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**RULES AND STANDARDS IN THE
WORKPLACE: A PERSPECTIVE FROM THE
FIELD OF LABOUR LAW**

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RULES AND STANDARDS IN THE WORKPLACE: A PERSPECTIVE FROM THE FIELD
OF LABOUR LAW: DAVID CABRELLI *

Abstract: Employment rights may be crafted as ‘bright-line’ rules or open-textured standards. Employment rights which are framed at a higher level of generality, such as standards, have not been examined in the same level of detail as rules in labour law scholarship. Standards can be divided into standards of conduct and standards of review. Standards of conduct represent commands to decision makers, such as employers, which enable them to scrutinise their decision making internally; whereas standards of review are addressed to adjudicators whose function it is to scrutinise the conduct of decision makers externally. In the majority of cases, the intensity of scrutiny which is attached to both of these standards will be the same, resulting in conflation. However, there is a general assumption that in adjudicating disputes involving employment rights, the judiciary is overly deferential to the managerial prerogative and this assumption can be corroborated – but also challenged – by an analysis which focuses on standards of review quite separately from standards of conduct. Such an examination reveals situations in which the level of scrutiny exerted externally by the adjudicator pursuant to the standard of review may be less, but also more, acute than that attached to the internal standard of conduct. This paper goes on to evaluate what the degree of intensity of scrutiny attached to standards of conduct and review reveals

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about employment rights more generally and erects a framework against which the argument about varying intensities of scrutiny can be given greater clarity.

Keywords: labour law, employment law, employment rights, labour rights, rules, standards, standards of conduct, standards of review, intensities of scrutiny

INTRODUCTION

This paper seeks to examine the nature and structure of legal commands which confer employment rights in the field of labour law. To that extent, it is engaged in a descriptive exposition of, and normative discourse about, the nature and structure of labour laws. In pursuing this line of inquiry, the paper adopts a basic distinction between employment rights which are expressed as rules and those which are articulated as standards.¹ Existing labour law scholarship has principally engaged with the significance of legal commands articulated as rules which confer employment rights.² However, this paper marches along an altogether different path, seeking to plug a gap in the existing labour law literature by focusing on employment rights which are crafted as open-textured legal standards. An employment right which is articulated as a standard may be described as a juridical command to an employer which draws out the law's expectations about acceptable managerial behaviour at a high level of generality.

In examining standards, a distinction is made in this paper between standards of conduct and standards of review. Standards of conduct are directed at employers and delineate the nature of the behaviour which the law anticipates from employers and against which employers may *internally* test their conduct and decision making. Meanwhile, standards of review represent the *external* level of scrutiny of managerial decision making and conduct which the law expects from adjudicators and so are addressed to such enforcement authorities. The significance of the distinction between standards of conduct and review lies

in the fact that it represents another means of measuring the normative force of laws and filling out their meaning. The perspective adopted in this paper is that laws conferring employment rights which are drawn as standards are characterised by an internal drift. Indeed, it is submitted that the intensity of scrutiny which is attached by a legislator or judge to an employment right expressed as a standard tells us something about the strength of (1) the fundamental values or particular policy preferences underpinning that particular right and (2) the right itself: the greater the deference to management allocated to the standard, the less significance the legislature or adjudicator (ie the law maker who was responsible for the promulgation of the right) would appear to attach to that right and the inherent policy issues or fundamental values which inform its scope and substance. Once this has been understood, it is an insight which affords us another yardstick against which employment rights can be measured. For example, there is a general assumption that in adjudicating disputes involving employment rights, the judiciary is overly deferential to the managerial prerogative³ and this assumption can be corroborated – but also challenged – by an analysis which focuses on standards of review quite separately from standards of conduct. Such an examination reveals situations in which the level of scrutiny exerted externally by the adjudicator pursuant to the standard of review may be less, but also more, acute than that attached to the internal standard of conduct.

