naval School v Hughes* [1979] IRLR 383 (EAT).

[128] It is important to note though, that even the smallest of employers will be judged by the reasonableness of their actions in each circumstance - *Henderson v Granville Tours Ltd* [1982] IRLR 494.

Another, more employee-focussed consideration for the tribunal relates to length of service, which should be taken into account when an employer contemplates dismissal. [129] An employee who has given loyal service for many years may expect to be treated with particular consideration. [130] In redundancy situations for example, tribunals generally have approved measures to place them at an advantage compared with employees with lesser service. [131]

However, the Scottish Inner House case of *BS v Dundee City Council* has recently downplayed the importance of length of service. [132] It argues the primary purpose of such consideration is to assist an employer in assessing the likelihood of future instances of misconduct or ill health, rather than being connected to any intrinsic concept of justice. This is hard to reconcile with earlier decisions such as *Dobie v Burns International Security Service (UK) Ltd* that did highlight the consideration of individual justice in these matters, [133] but it is perhaps closer in line with general principles of the reasonable responses test outlined in the previous section.

2.3.1 Conduct

When a conduct dismissal has occurred, the tribunal is required to consider guidelines set out in the ACAS Statutory Code of Practice for Disciplinaries and Grievances. [134] These are mostly concerned with procedural fairness: emphasising the rights of the employee to know conduct expectations in advance, for allegations to be fully investigated, opportunities for employees to argue their case, and procedures to

[129] *Dobie v Burns International Security Service (UK) Ltd* [1984] 1 WLR 43 (CA) 47 (Donaldson MR); *Strouthos v London Underground Ltd* [2004] EWCA Civ 402; [2004] IRLR 636.

[130] *Taylor v Parsons Peebles NEI Bruce Peebles Ltd* [1981] IRLR 119 (EAT).

[131] *Thomas & Betts Manufacturing Ltd v Harding* [1980] IRLR 255 (CA).

[132] *BS v Dundee City Council* [2013] CSIH 91; 2014 SC 254.

[133] *Dobie* (n 129).

[134] Trade Union and Labour Relations (Consolidation) Act 1992, s 207A. Consideration of the code is mostly relevant for assessing appropriate compensation in successful claims, but undoubtedly has some influence over how tribunals interpret section 98(4).

appeal decisions made.[135]

Thus, employers should have clear policies setting out expected conduct in the workplace, and the potential consequences for breaches of this.[136] However, behaviour from an employee that is obviously inappropriate (such as theft or violence) can in some cases fairly lead to dismissal without a specific organisational policy in place.[137]

When an allegation of misconduct has been made, employers should apply the standards of *Burchell* prior to making any decision to dismiss.[138] This, as previously described, means holding a genuine belief in the misconduct based on reasonable grounds, revealed by reasonable investigation. Such investigation and belief do not need to reach the standards of criminal prosecution,[139] and instead only need to be sufficient to fall within the band of reasonable responses.[140] This means that expectations of sufficient investigation will vary between cases. Tribunals are wary of criticising the conclusions of employer investigations.[141] For them to re-examine the facts of a case from their own perspective rather than that of the employer is an error of law.[142] This includes interpreting witness statements or drawing conclusions from evidence not presented.[143] However, if the investigation is so clearly inadequate as to be outside of what can be considered reasonable, then dismissal will be unfair, even if a fuller investigation would have likely produced the same outcome.[144]

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[135] ACAS, *Statutory Code of Practice on Grievance and Disciplinary Procedures* (TSO 2009) 7-8.
[136] *Meyer Dunmore International Ltd v Rogers* [1978] IRLR 167 (EAT).
[137] Deakin & Morris (n 118) 537.
[138] *Burchell* (n 108).
[139] Ibid.
[140] *Sainsbury's* (116).
[141] See for example, *Slater v Leicestershire Health Authority* [1989] IRLR 16 (CA).
[142] *Morgan v Electrolux Ltd* [1991] ICR 369 (CA); *London Ambulance Trust v Small* [2009] EWCA Civ 220; [2009] IRLR 563.
[143] *Orr* (n 88).
[144] *Brent London Borough Council v Fuller* [2011] EWCA Civ 267; [2011] ICR 806.

In some cases this focus on process has led to the fair dismissal of multiple employees, despite the employer knowing that not all were guilty of misconduct, because reasonable levels of investigation had failed to identify who the true perpetrator was.[145] Hence, the quality of employer investigation and process prior to dismissal has a larger bearing on fairness than whether or not the employee actually carried out the conduct accused of.[146] This again highlights how the reasonable responses test focuses on justifications for employer behaviour, rather than justice for those disadvantaged by it.[147]

Regarding such cases where substantive rather than procedural injustice is the main issue, guidance issued from higher courts on this subject sets a low bar for employers to argue that their actions fell within the band of reasonable responses. In *Post Office v Foley*, when attempting to describe a misconduct situation where dismissal would be clearly unreasonable, Mummery LJ used the example of an employee saying 'good morning' to his line manager.[148] He argued that in any less extreme case 'there is room for reasonable disagreement among reasonable employers as to whether dismissal for the particular misconduct is a reasonable or unreasonable response'.[149] Tribunals are thus in practice unlikely to find that an employer has responded overly harshly to an incident,[150] and where this occurs, such decisions are often overturned at appeal on grounds that they have substituted their own judgment for that of a reasonable employer.[151] Overall, a dismissal for conduct is unlikely to be found unfair purely on

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[145] *Monie v Coral Racing Ltd* [1981] ICR 109 (CA); *Parr v Whitbread & Co Plc (t/a Threshers Wine Merchants)* [1990] ICR 427 (EAT).

[146] *Da Costa v Optolis* [1976] IRLR 178 (EAT).

[147] *Devis* (n 100) 952 (Viscount Dilhorne); *Polkey* (n 115) 363 (Lord MacKay); Smith & others (n 107) 542.

[148] *Post Office; HSBC* (n 107) [50] (Mummery LJ).

[149] Ibid.

[150] See for example, *Tesco Stores Ltd v Othman-Khalid* (EAT, 10 September 2001) where the dismissal of an employee for one instance of stealing items worth approximately £1.50 was held to be within the band of reasonable responses.

[151] See for example, *Anglian Home Improvements Ltd v Kelly* [2004] EWCA Civ 901; [2005] ICR 242 where the Court of Appeal overturned a verdict of unfair dismissal. The original tribunal had previously judged the employee's failure to follow correct

grounds of substantive injustice.[152]

However, this argument should not be taken too far. For minor acts of misconduct, the ACAS code makes clear that employers are expected to issue warnings rather than move straight towards summary dismissal.[153] Likewise, the recent case of *Newbound v Thames Water Utilities Ltd* reminded tribunals that to conclude that an employer's decision to dismiss was outside the band of reasonable responses does not necessarily mean that the judge has substituted their views for that of the employer.[154] In that case, an employee's dismissal for certain health and safety breaches was found to be substantially unfair on the facts. Tribunals are still theoretically entitled to make such conclusions; there just appears to be little clarity on when they should.

2.3.2 Capability

Capability dismissals tend to fall into two different categories: those relating to prolonged sickness absence, and those relating to substandard work performance. This results in different issues being considered, but the reasonable responses test applies to both.

Dismissals relating to substandard performance appear, similar to conduct, more likely to be found unfair on procedural rather than substantive grounds.[155] Case law focuses on the importance of reasonable training, clear procedures, and fair warnings in advance of dismissal.[156] The employer should do its best to support the employee to carry out their role successfully before dismissal is considered.[157] However, where belief can be evidenced that the poor performance has a significant enough impact

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banking procedures a matter too minor to warrant gross misconduct.

[152] T Brodtkorb 'Employee Misconduct and Unfair Dismissal law: Does the range of reasonable responses test require reform?' (2010) 52 Int JLM 429, 436.

[153] ACAS (n 135) 12.

[154] *Newbound v Thames Water Utilities Ltd* [2015] EWCA Civ 677; [2015] IRLR 734.

[155] Honeyball (n 114) 173-5.

[156] *Winterhalter Gastronom Ltd v Webb* [1973] ICR 254 (NIRC); *Post Office v Mughal* [1977] ICR 763 (EAT).

[157] *Steelprint Ltd v Haynes* (EAT, 1 July 1996).

(such as safety concerns) then tribunals will not always consider a full performance management procedure necessary for the dismissal to be within the band of reasonable responses.[158]

In long-term sickness absence situations, the employer should attempt to gain accurate information regarding the employee's condition via a medical report,[159] to consult with the employee about opportunities for them to return to work,[160] and consider redeployment to other roles if appropriate in the circumstances.[161] Whilst each case will be considered on its own merits, failing to carry out these actions means that the dismissal may be considered outwith the band of reasonable responses. Procedural fairness, therefore, is highly important.[162]

It could be argued though, that concepts of substantive fairness have a somewhat higher profile in absence cases, with the question of how long should an employer wait before dismissing being an important consideration in the case law on this subject.[163] This goes to the heart of the conflict between an employer's economic interests and humanitarian concerns for the employee.[164] However, if the employer is able to argue that there are reasonable business reasons why they are unable to support the employee's absence any further, the dismissal will usually be fair.[165]

2.3.3 Redundancy

Redundancy is different in that it is defined and regulated by a number of specific statutory rules separate to ERA s 98(4). This means for example, that issues of overall employer justification when dismissing will often be considered as part of the

[158] *Turner v Pleasurama Casinos Ltd* [1976] IRLR 151 (EAT); *Alidair* (n 120).
[159] *East Lindsey District Council v Daubney* [1977] ICR 566 (EAT).
[160] *Spencer v Paragon Wallpapers Ltd* [1977] ICR 301 (EAT).
[161] *Merseyside and North Wales Electricity Board v Taylor* [1975] ICR 185 (EAT).
[162] Deakin & Morris (n 118) 544.
[163] *East Lindsey* (n 159); *Spencer* (n 160); *BS* (n 132).
[164] Honeyball (n 114) 175.
[165] *Lynock v Cereal Packaging Ltd* [1988] ICR 670 (EAT); *Spencer* (n 160).

statutory definition of redundancy, rather than the band of reasonable responses.[166] Likewise, for dismissals of over twenty employees within a three-month period, expectations of reasonable procedures will be largely set by separate statutory provisions.[167]

However, for smaller redundancy situations, the band of reasonable responses test still plays a significant part in assessing the adequacy and fairness of an employer's procedures before dismissal takes place.[168] *Williams v Compair Maxam Ltd* laid down a list of considerations for tribunals in this situation, which include union consultation, fair 'pooling' and selection of affected employees, and the offer of alternative employment where available and appropriate. [169]

2.3.4 Contravention of statute

Case law is limited on the role of ERA s 98(4) in dismissals for contravention of statute. Due to the necessity of the employer taking decisive action to prevent unlawful behaviour, expectations of procedural fairness can be lower than in other types of dismissal.[170] However, if there is reasonable opportunity for the affected employee to be redeployed into another role where the contravention of statute would not occur, or the employer's belief in any illegality is mistaken, then dismissal could still be unfair.[171]

2.3.5 SOSR

As described in chapter one, this category of dismissal has been defined widely by tribunals, [172] and as such, it is difficult to make general conclusions about the role that ERA s 98(4) plays.

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[166] ERA 1996, s 139.
[167] Trade Union and Labour Relations (Consolidation) Act 1992, s 188.
[168] *Watling* (n 96); *Wrexham Golf Co Ltd v Ingham* (EAT, 10 July 2012).
[169] *Willams v Compair Maxam Ltd* [1982] ICR 156 (EAT); *Grundy (Teddington) Ltd v Plummer* [1983] ICR 367 (EAT).
[170] *Kelly v University of Southampton* (EAT, 6 July 2010).
[171] Ibid; Honeyball (n 114).
[172] *RS Components Ltd v Irwin* [1974] 1 All ER 41 (NIRC).

In terms of substantive justice, a tribunal is entitled to examine the reason for dismissal, but must do so from the perspective of the employer.[173] In the case of dismissals - whether constructive or dictated by the employer - caused by changes to terms and conditions, the tribunal may conclude that the employer's actions were potentially fair under section 98(1), and separately consider whether the individual dismissal(s) fell within the band of reasonable responses under section 98(4).[174] A breach of contract by an employer can thus still be considered reasonable in these circumstances,[175] despite some commentators' arguments that this goes against the very principles of unfair dismissal legislation.[176] The tribunal must ask itself if the employer reasonably considered that advantages to itself outweighed the negative impact on the employee.[177] However, the tribunal's ability to criticise an employer's business plan is limited and thus, such dismissals are often fair.[178] For example, in *Chubb Fire Security Ltd v Harper*, the employer's decision to unilaterally change a salesperson's areas of work was considered reasonable on overall business grounds, despite them knowing that this would cause a noticeable decrease in the commission the employee earned.[179]

Likewise, if an employer can successfully prove that retaining an employee could lead to the loss of a significant customer or client, dismissal is likely to be reasonable.[180] Whilst the balancing out of employee and business needs should form part of a tribunal's reasoning in all SOSR dismissals,[181] the needs of the employer will regularly

[173] *Gilham* (n 91).
[174] Ibid; *St John of God (Care Services) Ltd v Brooks* [1992] ICR 715 (EAT).
[175] *RS Components* (n 172).
[176] Deakin & Morris (n 118) 575.
[177] *Chubb Fire Security Ltd v Harper* [1983] IRLR 311 (EAT).
[178] ACL Davies, 'Judicial Self-Restraint in Labour Law' (2009) 38 ILJ 278, 304; Deakin and Morris (n 118) 575-6; Honeyball (n 114) 189-191.
[179] *Chubb* (n 177).
[180] *Scott Packing & Warehousing Co Ltd v Paterson* [1978] IRLR 166 (EAT).
[181] *Dobie* (n 129).

overrule the question of justice for an individual employee.[182]

Regarding procedural fairness, failure to follow an appropriate procedure will make an SOSR dismissal unfair.[183] However, what is considered reasonable will be shaped by exact circumstances. Reference to disciplinary procedures, for example, is not necessary.[184] In some cases, the test laid out in *Burchell* will be appropriate,[185] and in others it might be something closer to consultation exercises used for redundancy.[186] This perhaps exemplifies both the flexibility and complexity of the reasonable responses test.

2.4 Criticism of the reasonable responses test

Despite its favour with judges, the reasonable responses test has been heavily criticised. It is accused of not being in line with the wording of ERA s 98(4), being akin to a perversity test in practice, and offering more power to employers then was intended by the legislation. These arguments will be examined in turn.

2.4.1 Misinterpretation of statutory wording

There are two ways in which the reasonable responses test is argued to have subverted the wording of ERA s 98(4). The first is its refusal to accept a fixed standard of reasonableness in employer behaviour. [187] Reasonableness according to the test, as already seen, consists of the entire continuum of behaviour that might be observed of reasonable employees as a whole. Only employer behaviour that is totally outside this continuum can be judged as unreasonable. This contrasts with stark statutory

[182] *Henderson v Connect (South Tyneside) Ltd* [2010] IRLR 466 (EAT); *Ssekisonge v Barts Health NHS Trust* (EAT, 2 March 2017).
[183] *Willow Oak Developments Ltd (t/a) Windsor Recruitment v Silverwood* [2006] EWCA Civ 660; [2006] ICR 1552.
[184] *Ezsias v North Glamorgan NHS Trust* [2011] IRLR 550 (EAT).
[185] *Perkin v St Georges Healthcare NHS Trust* [2005] EWCA Civ 1174; [2006] ICR 617.
[186] *Ellis v Brighton Co-operative Society Ltd* [1976] IRLR 419 (EAT).
[187] H Collins, *Justice in Dismissal: The Law of Termination of Employment* (OUP 1992) 38; A Freer, 'The Range of Reasonable Responses Test – From Guidelines to Statute' (1998) 27 ILJ 336.

wording that categorises employer behaviour as either 'reasonable or unreasonable'.[188]

The Court of Appeal in *Post Office* argued that Parliament must always have intended for a range of reasonableness to be applied, for otherwise the tribunal would act on its own personal opinions rather than viewing matters from the mindset of a reasonable employer.[189] However, Freedland and Davies counter that given the wording of the statute, it is more likely that Parliament intended employer behaviour to be judged objectively based on the tribunal bench's own perspective.[190]

The second area in which standard judicial interpretations of ERA s 98(4) have been criticised is regarding the phrase 'equity and substantial merits of the case'.[191] As already described, under the reasonable responses test this is interpreted as promoting an approach to judgment that eschews legal technicalities or jargon.[192] However, Freer argues that it also implies an even-handed approach that seeks to balance the competing interests of employers and employees in a fair way, and this is not included in the reasonable responses test.[193]

2.4.2 Perversity

Some, including Freer, argue that application of the reasonable responses test has thus turned section 98(4) into a perversity test.[194] This argument deserves careful attention. *Wednesbury Corp v Ministry of Housing and Local Government (No. 2)* sets out the standard test for perversity in public law.[195] Courts can overturn decisions by

[188] ERA 1996, s 98(4)(a); Deakin & Morris (n 118) 529.
[189] *Post Office; HSBC* (n 107); *Orr* (n 88).
[190] M. Freedland, 'Finding the Right Direction for the "Industrial Jury"' (2000) 29 ILJ 288, 290-1; Davies (n 178) 289.
[191] ERA 1996, s 98(4)(b)
[192] *Orr* (n 88).
[193] Freer (n 187) 341.
[194] Ibid 339; Davies (n 178) 293.
[195] *Wednesbury Corp v Ministry of Housing and Local Government (no. 2)* [1966] 2 QB 275 (CA).

public authorities in situations in circumstances where those decisions are manifestly unreasonable, or perverse in nature.[196] Public law is not the same as employment law and *Wednesbury* does not apply directly to employment tribunals, but the latter are accused of applying similar levels of restraint to their decision-making.[197] A significant source for these concerns lies within the Employment Appeal Tribunal (EAT) decision in *Vickers Ltd v Smith,* which decreed an employer's actions could only be seen as unreasonable if 'no sensible or reasonable management' would have taken them.[198] Such a line of thinking, it is argued, prevents employer actions from being challenged unless they are perverse in nature.[199] An example often cited to support this is *Saunders v Scottish National Camps Association* where the claim of an employee dismissed for being homosexual was unsuccessful as judges felt that the employer's actions could be supported by some reasonable employers at the time.[200]

Attempts have been made to distinguish the reasonable responses test from the *Wednesbury* test. In *Iceland*, for example, Browne-Wilkinson J wrote:

> The statement in Vickers Ltd v Smith is capable of being misunderstood so as to require such a high degree of unreasonableness to be shown that nothing short of a perverse decision to dismiss can be held to be unfair within the section. […] This is not the law. The question in each case is whether the industrial tribunal considers the employer's conduct to fall within the band of reasonable responses.[201]

Clearly there are differences in wording between 'no sensible or reasonable management' and 'the band of reasonable responses' but it is difficult to see how

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[196] *Wednesbury* (n 195); Davies (n 178) 278.

[197] Freer (n 187) 345; Davies (n 178) 293.

[198] *Vickers Ltd v Smith* [1977] IRLR 11 (EAT) [2] (Cumming-Bryce J).

[199] Freer (n 187) 339; Davies (n 178) 293.

[200] *Saunders v Scottish National Camps Association Ltd* [1981] IRLR 277 (IH). It should be noted that this decision took place before discrimination based on sexual orientation was made unlawful.

[201] *Iceland* (n 106) 25 (Browne-Wilkinson J). This argument was later approved by the Court of Appeal in *Post Office; HSBC* (n 107).

these approaches are distinguished in the context of ordinary tribunal cases. Logically, if an employment judge cannot assume that their own interpretations of a case will cover all possible reasonable outcomes within the range, then they must shift their own expectations of reasonable employer behaviour downwards.[202] Yet, given that no evidence will be led in court of how other reasonable employers manage their staff in practice, it will be impossible for the judge to know the exact limits of how low to set those expectations to keep them in line with a purely hypothetical reasonable employer.[203] *Brent London Borough Council v Fuller* for example - a gross misconduct case in which the Court of Appeal clearly struggled with semantics, and eventually produced a split decision - shows the considerable difficulties in establishing whether a tribunal has substituted its own judgment when it shows any criticism of the employer's case.[204]

The fact that the reasonable responses test is worded differently to that of *Wednesbury* thus does not mean that its results will always be distinct in practice. [205] As noted earlier in this chapter, when the Court of Appeal asked itself what definitely would <u>not</u> fall within the band of reasonable responses of an employer, the only answer given was dismissal for saying 'good morning' to a line manager.[206] Given such guidance, it is likely that the reasonable responses test has, at least on some such occasions, become a perversity test in reality.[207]

Furthermore, even if the reasonable responses test is not entirely akin to *Wednesbury*, this is largely because of its unpredictability. It is subjective reasoning masked by a veneer of objectivity.[208] As described by Smith;

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[202] Smith & others (n 107) 527-9.

[203] Collins (n 187) 78; Smith & others (n 107) 529.

[204] *Brent* (n 144). On reading this case, one is left with a distinct impression that much of the reasonable responses test lies in the exact phrasing of tribunal judgements, rather than the overall opinions they express.

[205] Freer (n 187) 340; Brodtkorb (n 152) 442.

[206] *Post Office; HSBC* (n 107) [50] (Mummery LJ).

[207] Brodtkorb (n 152) 431, 438 & 442.

[208] J Davies, 'A Cuckoo in the nest? A "range of reasonable responses" justification and

> The range or band test, therefore, does not magically allow tribunals to apply an objective standard whilst not substituting their own judgment for that of the employer; instead it allows them (a) to apply no meaningful objective standard, (b) arbitrarily to imagine a lower limit that is lower than their own to give effect to the band fiction, or (c) simply to apply their own lower limit and call it the band.[209]

Different tribunals can therefore potentially make different findings of fact on very similar circumstances, with the result that the same dismissal might legitimately be judged either fair or unfair.[210] The Court of Appeal has stated this inconsistency is a natural result of the legislation and not necessarily an error of law.[211] However, it places doubt on claims that the reasonable responses test is objective in nature.[212]

2.4.3 Power to employers

The above arguments imply that ERA s 98(4) has been interpreted to presuppose fairness on the part of the employer. Judges have restrained their own ability to apply reasoned analysis. Instead, the reasonable responses test requires that they only intervene in extreme cases where the employer's actions are very clearly in the wrong.[213] Collins describes how this occurs:

> In the middle range of cases, where the dismissal was clearly neither fair nor unfair, if the tribunal asks whether the employer's decision was reasonable, the question tends to lead to a negative response and a finding of unfairness. If, on the other hand, the tribunal asks whether the employer's decision was unreasonable, the question tends to shift the middle ground into the realm of fair dismissals. […] In short, the effect […] is to create a presumption of fairness and

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the Disability Discrimination Act 1995' (2003) 32 ILJ 164, 175-6.

[209] Smith & others (n 107) 529.

[210] Honeyball (n 114) 195-6.

[211] *Gilham* (n 91) 240 (Griffiths LJ).

[212] For examples of such claims being made, see *Brent* (n 144) 805 (Mummery LJ) & *Turner v East Midlands Trains Ltd* [2012] EWCA Civ 1470; [2013] 3 All ER 275 [19] (Elias LJ).

[213] Davies (n 178) 291; Deakin & Morris (n 118) 546.

> excuse for non-intervention.[214]

Freer argues similarly:

> By implementing the range of reasonable responses test, the question effectively becomes 'is it possible that the employer is acting reasonably, or is the employer acting wholly unreasonably?' Given that the answer must be one or the other, the outcome in the majority of cases is inevitable.[215]

These arguments should not be overstated. Clearly, the reasonable responses test does not prevent employees from winning unfair dismissal cases regularly. However, as found earlier in the chapter (with possible exceptions for dismissals for long-term sickness absence or SOSR) this is most likely to happen in situations of procedural unfairness, where it can objectively be argued that an employer has not followed its own policies, practices, or external codes of practice. Findings of unfair dismissal for reasons of substantive injustice – where the employer's actions may be procedurally correct but still unreasonable – appear less common.[216]

The 1999 case of *Haddon v Van Den Bergh Foods Ltd* attempted to move away from the reasonable responses test for these reasons.[217] It involved a catering employee dismissed for refusing to complete the last one and a half hours of his shift at his own long-service awards event after drinking alcohol provided free by the employer. The original tribunal had found dismissal in these circumstances within the range of reasonable responses and thus fair. On appeal, the employee successfully argued that judges should consider their own sense of reasonableness rather than solely rely on that of the hypothetical reasonable employer, as to do latterly produced a test of unfairness by perversity alone.[218] This EAT case was followed swiftly by others,

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[214] Collins (n 187) 39.

[215] Freer (n 187) 341.

[216] Deakin & Morris (n 118) 546.

[217] *Haddon v Van den Bergh Foods* Ltd [1999] ICR 1150 (EAT).

[218] Ibid.

including *Midland Bank Plc v Madden.*[219] Yet in a joint Court of Appeal judgment for the latter case, such arguments against the reasonable responses test were swiftly dispensed with as being incompatible with previous authorities and the opposing *Iceland* approach directly approved.[220]

Why courts should place so much value on employer expertise and judgment can be questioned.[221] Unlike in public law, there should be no assumption that employment dismissals have been motivated by overall public benefit.[222] Employers have their own vested business interests to consider, and these are often at odds with protecting the employment rights of individual staff.[223] Neither can all employers be assumed to have expertise in best practice human resources.[224] Simply because a practice is common within the business world, it does not mean that it is sensible, reasonable, or fair.

Courts have often articulated the importance of considering matters from an employer's rather than employee's perspective, but relatively little time has been taken to explain why such an approach makes for fairer judgments.[225] In *Watling*, Phillips J described how:

> [I]f an industrial tribunal equates its view of what itself would have done with what a reasonable employer would have done, it may mean that an employer will be found to have dismissed an employee unfairly even though many perfectly good and fair employers would have done as that employer did.[226]

The counterpoint to this argument - that an employee could have been fairly dismissed even though many employers would consider that unreasonable - goes

[219] *Midland Bank Plc v Madden* [2000] 2 All ER 741 (EAT).
[220] *Post Office; HSBC* (n 107).
[221] Davies (n 178) 304.
[222] Ibid 293.
[223] Ibid 290.
[224] Ibid.
[225] Ibid 305.
[226] *Watling* (n 96) 1056-57 (Phillips J).

unrecorded. One possible argument though, is that as it is employers who bear the legal penalties for unfairly dismissing an employee, it is Parliament's intention that they be judged solely by standards over which they have control.[227] Thus overall, it could be argued that the reasonable responses test allows employers to create their own rulebooks, and so long as these rules are adhered to, there is often little that a dismissed employee can do to challenge this, except in the most obviously arbitrary and unfair of circumstances.[228]

2.5 Potential developments in the reasonable responses test

Despite criticism, interpretation of ERA s 98(4) has appeared settled for many years. A further attempt to review the test in *Orr v Milton Keynes Council* in 2011 was dispelled by the Court of Appeal.[229] Therefore, recent comments by Lord Wilson and Baroness Hale of the Supreme Court in *Reilly* have caused surprise.[230] The case was not expected to have had any impact on the interpretation of ERA s 98 and neither party argued thus. However, in a judgment approved by the majority of the bench, Lord Wilson made several *obiter* remarks to state that the accepted view of *Burchell*'s tripartite test forming part of section 98(4) was false. Instead, the test should fall within sections 98(1) and (2).[231] In a separate judgment, Baroness Hale agreed with this reasoning.[232]

Setting the entire *Burchell* test within sections 98(1) and (2) contradicts the existing authority of *Post Office.*[233] It means that arguments regarding grounds for belief in misconduct and the reasonableness of the investigation that created those grounds become attached to the reason for the employee's dismissal, rather than the reasonableness of it.[234] In a technical sense, this changes the two-stage test for unfair

[227] Brodtkorb (n 152) 430.
[228] Ibid 443-44 & 446-47.
[229] *Orr* (n 88).
[230] *Reilly* (n 85); S Levinson, 'Burchell and judicial jostling' (2018) 168 NLJ 10.
[231] *Reilly* (n 85) [20]-[21] (Lord Wilson JSC).
[232] Ibid [33] (Baroness Hale JSC).
[233] *Post Office; HSBC* (n 107).
[234] *Burchell* (n 108).

dismissal that was outlined in chapter one. Instead of having a 'low-bar' first stage where the employer is required simply to demonstrate a genuine belief in the employee's misconduct in order to establish a potentially fair reason for dismissal, this aspect of the test becomes more demanding for the employer. The fairness of the investigation and the employer's interpretation of its findings would have to be successfully proven prior to any consideration of whether the decision to dismiss on those grounds was reasonable.

This could alter the outcome of some tribunal cases for two reasons. Firstly, that whereas ERA s 98(4) has a neutral burden of proof,[235] sections 98 (1) and (2) place the burden of proof on the employer, and this could make an employer's case more difficult to establish. Secondly, it was argued in the (later overruled) EAT decision in *Midland* that if the *Burchell* test was only relevant to sections 98(1) & (2), then the reasonable responses test would no longer apply to it, potentially allowing for less restraint in a tribunal's reasoning.[236] The reasonable responses test would still apply to section 98(4), but the number of matters to be decided under it would be fewer. Deakin and Morris have argued previously that there is 'clear authority in the statutory scheme' for such separation in the questions of reason for and reasonableness of dismissal.[237]

The significance of any shift to the burden of proof should not be overstated, as *Burchell* itself was initially decided before the burden of proof for ERA s 98(4) became neutral[238] and that later shift is not considered to have had a great impact on unfair dismissal law.[239] However, the potential dilution of the reasonable responses test is a more important matter to consider.

Lord Wilson's judgment in *Reilly* does not suggest significant change to the scope of

[235] *Hackney* (n 89).
[236] *Midland* (n 219).
[237] Deakin & Morris (n 118) 529. See also Freedland (n 190) 293.
[238] Honeyball (n 114) 182.
[239] Smith & others (n 107) 521; Deakin & Morris (n 118) 526.

the reasonable responses test, stating that 'no harm has been done' by misinterpretation of the *Burchell* decision by lower courts:[240]

> In effect it has been considered only to require the tribunal to inquire whether the dismissal was within a range of reasonable responses to the reason shown for it and whether it had been preceded by a reasonable amount of investigation. Such requirements seem to me to be entirely consonant with the obligation under section 98(4) to determine whether, in dismissing the employee, the employer acted reasonably or unreasonably.[241]

Baroness Hale takes a slightly different view, noting in her judgment that the misapplication of *Burchell* could potentially make unfair dismissals fair, and fair dismissals unfair.[242] However, despite this, she argues that to change settled law without very good reason would be 'irresponsible' and judges must note that Parliament has made no attempt to correct any previous errors in statutory interpretation.[243] She ends her judgment with the words that 'the law remains as it has been for the last 40 years and I express no view about whether that is correct.'[244]

It is helpful to consider *Reilly* in the context of previous House of Lords decisions such as *Smith v Glasgow District Council* and *Polkey* as these are binding authority for the Supreme Court on unfair dismissal.[245] The former may be particularly relevant as it considered the relationship between reasons for the dismissal, and its overall reasonableness. [246] The House of Lords was asked to consider whether a dismissal could still be fair if one of the conduct accusations behind it was not sufficiently evidenced. Its decision was no, stating that the employer's reasons for dismissal have to be considered in both stages of the test for unfair dismissal. If they are not sufficiently established, then the decision to dismiss for those reasons can never be

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[240] *Reilly* (n 85) [22] (Lord Wilson JSC).

[241] Ibid.

[242] Ibid [33] (Baroness Hale JSC).

[243] Ibid [34] (Baroness Hale JSC).

[244] Ibid [35] (Baroness Hale JSC).

[245] *Smith v City of Glasgow District Council* 1987 SC (HL) 175; *Polkey* (n 115).

[246] *Smith* (n 245).

reasonable. Despite being post-*Burchell*,[247] the *Smith* judgment does not reference that case and the exact question of which section of the ERA its tripartite test fits within does not arise. [248] However, instead it suggests (similarly to the comments of Lord Wilson in *Reilly*) that such technical considerations may be irrelevant as the sufficiency of grounds for belief in misconduct will be relevant for s 98(1), (2) and (4).

Polkey can also be read as minimising the risk of *Burchell's* reconsideration having any significant impact on tribunal decisions.[249] Whilst a case about redundancy rather than conduct, it approves the view that the tribunal must consider the decision to dismiss from the perspective of a reasonable employer, and also states that 'it is not correct to draw a distinction between the reason for dismissal and the manner of dismissal as if these were mutually exclusive'.[250] Given this authority, it is hard to see how *Burchell* could be considered as exempt from the reasonable responses test.

Overall, despite some excited commentary suggesting it marks the Supreme Court's antipathy to the reasonable responses test,[251] *Reilly* is unlikely to have startling impact. Given Justices' obvious reluctance to make sweeping changes, and the previous authorities of *Smith* and *Polkey*, it is likely that the reasonable responses test will escape relatively unscathed.

2.6 Chapter conclusion

This chapter has examined the origin, application, and criticism of ERA s 98(4)'s reasonable responses test. It emerges as a conceptually problematic, but resilient and staple provision of unfair dismissal law. It forces issues of procedural integrity to the fore, whilst arguably minimising aspects of substantive justice for employees who lose their livelihoods. Whilst statute remains the same, this is unlikely to change.

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[247] *Burchell* (n 108).
[248] *Smith* (n 245).
[249] *Polkey* (n 115).
[250] Ibid 362 (Lord Mackay).
[251] Levinson (n 230).

Next, this dissertation will conduct a similar analysis of the role of proportionality in the EqA when relating to dismissal from employment.

Chapter 3:
Objective justification within the EqA

3.0 Introduction

Having examined the concept of reasonableness within unfair dismissal law, we now similarly analyse objective justification within the EqA, focussing particularly on dismissal from employment. This will demonstrate how objective justification is a developing, and in many situations, uncertain aspect of law.

3.1 Justification Defences

As chapter one described, dismissal from employment in discriminatory circumstances is unlawful under EqA s 39(2)(c). However, certain types of discrimination allow a defence of justification for employers. If this is successful, the employee will no longer have a valid claim.[252]

The three relevant defences are almost identical, consisting of the following:

- For indirect discrimination, section 19(2)(d) allows justification where the employer demonstrates the PCP to be 'a proportionate means of achieving a legitimate aim'.[253]

- For discrimination arising from disability, section 15(1)(b) allows justification where 'the treatment is a proportionate means of achieving a legitimate aim'.[254]

- For direct discrimination on grounds of age, section 13(2) states that 'A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim'.[255]

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[252] I Smith & others, *Smith and Wood's Employment Law* (13th edn, OUP 2017) 274.
[253] Equality Act 2010 (EqA 2010) s 19(2)(d).
[254] EqA 2010, s 15(1)(b).
[255] EqA 2010, s 13(2).

Interpretation of the phrase 'proportionate means of achieving a legitimate aim' is applied consistently across all three types of claim.[256] As the same phrase was used in pre-2010 equality legislation, case law from earlier statutes is still relevant today.[257]

3.2 The European Background

The EqA codifies UK obligations on equality legislation placed by various EU directives.[258] These directives use the phrase 'objectively justified' rather than 'a proportionate means of achieving a legitimate aim'.[259] However, case law from the European Court of Justice (ECJ) and Court of Justice of the European Union (CJEU) in this area is still binding on UK courts and tribunals.[260] It is therefore important to understand the EU's interpretation of objective justification in the context of equality.

The leading case is *Bilka-Kaufhaus GmbH v Weber von Hartz*, which concerned a dispute over pensions for part-time workers who were disproportionately female.[261] The ECJ ruled that objective justification in an equality context meant that the measures chosen by the employer must 'correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end'.[262] This judgment has been consistently highlighted within EU decisions regarding objective justification since.[263]

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[256] K Monaghan, *Monaghan on Equality Law* (2nd edn, OUP 2013) 315.
[257] Smith & others (n 252) 274.
[258] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16; Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.
[259] S Deakin & G Morris, *Labour Law* (6th edn, Hart Publishing 2012) 642.
[260] JA Lane & R Ingleby, 'Indirect discrimination, justification and proportionality: are UK claimants at a disadvantage?' (2018) 47 ILJ 531, 547.
[261] Case 170/84 *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] ECR 1607.
[262] Ibid para 36.
[263]A Baker 'Proportionality and Employment Discrimination in the UK' (2008) 37 ILJ 305, 310.

This legal test set out in *Bilka* places interpretation of objective justification squarely within the European legal tradition of proportionality.[264] As described by Lord Hoffman, this principle consists of three elements, namely:

> (1) [S]uitability: an administrative or legal power must be exercised in a way which is suitable to achieve the purpose intended and for which the power was conferred; (2) necessity: the exercise of the power must be necessary to achieve the relevant purpose and (3) proportionality in the narrower sense: the exercise of the power must not impose burdens or cause harm to other legitimate interests which are disproportionate to the importance of the object to be achieved.[265]

By comparing this definition of proportionality with the *Bilka* test, we see that the elements of suitability (or appropriateness) and necessity are listed in both. Where *Bilka* differs from the classic formulation of proportionality is in its replacement of 'proportionality in the narrower sense' with a strict edict of 'real need' on the part of the employer.[266] The result of this is to demonstrate that EU law gives discrimination significant weight in the balancing of proportionality.[267] For acts of discrimination to be justified by an employer, their overall objectives in pursuing such means cannot merely be convenient or advantageous. They must instead constitute a real need related to business or organisational efficacy.[268] Substantive justice for the employee must therefore be at the forefront of a court's reasoning.

Such is the strict legal test that the phrase 'a proportionate means of achieving a legitimate aim' must correspond to.[269] Whether judicial interpretation of the phrase

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[264] TK Hervey, 'Justification for indirect sex discrimination in employment: European Community and United Kingdom Law compared' (1991) 40 ICLQ 807, 823-4.
[265] Lord Hoffman 'The Influence of the European Principle of Proportionality upon UK Law' in E Ellis (ed) *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1999) 107, 107.
[266] Baker (n 263) 309-10.
[267] Ibid 310; Smith & others (n 252) 277.
[268] Smith & others (n 252) 277.
[269] Ibid.

achieves this is a matter of debate, and requires close analysis of UK case law. To start, this will include consideration of a wide range of cases in order to ascertain legal principles. Further on in the chapter, we will consider how these principles have been applied to cases involving dismissal from employment.

3.3 Legitimate Aim

According to the EqA Statutory Code of Practice, the phrase 'legitimate aim' denotes that the treatment or PCP 'should be legal, should not be discriminatory in itself, and must represent a real, objective consideration'.[270] This guidance applies the approach of *R (Elias) v Secretary of State for Defence*, a Court of Appeal judgment that stressed the importance of *Bilka.*[271] Therefore the objective sought 'must correspond to a real need'[272] that is 'sufficiently important to justify limiting a fundamental right'.[273] It is for the tribunal to establish whether a legitimate aim has been demonstrated in each case, rather than relying on the subjective opinion of the discriminator.[274]

In practice, it seems incidents where the respondent fails to demonstrate a legitimate aim are rare. Accepted aims within case law are wide-ranging and have included for example; the promotion of equal opportunities,[275] the provision of Orthodox Jewish education to those of that faith,[276] compensating redundant employees for lost earnings,[277] and the efficient provision of care services.[278] However, one example of where an aim was not accepted as being legitimate is *Allonby v Accrington and*

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[270] Equality and Human Rights Commission (EHRC), *Equality Act 2010 Code of Practice: Employment Statutory Code of Practice* (EHRC 2011) para 4.28.
[271] *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293; [2006] 1 WLR 3213; later approved by the Supreme Court in *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15; [2012] 3 All ER 1287.
[272] *Elias* (n 271) [151] (Mummery LJ).
[273] Ibid [165] (Mummery LJ).
[274] Ibid.
[275] *Ladele v Islington London Borough Council* [2009] EWCA Civ 1357; [2010] 1 WLR 955.
[276] *R (on the application of E) v JFS Governing Body* [2009] UKSC 15; [2010] 2 AC 728.
[277] *Barry v. Midland Bank Plc* [1999] 1 WLR 1465 (HL).
[278] *Mba v Merton London Borough Council* [2013] EWCA Civ 1562; [2014] 1 WLR 1501.

Rosendale College.[279] This involved the dismissal of part-time workers following legislative changes that would have given them the same entitlement to employee benefits as full-time workers. Here, the Court of Appeal noted how:

> [I]f the aim of the dismissal was itself discriminatory (as the applicant contended it was, since it was to deny part-time workers, a predominantly female group, benefits which Parliament had legislated to give them) it could never afford justification.[280]

This appears to demonstrate a fairly clear approach to defining a legitimate aim. Yet questions remain. For example, the *Elias* judgment emphasised the need to distinguish aims and means when considering justification.[281] This implies that the legitimate aim must be a separate thing from the means that carry it out. However, in the later Court of Appeal case, *Woodcock v Cumbria Primary Care Trust*, where a high-level employee complained of being made redundant without appropriate consultation shortly before his 49th birthday in order to reduce the financial payment due to him, it was accepted that making the claimant redundant was in itself a legitimate aim.[282] It seems difficult to reconcile that the act of dismissal from which the discrimination claim flowed, could itself constitute a legitimate aim for that very act. It seems more likely that the aim that the respondent sought to achieve would be the running of a cost-efficient organisation, and the dismissal of a redundant employee in the most cost-effective of circumstances would be a means towards that.[283] The *Woodcock* approach to legitimate aim was followed in *Crime Reduction Initiatives (CRI) v Lawrence* whereby dismissal of an absent employee was classed as a legitimate aim in itself.[284] So far this surprising interpretation of the legislation does not appear to have been challenged.

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[279] *Allonby v Accrington and Rosendale College* [2001] EWCA Civ 529; [2001] 2 CMLR 27.
[280] Ibid [29] (Sedley LJ).
[281] *Elias* (n 271) [145] (Mummery LJ).
[282] *Woodcock v Cumbria Primary Care Trust* [2012] EWCA Civ 330; ICR 1126.
[283] It should be noted that following *Seldon v Clarkson Wright & Jakes* [2012] UKSC 16; [2012] 3 All ER 1301, cases of direct age discrimination such as this would require an even stricter identification of legitimate aim. See text to n 287 below.
[284] *Crime Reduction Initiatives (CRI) v Lawrence* (EAT, 17 February 2014).

The reason why courts may be reluctant to see cost-efficiency as a legitimate aim is the hesitancy with which the higher courts have allowed costs or economic reasons to be classed as such. Cost savings by themselves cannot constitute a legitimate aim, unless they are combined with other legitimate factors,[285] which can include an absence of means.[286] This is a developing and somewhat uncertain area of law.[287] Questions remain as to what precisely constitutes a costs justification (as opposed to any other aim based on business efficiency or absence of means) and how tribunals should weigh up the different factors to decide whether cost considerations have been too high a factor in the discriminator's mind.[288] These issues are often particularly relevant to cases involving dismissal, and so will be considered further in that context later in the chapter.

Finally on legitimate aim, it is noted that direct age discrimination requires a more stringent interpretation of this than in other claims. This means that the aim must correspond with certain social policy objectives in the public interest such as inter-generational fairness or dignity for older workers.[289]

3.4 Proportionate Means

Deriving the correct test for the phrase 'proportionate means' in UK law is complex. The Code of Practice lists two separate ways in which proportionality is judged. The first involves a balancing exercise during which a tribunal 'may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice [or treatment] as against the employer's reasons for applying it, taking into account all relevant facts'.[290] Secondly, the code follows on to describe how 'EU law views treatment as proportionate if it is "an appropriate and necessary" means of achieving

[285] *Cross v British Airways Plc* [2005] IRLR 423 (EAT); *Woodcock* (n 282).
[286] *Heskett v Secretary of State for Justice* (EAT, 25 June 2019).
[287] See for example, the recent decision of *Heskett* (n 286).
[288] Monaghan (n 256) 351-52.
[289] *Seldon* (n 283).
[290] EHRC (n 270) para 4.30.

a legitimate aim'.[291]

The balancing approach to adjudging proportionality mentioned above was initially developed in *Hampson v Department for Education and Science*.[292] Balcombe LJ wrote how justification 'requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition'.[293] This was argued to be an equivalent test to *Bilka,*[294] and was approved by the House of Lords in *Webb v EMO Air Cargo (UK) Ltd.*[295] Lord Hoffman has previously argued that there is an English legal tradition of considering proportionality in a less structured manner to that of the EU, but which nevertheless produces the same results.[296] The *Hampson* balancing exercise could be interpreted as one such example. Other commentators however, see it merely as a proportionality-avoidance tactic.[297]

The House of Lords came to its decision in *Barry v Midland Bank Plc* using a similar balancing approach.[298] Here, a redundant part-time female employee argued that her severance payment should take into account her many years of full-time work for the company prior to becoming a parent. Their lordships agreed that it was indirect discrimination, but could potentially be justified. They described the legal test as follows:

> [T]he ground relied upon as justification must be of sufficient importance for the national court to regard this as overriding the disparate impact of the difference in treatment, either in whole or in part. The more serious the disparate impact […], the more cogent must be the objective justification.[299]

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[291] Ibid para 4.31.

[292] *Hampson v Department for Education and Science* [1990] 2 All ER 25 (CA).

[293] Ibid 34 (Balcombe LJ).

[294] *Bilka* (n 261).

[295] *Webb v EMO Air Cargo (UK) Ltd* [1993] 1 WLR 49 (HL).

[296] Hoffman (n 265) 113.

[297] Baker (n 263) 308.

[298] *Barry* (n 277).

[299] Ibid 1475 (Lord Nicholls).

Such consideration of the need to measure objective against impact reflects the European principle of 'proportionality in the narrower sense' explained earlier, but does not match the structured test set out in *Bilka*.[300] The latter was cited in judgment however, suggesting that law lords considered theirs to be an equivalent approach.[301] The result in this case was that the bank's aim of compensating employees for lost income was of sufficient importance to justify any disproportionate impact on female staff. No valid suggestion had been made of how the bank could achieve this same aim through any less discriminatory means.[302] Other cases have concluded that the remit of any balancing exercise can also include the interests of society overall, such as discrimination in the wider community.[303]

As the Code of Practice implied earlier however, this balancing approach no longer sits alone as the correct test for proportionate means. In *Elias* the Court of Appeal extended the test to bring it closer in line with the language of *Bilka.*[304] As such 'the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end.'[305] Further on in the judgment this last aspect is clarified as requiring that the PCP or treatment be 'no more than is necessary to accomplish the objective.'[306]

The inclusion of objective criteria such as appropriateness and necessity strengthens the *Hampson* balancing approach and brings the overall test of 'proportionate means of achieving a legitimate aim' closer in line with EU law.[307] *Elias* suggested that balancing detriment against seriousness of the objective is part of understanding

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[300] M Connolly, 'Justification and Indirect Discrimination' (2001) 44 Emp LB 4; Baker (n 263) 310.
[301] *Barry* (n 277) 1476 (Lord Nicholls); M Connolly, *Discrimination Law* (2nd edn, Sweet & Maxwell 2011) 184.
[302] *Barry* (n 277).
[303] *Ladele* (n 275).
[304] *Elias* (n 271); *Bilka* (n 261); Lane & Ingleby (n 260) 535.
[305] *Elias* (n 271) [151] (Mummery LJ).
[306] Ibid [165] (Mummery LJ).
[307] Deakin & Morris (n 259) 643-4.

whether or not the means employed are necessary and reflect a real need.[308] The Supreme Court has approved this approach. [309] However, some commentators argue that the full range of considerations included in the conjoined tests are rarely reflected in judgments of the EAT and Court of Appeal.[310] This point will be considered in more detail later in the chapter.

Part of this confusion may lie in the debate whether 'necessary' in the proportionality test is to be qualified by 'reasonably'; and if so, what this means in the context of individual cases. The term 'reasonably necessary' appears in a number of Court of Appeal judgments including *Allonby* and *Hardy and Hansons Plc v Lax*.[311] In the latter it was qualified that in this context, 'reasonably' does not imply a test of reasonable responses or margin of appreciation for the discriminator. Instead:

> The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary.[312]

The phrase 'reasonably' therefore appears to be an aspect of the balancing exercise between objective and impact. Some significant cases such as *Elias* have discarded it as a qualifier, given that it does not appear in the *Bilka* judgment.[313] However, the Supreme Court in *Homer v Chief Constable of West Yorkshire Police* and *Seldon v Clarkson Wright & Jakes* added an almost hesitant '(reasonably)' before the term 'necessary', and thus, the qualifier is likely to remain.[314]

This shift of language is potentially significant, for the questions of whether a

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[308] *Elias* (n 271) [151] (Mummery LJ).
[309] *JFS* (n 276); *Homer* (n 271).
[310] Lane & Ingleby, (n 260) 531.
[311] *Allonby* (n 279); *Hardy and Hansons Plc v Lax* [2005] EWCA Civ 846; [2005] ICR 1565.
[312] *Hardy* (n 311) [32] (Pill LJ).
[313] *Elias* (n 271).
[314] *Homer* (n 271) [23] (Lady Hale); *Seldon* (n 283) [55] (Lady Hale).

particular treatment or PCP is necessary to achieve the aim, and whether possible alternatives were sufficiently considered have remained common points by which discrimination claims succeed or fail.[315] Usually, *Bilka* is interpreted as meaning that where an alternative, non-discriminatory means is possible, the measure cannot be justified.[316] This is reflected in the Code of Practice.[317] The judgment in *Homer* appeared to agree, so where a question arises about the justification of a particular means, 'to some extent, the answer depends upon whether or not there were non-discriminatory alternatives available'.[318] However, the qualifier of 'to some extent' has allowed other cases such as *Kapenova v Department of Health* to conclude that the existence of non-discriminatory alternatives does not always prevent a particular means from being reasonably necessary.[319] The Supreme Court recently re-affirmed the importance of considering alternative means in *Naeem v Secretary of State for Justice* and so it appears that cases where this applies less strictly are possible, but will be rare.[320]

In cases regarding disability discrimination, this general expectation to consider alternative measures is amplified by the separate duty for organisations to make reasonable adjustments under EqA s 20. The Code of Practice makes clear that whilst fulfilling an obligation to make reasonable adjustments for a disabled person will not necessarily mean that further discrimination cannot be justified, any failure to do so will make justification in discrimination arising from disability cases very difficult.[321] *York City Council v Grosset* is one such example, whereby a disabled teacher successfully claimed that a failure to provide him with reasonable adjustments in the workplace was linked to later misconduct, for which he had been dismissed.[322] This

[315] Lane & Ingleby (n 260) 541.
[316] Hervey (n 264) 823-24.
[317] EHRC (n 270) para 4.31.
[318] *Homer* (n 271) [25] (Lady Hale).
[319] *Kapenova v Department of Health* [2014] ICR 884 (EAT).
[320] *Naeem v Secretary of State for Justice* [2017] UKSC 27; [2017] 1 WLR 1343.
[321] EHRC (n 270) para 5.21-5.22.
[322] *York City Council v Grosset* [2018] EWCA Civ 1105; [2018] 4 All ER 77. This must be distinguished from *Monmouthshire County Council v Harris* (EAT, 23 October 2015)

case is discussed further in chapter four.

It is often important to consider in individual cases whether the balancing exercise requires justification of a general policy, or whether it is the application of that policy to a particular individual that must be justified. This point was clarified in *Seldon* as depending on whether the policy is a general one that is applied equally to all individuals, or whether it is one that allows treatment to be tailored to individual circumstances.[323] In the former, only the policy itself requires justification against its impact. In the latter, such as in the application of absence or disciplinary policies, the treatment towards the individual in question must be justified.[324]

GMB v Allen cautioned against the danger of including matters of remedy within a proportionality analysis.[325] Thus, the proposition that a particular act of discrimination caused no or little loss to the claimant is not relevant to justification and should instead be reserved for a remedy hearing.[326] Despite this guidance, issues of potential loss have occasionally been included within the balancing exercise of other cases.[327]

Finally, the question of proportionality in cases where the legitimate aim of a particular PCP or treatment is only identified by the discriminator after its implementation has been raised on various occasions, including on appeal to the CJEU in *Cadman v Health and Safety Executive*.[328] The settled response to this is that a justification defence in such circumstances can be successfully made, but is more difficult to prove and will be more carefully scrutinised.[329]

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where the failure to make reasonable adjustments was a time-barred claim that did not directly relate to the later dismissal.

[323] *Seldon* (n 283).
[324] Ibid.
[325] *GMB v Allen* [2008] EWCA Civ 810; [2008] ICR 1407.
[326] Ibid.
[327] See for example *Woodcock* (n 282) [71] (Rimer LJ).
[328] Case C-17/05 *Cadman v Health and Safety Executive* [2006] ECR I-9583.
[329] *Seldon* (n 283).

3.5 Level of appropriate scrutiny

As implied above, a high level of scrutiny is applied to the arguments of both claimant and respondent in cases involving proportionality.[330] 'This is an appraisal requiring considerable skills and insight. […] [A] critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal.'[331] The tribunal is entitled to make its own interpretation of the evidence before it, including witness statements.[332] The burden of proof is on the respondent to establish justification, but unlike in a reasonable responses test, the tribunal is not bound to respect their subjective viewpoint.[333]

3.6 Application of proportionality to dismissal situations

Prior to the EqA, dismissal situations that involved proportionality under equalities legislation were rare.[334] Those that did occur related to indirect discrimination such as in redundancy situations, or where an employee refused to comply with a standard rule or policy.[335] However, following the introduction of the section 15 claim for discrimination arising from disability, the term 'a proportionate means of achieving a legitimate aim' is now regularly applied to dismissals due to long-term absence or misconduct.[336] Interpreting the proportionality test in these new situations has posed challenges, and it is likely to take time for consistent precedents to develop.[337] The following analysis attempts to suggest directions in which the law is heading.[338]

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[330] *York* [n 322].

[331] *Hardy* (n 311) [33] (Pill LJ).

[332] Ibid [37] (Pill LJ); *GMB* (n 325).

[333] *Homer* (n 271).

[334] A previous justification clause in the Disability Discrimination Act 1995 for disability-related discrimination was worded differently and case law related to this is no longer valid. See Connolly, *Discrimination Law* (n 301) 413.

[335] Examples of this include *Hardy* (n 311) and *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880; IRLR 872.

[336] A Lawson, 'Disability and employment in the Equality Act 2010: Opportunities seized, lost, and generated' (2011) 40 ILJ 359, 365.

[337] Smith & others (n 252) 275.

[338] It is noted that not all case law considered below involved the actual dismissal of the employee as in some occasions the claimant has resigned or brought

There is relatively little evidence of structured proportionality analyses being applied by the EAT as regards dismissal situations.[339] Analysis is more likely to consist of *Hampson*-style balancing exercises that do not mention terms associated with more structured *Bilka*-eque analyses such as appropriateness and necessity.[340] It is surprising, for example, how rarely the Supreme Court's judgment in *Homer* is directly cited given that it is the clearest and highest authority for proportionality analysis in the UK.[341] Instead, judgments often do not cite any authority for proportionality at all, or use older, less vigorous authorities.[342] Where an employer's aim is decided to be legitimate, judgments often move very swiftly to a conclusion that dismissal was proportionate.[343]

However, it is acknowledged that amongst cases examined, even amongst those that cite a balancing approach, there are examples of courts or tribunals embracing a critical and stringent approach to proportionality in dismissal cases. This includes re-interpreting evidence, disagreeing with witnesses, and rejecting conclusions that do not adequately weigh up the perspectives of either employer or employee.[344]

It has not yet been fully resolved whether courts may take into account medical or other evidence that was not available to the employer at the time of dismissal in their proportionality analyses. The EAT in *Reid v Lewisham London Borough Council* held

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proceedings whilst in employment, but they are all situations where dismissal would clearly have been a likely outcome in the near future.

[339] Lane & Ingleby (n 260) 536.

[340] Ibid 538.

[341] *Homer* (n 271).

[342] See for example, *Chivas Brothers Ltd v Christiansen* (EAT, 19 May 2017), or *Baldeh v Churches Housing Association of Dudley and District Ltd* (EAT, 11 March 2019). It is also interesting to note how even the Court of Appeal judgment in *McFarlane* (n 335) made no mention of the same court's earlier judgment in *Elias* (n 271) even though doing so might have significantly changed the direction of argument.

[343] See for example, *Mba* (n 278) or *McFarlane* (n 335).

[344] *Asda Stores Ltd v Raymond* (EAT, 13 December 2018); *Chivas* (n 342); *Hensman v Ministry of Defence* [2014] Eq LR 650 (EAT).

that this was an error of law, yet the Court of Appeal explicitly took such post-dismissal evidence into account in *York* a month later.[345] It is unclear whether *Reid* is therefore overruled on that point, or if the cases could be distinguished on the facts. The answer to this question could have significant implications for employers and their liability for discrimination.

3.6.1 Conduct

Relevant cases involving misconduct can be broken down into two main categories: those that involve an employee refusing to obey an instruction from their employer (usually on grounds that the instruction is indirectly discriminatory), and those that involve more traditional misconduct that was fully or partly caused by their disability.

In the former, employers who demonstrate a significant legitimate aim for the instruction are usually able to successfully justify their decision to dismiss. Therefore in *Azmi v Kirklees Metropolitan Borough Council* the employer successfully justified their requirement for an employee to remove her veil when working directly with children on the grounds that it hindered their learning.[346] This decision has been criticised for a lack of scrutiny given to alternative arrangements suggested by the claimant, and failure by the EAT to consider the wider discrimination which Muslim women experience in employment.[347]

The exact legitimate aim identified by the tribunal can have significant implications for how likely dismissal is seen to be proportionate in these situations. For example, in *Ladele v Islington London Borough Council* the decision by that employer to insist that all its registrars were registered to perform civil partnerships as part of their equal opportunities policy was seen as its legitimate aim, rather than the means of upholding that policy.[348] Therefore the suggestion that an alternative means for the

[345] *Reid v Lewisham London Borough Council* (EAT, 13 April 2018); *York* (n 322) [29] (Pill LJ).
[346] *Azmi v Kirklees Metropolitan Borough Council* [2007] ICR 1154 (EAT).
[347] Lane & Ingleby (n 260) 542-3.
[348] *Ladele* (n 275).

council would have been not to require all registrars to register to conduct civil partnerships, was discounted as irrelevant. By contrast, the accepted aim in *Pendleton v Derbyshire County Council* was simply to safeguard children in a school environment.[349] The decision to dismiss the employee for remaining with her husband after he was convicted of a sexual offence was the means towards this. This allowed the EAT to consider alternative methods by which the employer could have achieved their aim, and the decision to dismiss was hence disproportionate.

As regards other types of misconduct, we see a more consistent application of the need to consider alternative options than dismissal, and the relationship between dismissal and the employer's aims is likewise often challenged. The *Bilka* requirements of appropriateness and necessity seem to be regularly applied, even if not often explicitly stated in judgments.[350] This can be seen in cases such as *Burdett v Aviva*, *Risby v Waltham Forest London Borough Council*, *Chivas Brothers Ltd v Christiansen*, and *Asda Stores Ltd v Raymond.*[351] In *Chivas Brothers* for example, the EAT agreed that application of the employer's health and safety policy was a legitimate aim, but given that questioning of the employer's witnesses revealed how the employee's misconduct did not give rise to any particular health and safety risk, dismissal was found to be disproportionate on the facts.[352]

However, the tribunal must still give significant consideration to the employer's aims when deciding to dismiss. Therefore, in *Hensman v Ministry of Defence* the employer was successful in appealing a disability discrimination claim because the original tribunal had not applied enough consideration to its reasons to dismiss the employee.[353]

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[349] *Pendleton v Derbyshire County Council* [2016] IRLR 580 (EAT).
[350] *Bilka* (n 261)
[351] *Burdett v Aviva Employment Services Ltd* (EAT, 14 November 2014); *Risby v Waltham Forest London Borough Council* (EAT, 18 March 2016); *Chivas Brothers* (n 340); *Asda Stores Ltd v Raymond* (n 344).
[352] *Chivas Brothers* (n 342).
[353] *Hensman v Ministry of Defence* (n 344).

3.6.2 Capability

Case law relating to justification of long-term absence dismissal has grown rapidly in recent years. Tribunals generally agree that dismissal following long-term absence (where there is no evidence suggesting a likely return to work in the near future) is proportionate.[354] However, the process by which such conclusions are reached varies. In particular, there is inconsistency in the identification of legitimate aim for these dismissals, even when circumstances are very similar. Examples of legitimate aims accepted in long-term absence situations include dismissal of absent employees,[355] efficient and/or high quality running of the workplace,[356] safeguarding of public funds,[357] consideration of the impact on other staff members,[358] supporting absent employees as much as reasonable,[359] having a workforce that attends and carries out work required,[360] and financial obligations to the overall organisation.[361] To some extent we would expect a level of variation based on individual employer circumstances. However, it still could be argued that objective justification for long-term absence would be more transparent if a more consistent approach to legitimate aim and proportionality was adopted by judges. Of course, an issue with this may be that absence management is often concerned with the saving of financial costs, which as previously discussed, cannot by itself be a legitimate aim.[362]

The Court of Appeal attempted to provide some clarity in *Bolton St Catherine's Academy v O'Brien*, emphasising that:

> In principle the severity of the impact on the employer of the

[354] See for example *Monmouthshire* (n 322); *obiter* comments in *General Dynamics Information Technology Ltd v Carranza* [2015] ICR 169 (EAT) [47] (Richardson J).
[355] *CRI* (n 284) [6].
[356] *Bolton St Catherine's Academy v O'Brien* [2017] EWCA Civ 145; [2017] ICR 737 [27]; *Ali v Torrosian & others (t/a Bedford Hill Family Practice)* (EAT, 2 May 2018) [11].
[357] *Monmouthshire* (n 322) [51].
[358] Ibid.
[359] *Buchanan v Commissioner of Police of the Metropolis* [2017] ICR 184 (EAT) [56].
[360] *Awan v ICTS UK Ltd* (EAT, 23 November 2018) [22].
[361] *Reid* (n 345) [9].
[362] See section 3.3.

> continuing absence of an employee who is on long-term sickness absence must be a significant element in the balance that determines the point at which their dismissal becomes justified, and it is not unreasonable for a tribunal to expect some evidence on that subject.[363]

Therefore, where an employer can demonstrate that the absence is causing a negative impact on their business, and the situation is unlikely to change, then dismissal will normally be proportionate.[364] However, if evidence arises that indicates a likely return to work, or reasonable adjustments that might enable the individual to return, it will be much harder for the employer to justify dismissal.[365]

In terms of absence management procedures prior to dismissal, if procedural error does not in itself cause discriminatory impact, it will not be relevant to justification.[366] However, employers are expected to interpret absence management procedures in the light of the EqA and individual circumstances. If failure to do so causes detriment to the employee, then this will make justifying treatment towards them more difficult.[367]

In terms of dismissals for poor performance in the workplace, there is not currently enough case law to make general conclusions about how proportionality is applied. However, the very recent decision of *Baldeh v Churches Housing Association of Dudley and District Ltd* (which cited no case law authority for proportionality at all) suggested that a balancing exercise between the employer's legitimate aim and impact of dismissal on the employee was the appropriate test.[368] This reasoning, once again, seems closer to *Hampson* than to *Homer.*[369]

3.6.3 Redundancy

[363] *Bolton* (n 356) [45] (Underhill LJ).
[364] *Awan* (n 360).
[365] *Bolton* (n 356).
[366] *CRI* (n 284).
[367] *Buchanan* (359).
[368] *Baldeh* (n 342).
[369] *Hampson* (n 292); *Homer* (n 271).

In redundancy situations, establishing legitimate aim should theoretically be problematic due to the normal association of redundancy exercises with saving costs. However, tribunals have shown themselves very willing to accept this category of dismissal as potentially justifiable in practice. Proportionality analysis can be short and swift.[370] *Magoulas v Queen Mary University of London* suggests a pragmatic approach to the consideration of alternative means in the context of genuine and lengthy periods of consultation prior to dismissal.[371] However, if the tribunal is dissatisfied with an employer's explanations of a redundancy situation or lack of alternative work, then dismissal will not be proportionate.[372]

3.6.4 Other reasons for dismissal

The Supreme Court has established that despite it being a clear example of direct age discrimination, compulsory retirement for employees of a certain age may be justifiable in individual situations if implemented for legitimate aims connected with overall social policy, and where the precise details of policy are seen as reasonably necessary and appropriate.[373]

However, both *Allonby* and *Redfearn v Serco Ltd* demonstrate that when other reasons for dismissal are considered, tribunals will apply a critical scrutiny of both legitimate aim and its appropriateness to the circumstances.[374] Such attempts by employers to construct artificial reasons for dismissal in order to avoid direct discrimination claims will fail the test of proportionality.

3.7 Criticisms of the UK's approach to proportionality

As demonstrated, the correct test for proportionality in the UK has proven hard to grasp and patchy in its implementation. Some commentators have argued that this means that the UK is failing in its obligation to implement an approach that is, even if

[370] *Woodcock* (n 282).
[371] *Magoulas v Queen Mary University of London* (29 January 2016, EAT).
[372] *Hardy* (n 311).
[373] *Seldon* (n 283).
[374] *Allonby* (n 279); *Redfearn v Serco Ltd (t/a West Yorkshire Transport Service)* [2005] IRLR 744 (EAT).

not the same as *Bilka*, at least as effective in its results.[375] As Connolly comments, 'there is a difference between requiring that the challenged practice goes no further than necessary to achieve the aim and requiring a balance of interests.'[376]

It is thus argued that the loose replacement of 'reasonably necessary' for 'necessary' and 'legitimate aim' for 'real need' means that the UK's test is weaker than it should be, and hence does not provide claimants with adequate protection.[377] Davies suggests that this particularly affects the judicial analysis of economic dismissals whereby too much weight is applied to the perspective of business rather than employee.[378] This chapter's findings on inconsistent and sketchy approaches to proportionality in redundancy and absence dismissals could support such an argument.

The UK's approach to proportionality is also criticised for failing to take wider societal issues of discrimination into sufficient consideration in cases like *Azmi*.[379] This, alongside the concerns above, means that legislative policy objectives of the EqA are weakened.[380] As Baker writes,

> When an employer pleads a justification defence […], the employer claims that its policy is not the kind of situation the statutes seek to prevent. Proportionality does the job of sorting acceptable situations from unacceptable ones. If the impact is proportionate, the measure is by definition not the kind on whose prevention society has placed an overriding priority. Why should this determination not involve consideration of whether this rule or practice, which the employer claims should receive exceptional treatment, brings about the kinds of effects that the statute seeks to eliminate or minimise?[381]

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[375] Smith & others (n 252) 277; Lane & Ingleby (n 260) 531.
[376] Connolly, *Discrimination Law* (n 301) 184.
[377] Ibid 184-85; Smith (n 252) 276; Lane & Ingleby (n 260) 547
[378] ACL Davies, 'Judicial Self-Restraint in Labour Law' (2009) 38 ILJ 278, 301.
[379] *Amzi* (n 346); Lane & Ingleby (n 260) 542-3.
[380] Connolly, *Discrimination Law* (n 301) 185-86.
[381] Baker (n 263) 325.

The UK's preference for balancing exercises rather than structured proportionality tests, it is argued, makes judicial decisions on these matters less transparent.[382] Lane and Ingleby go so far as to suggest that it has inadvertently allowed a unfair ranking system of protected characteristics to develop in case law that puts claimants of religious discrimination at particular disadvantage.[383] Lack of clarity in legal tests could thus have serious consequences.

However, the same authors also acknowledge that structured proportionality tests such as *Bilka* can be inflexible and do not always act in the interests of society overall.[384] On the subject of what makes a perfect objective justification test, there are no easy answers.

3.8 Potential developments in proportionality

It is clear that areas of uncertainty remain in this area of the law. Given judges' reluctance to consistently apply *Bilka*, it is possible that the UK's planned exit from the EU and the potential end to any obligation to comply with its judgments will have a significant impact on the direction in which concepts of proportionality develop. As Ingleby and Lane point out, 'if the UK courts failed to fully apply the jurisprudence of the CJEU prior to "Brexit", it is unlikely that they will succumb to it now.'[385]

3.9 Chapter conclusion

This chapter has demonstrated that despite being a clearly vigorous and stringent concept, it is hard to pinpoint the exact nature of objective justification within the UK,

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[382] Ibid 330.

[383] Lane & Ingleby (n 260) 546-47. This argument is based on analysis of case law including *Azmi* (n 346) and *Ladele* (n 275). A counterargument would be that rather than this being an issue of prejudice, the application of justification defences to religious discrimination is affected by the fact claimants are more likely to want different, as opposed to equal treatment - Connolly, *Discrimination law* (n 301) 199. Where this goes against rules intended to prevent discrimination against other protected groups, it is unlikely to be justified - Monaghan (n 256) 353. However, a lack of clarity and structure regularly shown in proportionality analyses undoubtedly fuels this debate.

[384] Ibid 549.

[385] Ibid 549-50.

especially as it applies to dismissal situations. Substantive justice is clearly more significant than procedural matters, but the exact application of the justification test appears to vary. Judicial interpretation is often inconsistent due to the challenges of combining English notions of 'balance' with strict European interpretations of proportionality. Because of these opposing influences, the UK's likely exit from the EU in late 2019 may have significant long-term consequences for how the phrase 'a proportionate means of achieving a legitimate aim' is understood in the future.

Chapter four will directly compare the test of proportionality with that of reasonable responses as it attempts to assess how increasingly regular interaction between the two may further shape UK law relating to dismissal.

Chapter 4:
Interactions between reasonable responses and proportionality

4.0 Introduction

The previous two chapters have outlined the tests of reasonable responses and proportionality as they relate to unfair dismissal and discrimination claims. Traditionally it was rare that these two separate claims would be applied to the same dismissal situation. However, as discrimination law evolves, this has started to become more common.[386] This chapter compares the nature of reasonable responses and proportionality, and attempts to assess how they interact at tribunal level in dismissal situations. Such assessment is based on limited case law evidence, but indicates that this is a developing area that potentially could make managing dismissal a more complex process for employers; or alternatively could lead to changes in the tests themselves.

4.1 Comparisons between reasonable responses and proportionality

It is accepted generally that both tests are distinct.[387] The reasonable responses test condones employer behaviour that lies within a normal range.[388] It applies no higher standard than to compare the actions of one employer with those of (usually hypothetical) alternatives.[389] By contrast, proportionality is a much stricter, value-laden test that enables the court to judge the legitimacy of an employer's actions, and to assess whether aims could have been achieved through less discriminatory means.[390] Chapters two and three have highlighted these differences; the detail of

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[386] The author's search for relevant case law found none prior to 2014, but a small and steadily increasing number after that including four in 2017, and five in 2018. All are referred to in the course of this chapter.

[387] I Smith & others, *Smith and Wood's Employment Law* (13th edn, OUP 2017) 275; ACL Davies, 'Judicial Self-Restraint in Labour Law' (2009) 38 ILJ 281-82.

[388] J Davies, 'A Cuckoo in the nest? A "range of reasonable responses" justification and the Disability Discrimination Act 1995' (2003) 32 ILJ 164, 178.

[389] Smith & others (n 387) 525-6.

[390] S Deakin S & G Morris, *Labour Law* (6th edn, Hart Publishing 2012) 642.

which can be summarised in the following ways.

4.1.1 Intention and focus

The intention behind the reasonable responses test is to promote fairness and reasonable behaviour by employers.[391] Considerations of impact on the individual employee are secondary to these overriding concerns.[392] It focuses on judging the employer's behaviour based on knowledge they had at the time of dismissal, rather than any facts that emerge after that date.[393] Case law thus centres on attempts by the employer to act fairly at the time of dismissal, at the expense of consideration for the individual employee, who may be treated unjustly.[394]

By contrast, the proportionality test in its purest form applies a different approach. Discriminatory impact on the employee lies at the core of the tribunal's concerns, and it is for the employer to argue that their legitimate aim is justification against this.[395] Chapter three described how the tribunal's treatment of relevant evidence that arises after the dismissal itself is not yet set out fully in case law.[396]

4.1.2 Alternative actions to dismissal

It is accepted that a reasonable response by an employer can take various forms, and so long as an individual's dismissal falls within this band, tribunals will not judge whether or not it was the most appropriate response for the circumstances.[397] This is in contrast to the *Bilka* requirement that an employer must demonstrate that their actions when dismissing an employee constituted the least discriminatory method of upholding the legitimate aim in question.[398]

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[391] *Orr v Milton Keynes Council* [2011] EWCA Civ 62; [2011] 4 All ER 1256.
[392] *W Devis & Sons Ltd v Atkins* [1977] AC 931 (HL).
[393] Ibid.
[394] See for example, *Monie v Coral Racing Ltd* [1981] ICR 109 (CA).
[395] *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293; [2006] 1 WLR 3213.
[396] See section 3.6.
[397] *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 (EAT).
[398] Case 170/84 *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] ECR 1607.

4.1.3 Level of judicial restraint

Under the reasonable responses test, judges must not allow their own opinions about the facts of any case to influence the overall judgment.[399] Instead, evidence is viewed from the perspective of a hypothetical reasonable employer.[400] This includes for example, the interpretation of witness statements, over which the employer's view can only be disregarded if it is seen to be entirely unreasonable in nature.[401]

Proportionality as described in *Bilka* has no such restriction on judicial interpretation of the facts.[402] Judicial analysis should be objective and meaningful.[403] Tribunals are entitled to interpret evidence as they see fit, and to challenge employer (or claimant) assertions where appropriate.[404]

4.1.4 Procedural fairness

ERA s 98(4)'s emphasis on fairness and reasonable behaviour by employers has led to a large focus on procedural fairness.[405] Employers should only make decisions to dismiss against a background of fair, consistent, and transparent organisational procedure.[406] Failure to provide this is likely to lead to a finding of unfair dismissal, even if the employer can demonstrate that the dismissal itself was not unjust.[407] Case law on proportionality shows a lower degree of deference to procedural fairness, so long as any irregularity in employer behaviour is not connected to the discrimination itself.[408]

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[399] *Watling & Co Ltd v Richardson* [1977] AC 931 (HL).
[400] *Orr* (n 391).
[401] Ibid.
[402] *Bilka* (n 398).
[403] *Hardy and Hansons Plc v Lax* [2005] EWCA Civ 846; [2005] ICR 1565.
[404] Ibid; *GMB v Allen* [2008] EWCA Civ 810; [2008] ICR 1407.
[405] Smith & others (n 387) 522.
[406] *British Home Stores Ltd v Burchell* [1980] ICR 303 (EAT).
[407] *Polkey v AE Dayton Services Ltd* (1988) AC 344 (HL).
[408] *Crime Reduction Initiatives (CRI) v Lawrence* (EAT, 17 February 2014).

4.1.5 Substantive Justice

The reasonable responses test thus places little weight on substantive justice.[409] Where it occasionally does (such as in some cases of long-term absence and SOSR), the employer's needs usually take priority,[410] as only 'sufficient' reason to dismiss is required.[411] By contrast, proportionality's focus on the interests of the claimant means that substantive justice is a more significant aspect.[412]

4.1.6 Power balance between employer and employee

Both the reasonable responses and proportionality tests have been criticised for allowing the power balance in tribunals to shift towards employers rather than employees.[413] Such criticisms levelled against the former test, which is held to be intrinsically imbalanced as an approach, have been especially fierce.[414] By contrast, criticisms of imbalance in discrimination cases are usually triggered by a perceived misapplication of the principle of proportionality, rather than being something that inevitably flows from it.[415] Where correctly applied, the *Bilka* test is considered to give greater power to employees than employers.[416]

4.1.7 Objectivity

Chapter two described how the reasonable responses test in theory contains objective

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[409] T Brodtkorb 'Employee Misconduct and Unfair Dismissal law: Does the range of reasonable responses test require reform?' (2010) 52 Int JLM 429, 443.
[410] See for example, *Lynock v Cereal Packaging Ltd* [1988] ICR 670 (EAT); *Henderson v Connect (South Tyneside) Ltd* [2010] IRLR 466 (EAT).
[411] Employment Rights Act 1996 (ERA 1996) s 98(4)(a).
[412] *Bilka* (n 398).
[413] See for example, Davies (n 388) 304-05.
[414] H Collins, *Justice in Dismissal: The Law of Termination of Employment* (OUP 1992) 38; A Freer, 'The Range of Reasonable Responses Test – From Guidelines to Statute' (1998) 27 ILJ 335, 335.
[415] A Baker 'Proportionality and Employment Discrimination in the UK' (2008) 37 ILJ 305, 328; JA Lane & R Ingleby, 'Indirect discrimination, justification and proportionality: are UK claimants at a disadvantage?' (2018) 47 ILJ 531, 547.
[416] Baker (n 415) 310.

elements, but is mostly subjective in reality.[417] Chapter 3 established that the proportionality test is much more objective in nature, but that case law suggests it is regularly applied in a somewhat subjective manner.[418]

4.1.8 Future direction

The reasonable responses test is longstanding and well-established.[419] Analysis in chapter two argued how it is unlikely that the test and its application will be significantly altered in the near future.[420] The proportionality test in discrimination claims lacks this settled status, particularly in how it is applied to dismissal.[421] Various areas of uncertainty were identified in chapter three.[422]

4.2 Interaction between both tests in dual claim situations

In situations where a dismissed employee has brought claims of both unfair dismissal and discrimination arising from disability, tribunals may be required to apply both reasonable responses and proportionality tests separately to the same evidence. We now assess occasions where such cases have been considered by either the EAT or Court of Appeal. However, due to a limited amount of case law available, analysis will be restricted to dismissals based on long-term sickness absence or misconduct.

4.2.1 Sickness absence

An early dual claim case involving dismissal for sickness absence to reach the EAT was *Crime Reduction Initiatives (CRI) v Lawrence*.[423] This established the separate nature of both tests, finding that an error in procedure by the employer was enough to take dismissal outside of the band of reasonable responses, yet did not impact on proportionality. This resulted in the employee losing their case for discrimination, despite the success of their unfair dismissal claim.

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[417] See section 2.2.
[418] See section 3.6.
[419] *Orr* (n 391).
[420] See section 2.5.
[421] Lane & Ingleby (n 415) 549-50.
[422] See sections 3.3 and 3.4 in particular.
[423] *CRI* (n 408).

However later case law emphasises that where obvious procedural errors are not present, the issues with which tribunals must concern themselves are very similar for both reasonableness and proportionality. The Court of Appeal in *Bolton* gave the following guidance:

> I accept that the language in which the two tests is expressed is different and that in the public law context a 'reasonableness review' may be significantly less stringent than a proportionality assessment (though the nature and extent of the difference remains much debated). But it would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law.[424]

The judgment went on to explain that differences between the tests of reasonableness and proportionality should not be over-emphasised, as both allowed respect for the actions of the decision-maker and as such, should not usually lead to different results in this context.[425] Quite how such argument can be squared with the contrasting theoretical doctrines of reasonable responses and proportionality as discussed earlier in this chapter is unclear.[426]

However, what is clear is that the Court of Appeal believes that factors such as impact of sickness absence on the employer, and the question of how long they should wait before dismissing, are common matters for both unfair dismissal and discrimination claims.[427] Other case law from the EAT has established similarly that issues such as the

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[424] *Bolton St Catherine's Academy v O'Brien* [2017] EWCA Civ 145; [2017] ICR 737 [53] (Underhill LJ).

[425] Ibid.

[426] The *Homer* decision (*Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15; [2012] 3 All ER 1287) was cited in argument during *Bolton*, but notably, was not referred to in the final judgment.

[427] *Bolton* (n 424).

consideration of alternative methods of working,[428] and the presence of implied terms regarding contractual sickness benefits,[429] will likewise be considered under both tests. It is unsurprising therefore, that other than *CRI*,[430] all dual claims for sickness absence dismissal considered for this dissertation have resulted in the same result – either success or failure – for both claims.[431] In practice, the tests of reasonable responses and proportionality are very similar when applied to sickness absence situations. In *Birmingham City Council v Lawrence* for example, the EAT felt bound by *Bolton* to conclude that if a tribunal's findings on proportionality were unsafe, then this meant that findings on reasonable responses must be unsafe also.[432]

4.2.2 Conduct

At first glance, case law on dual claims involving conduct dismissals appears to follow a similar pattern. In the majority of cases considered for this dissertation, the results of reasonable responses and proportionality tests have likewise produced the same result – whether success or failure – for each claim. Sometimes, such as in the cases of *Hensman* and *Asda,* these results are based on very similar analysis for each claim by the tribunal.[433] In *Risby,* the EAT described a 'substantial degree of overlap between the two statutory questions' which meant that a proportionality decision on alternative options to dismissal could potentially change the result of a reasonable responses analysis.[434]

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[428] *Ali v Torrosian & others (t/a Bedford Hill Family Practice)* (EAT, 2 May 2018).
[429] *Awan v ICTS UK Ltd* (EAT, 23 November 2018).
[430] *CRI* (n 408).
[431] *Monmouthshire County Council v Harris* (EAT, 23 October 2015); *obiter* remarks in *General Dynamics Information Technology Ltd v Carranza* [2015] ICR 169 (EAT); *Bolton* (n 424); *Birmingham City Council v Lawrence* (EAT, 2 June 2017); *Reid v Lewisham London Borough Council* (EAT, 13 April 2018); *Ali* (n 428); *Awan* (n 429).
[432] *Birmingham* (n 431).
[433] In *Hensman v Ministry of Defence* [2014] Eq LR 650 (EAT), both unfair dismissal and discrimination awards were successfully appealed on grounds that the original tribunal had not given enough consideration to the employer's reasons for dismissal. In *Asda Stores Ltd v Raymond* (EAT, 13 December 2018), the employee's success in both unfair dismissal and discrimination claims was based on health considerations and errors in the employer's reasoning.
[434] *Risby v Waltham Forest London Borough Council* (EAT, 18 March 2016) [9] (Mitting J).

However, at other times the EAT has considered issues of reasonableness and proportionality in quite separate ways. For example, in *Burdett v Aviva Employment Services,* where an employee with schizophrenia had committed very significant misconduct as a result of not taking prescribed medication, success in his unfair dismissal claim was largely based on the employer's failure to consider the lack of wilful culpability involved.[435] By contrast, the success of his claim for discrimination arising from disability arose principally because the employer did not consider alternative methods of achieving their legitimate aim other than dismissal.

The recent Court of Appeal judgment in *York* was a significant development in this subject. [436] Here, a disabled teacher was dismissed after showing pupils an inappropriate film in class. Crucial factors affecting both claims were the perceived relationship between the employee's disability and his conduct, and the level of remorse and reflection shown by him afterwards. The unfair dismissal claim failed because the tribunal decided that the employers' opinions on these matters were within the band of reasonable responses and as such, could not be further questioned. However the discrimination claim succeeded because the tribunal applied its own proportionality assessment of the relevant evidence (including medical evidence unavailable to the employer when dismissing), which led it to disagree with the employer's views. The Court of Appeal approved of both approaches, emphasising that the tests of proportionality and reasonableness were 'plainly distinct'. [437] Contradictory guidance from *Bolton* discussed above was considered by Sales LJ, but was distinguished on the facts of the case.[438] Given the quote from Underhill LJ in section 4.2.1 above, these distinguishing facts presumably must relate to the reason for dismissal.[439]

[435] *Burdett v Aviva Employment Services Ltd* (EAT, 14 November 2014).
[436] *York City Council v Grosset* [2018] EWCA Civ 1105; [2018] 4 All ER 77.
[437] Ibid [55] (Sales LJ).
[438] Ibid.
[439] See text to n 423.

4.3 Potential future directions for dual claims

The Court of Appeal thus appears of the opinion that comparisons between the tests of reasonableness and proportionality will depend on the employer's reason for dismissing the employee. In sickness absence cases, the tribunal's analysis will be very similar for each test, yet in conduct situations they are likely to be quite different.[440] Given the substantial theoretical differences between reasonableness and proportionality explored so far in this dissertation, this guidance may be considered as lacking in principle. It is not easy to see why the interaction between the two tests should differ so markedly when sickness absence and conduct situations are compared. In other words, if a dismissal for conduct can be reasonable but not proportionate, why should it be different for a dismissal due to absence? It is likely that further clarification on this point will be required from the higher courts in the future.

A particular area of note to consider will be how the tests differ in terms of evidence tribunals can consider, and how they use it. For example, *York* implies that evidence obtained post-dismissal will be acceptable for a discrimination claim, but not an unfair dismissal one.[441] Likewise, it implies that the opinions in an employer's witness statement must be respected for the latter, but not necessarily for the former.[442]

If different standards are applied to unfair dismissal and discrimination claims, this may create additional complexity for employers when dismissing staff. That is possibly a driver for some courts and tribunals to deliberately ensure that dual claim situations do not create two different results.[443] Indeed, it could be argued that in cases such as *Asda* (where the EAT unusually upheld a tribunal's decision to reject some employer interpretation of evidence under the unfair dismissal claim), the tests of either reasonableness or proportionality have been softened in order to ensure consistent

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[440] *York* (n 436).
[441] Ibid.
[442] Ibid.
[443] *Bolton* (n 424) [53] (Underhill LJ). See also comments within Sedley LJ's dissenting opinion in *Orr* (n 391) [18] (Sedley LJ).

outcomes for both claims.[444] If this was indeed the case, and it continued over time, then this could affect the long-term development of one, or both areas of the law.

Another interpretation of the Court of Appeal's position would be that it reflects general inconsistency in the application of the reasonable responses test. As chapter two demonstrated, it is much rarer for dismissals in conduct situations to be found unfair on grounds of substantive fairness than it is for dismissals in long-term absence situations.[445] Tribunals are rarely able to argue that dismissal for a particular act of misconduct would be outside of the band of reasonable responses without any procedural concerns to draw on. Yet the similar question of whether the employer waited long enough before dismissing someone for long-term absence (in procedurally correct circumstances) is not only accepted as legitimate under the test, but is at the forefront of case law in that area. Therefore when both types of dismissal are considered under a proportionality analysis, sickness absence cases will often produce the same result as in unfair dismissal, whilst conduct cases could be quite different. Again, it is possible that the highlighting of this inconsistent trend could result in developments in how one or both tests are applied in the longer term.

4.4 Chapter Conclusion

Theoretically the tests of reasonable responses and proportionality are distinct in law. However, in practice the relationship between them proves to be complex, and likely to develop over time. It is possible that the on-going interaction between unfair dismissal and discrimination claims may result in long-term changes into how courts apply the tests of proportionality and reasonableness. Even if this is not the case, employers may find unravelling the law of dismissal a much more complex process in the future. Thus, it is an area of law that deserves continued observation.

[444] *Asda* (n 433).

[445] See sections 2.3.1 and 2.3.2.

Conclusion

5.0 Summary of findings

This dissertation began with the aim of identifying exact differences between a dismissal that was reasonable, and one that was a proportionate means of achieving a legitimate aim. The former is relevant for unfair dismissal claims under the ERA, and the latter is relevant for some discrimination claims under the EqA. The preceding analysis has demonstrated that such differences are easier to describe in theory than in practice.

Chapter one explained the background to both unfair dismissal and anti-discrimination law, and how both might offer legal protection to those dismissed from employment. Yet the underlying statutes are distinct. The ERA sought to provide avenues for individual dignity and autonomy in the workplace. The EqA was designed to provide more than this: to enforce societal expectations of equality and thus positively shape the behaviour of organisations. From the start, it was clear that claims of unfair dismissal and discrimination, though potentially overlapping, are different in various ways. Many individuals will meet the criteria for one but not the other. Where someone meets the criteria for both, they could hypothetically bring a dual claim.

Chapter two examined ERA s 98(4) and its pivotal importance to unfair dismissal claims. Interpretation of this subsection has been consistently in line with the *Iceland* reasonable responses test.[446] This is, that tribunals must consider the decision to dismiss from the perspective of a reasonable employer and not substitute its own opinion for that. Reasonableness is therefore a wide concept with few boundaries, other than those posed by procedural expectations. The test has been criticised for limiting the power of employees to challenge dismissal, but is ultimately a settled concept that is likely to survive the challenge of *Reilly*.[447]

[446] *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 (EAT).

[447] *Reilly v Sandwell Metropolitan Borough Council* [2018] UKSC 16; [2018] 3 All ER 477.

Next, chapter three carried out a similar analysis of proportionate means and legitimate aim within the EqA. Due to European legislation and case law, this theoretically requires a strict test of proportionality in relevant dismissal cases. However, UK courts and tribunals have been historically reluctant to apply this. This may be partly because proportionality as defined, with its limitations on cost as an acceptable legitimate aim, poses intrinsic difficulties in situations such as redundancy and absence dismissals. Whilst over time the direction of case law has gradually moved closer to the *Bilka* test,[448] less structured balancing exercises are still regularly used in practice and this arguably weakens protection for dismissed employees. It is likely that interpretations of this area of law will continue to develop, and the UK's planned exit from the EU may impact on this.

Finally, in chapter four, the tests of reasonable responses and proportionality were directly compared. In theory they are very different. However, analysis of dual claim situations for unfair dismissal and discrimination demonstrated inconsistent and confusing interactions between them in practice. Court of Appeal guidance in conduct and sickness absence dismissals appears contradictory, and no clear reason has been provided for this. It was suggested though, that the explanation may lie either in judges' reluctance to make different conclusions on each claim when applied to the same facts, or historical inconsistencies in the application of the reasonable responses test. In either case, it seems likely that future dual claim situations will eventually force higher courts to confront this inconsistent reasoning, and, as such, may develop the application of one, or both, legal tests.

5.1 Implications

As has been argued, the reasonable responses test is settled law with authority extending all the way to the House of Lords. Therefore, it is hard to imagine any significant change to its application in the future. However, given the level of inconsistency within existing applications of the proportionality test, combined with likely uncoupling of UK case law on equality from that of the CJEU caused by 'Brexit',

[448] Case 170/84 *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] ECR 1607.

it seems more probable for future developments to occur in that area. Thus, one possibility is an eventual softening of the proportionality test to bring it more in line with notions of reasonableness. This, reflecting the Court of Appeal thinking in *Bolton*, would help to ensure that dual claims for both unfair dismissal and discrimination did not lead to two different results at tribunal, giving greater certainty and clarity for employers when managing their workforce.[449] Its impact on equality in those workforces might be less positive.

However, higher courts in the future may alternatively prefer to adopt a *York* approach that highlights the distinctiveness of both ERA and EqA, allowing for their differing underlying purposes, and explicitly sanctioning the concept that claims under each will involve separate legal tests.[450] Such a result would make managing dismissal more complex for employers, but would be advantageous for claimants and disadvantaged groups in general.

5.2 Final remarks

Overall, it could be said that this dissertation has not been entirely successful in its quest to identify precise differences between reasonable responses and proportionality when applied to dismissal situations. However, it does instead suggest that the relationship between both legal tests is fascinatingly complex, and deserving of study.

[449] *Bolton St Catherine's Academy v O'Brien* [2017] EWCA Civ 145; [2017] ICR 737.
[450] *York City Council v Grosset* [2018] EWCA Civ 1105; [2018] 4 All ER 77.

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Glossary of abbreviations used

CJEU: Court of Justice of the European Union

EAT: Employment Appeal Tribunal

ECJ: European Court of Justice

EqA: Equality Act 2010

ERA: Employment Rights Act 1996

EU: European Union

PCP: Provision, criterion, or practice

SOSR: Some other substantial reason