This paper is split into the following parts. Parts 1, 2, 3 and 4 articulate the differences between standards of conduct and review, and explore how the intensity of scrutiny attached to standards of conduct and review are forged. Parts 5 and 6 then go on to identify examples of divergence between standards of conduct and review from the field of labour law and the rationales in favour of such a divide. Finally, in parts 7 and 8, a basic normative structure or metric is erected against which the arguments in this paper can be given greater clarity and meaning. The final part concludes.

1. OF RULES AND STANDARDS

The aim of this section is twofold: first, to say a little about the defining criteria of rules and standards in the field of labour law as a means of differentiating between the two; secondly, to address briefly what standards reveal about the character of employment laws.⁴ It is trite to state that one of the key functions of labour law is to strike a balance between management and the labour force, or 'to support and to restrain the power of management and the power of organised labour'.⁵ At the heart of the employment relationship lies the managerial prerogative. A consequence of the exercise of managerial autonomy is that the employer will take a whole range of decisions having positive and adverse implications for employees and their interests. Given the potential for abuse arising from the untrammelled application of the managerial prerogative, the common law and Parliament have intervened in specific contexts and at different times to introduce laws to police the behaviour of employers by conferring rights in favour of employees. Such laws establishing employment rights may manifest themselves as (1) rules or (2) standards.⁶ Rules occasionally impose strict liability on employers. Regulations 13 and 13A of the Working Time Regulations 1998, SI 1998/1833 are paradigmatic of an employment right expressed as a basic rule, to the effect that all employees are entitled to 28 days leave in each leave year. Meanwhile, a juridical command which confers rights in favour of employees may be channelled through a standard which signposts expectations about managerial behaviour in an open-textured manner. Standards represent a less peremptory or compelling form of normativity. For example, a possible variation on the theme of regs 13 and 13A of the Working Time Regulations 1998 duly expressed in terms of a standard might be a legal command that all employers must ensure that their employees take an adequate and appropriate amount of leave in any successive annual period. The legal command expressed as a standard is thus less precise in nature in comparison with the rule amounting to a tangible differential in formal substantive terms.⁷ Words and phrases such as 'reasonable', 'proportionate',

'rational', 'due care', 'equitable', 'adequate' and 'appropriate' are examples of classic standard-like language.⁸

The purpose of making the categorical distinction between rules and standards in this paper is essentially geared towards the adoption of an organising framework. This framework enables us to move on to a consideration of the issues which influence the nature of standards, and the identification and rationalisation of the elements which shape the level of intensity of scrutiny of managerial action (duly exerted internally by employers and externally by an adjudicator) pursuant to the application of such standards. Furthermore, inherent within the acknowledgment of the existence of standards is the recognition that the normative force of certain employment rights cannot be conceptualised as static or fixed. Rather, that those rights possess an intrinsic capacity to drift in terms of their force of application once instantiated within a particular fact-dependent context. This insight encourages us to engage in a more nuanced dialogue about standards and to divide them into two separate camps which are mutually exclusive, yet interdependent. That is to say, that standards may be segregated into standards of conduct and standards of review. This distinction is particularly important since it presupposes that the strength of standards may drift and vacillate in terms of intensities of scrutiny.

2. OF STANDARDS OF CONDUCT AND STANDARDS OF REVIEW

Standards may be divided into 'standards of conduct' and 'standards of review'. What is the distinction between them? Is it a positivistic, source-based distinction in the sense that standards of conduct are, by necessity, promulgated by the legislature with the standard of review duly handed down by an adjudicator (or vice versa), or is the threshold criteria predicated on the object of the instruction, ie the legal person to whom the standard is

addressed? In order to answer this question, one is required to consult existing scholarship in the area of corporate law:⁹

‘A standard of conduct states how an actor should conduct a given activity or play a given role. A standard of review states the test a court should apply when it reviews an actor’s conduct to determine whether to impose liability or grant injunctive relief.’

In the labour law context of legal commands conferring employment rights, standards of conduct are directed at employers, whereas standards of review are addressed to the tribunals and courts.¹⁰ Thus, the source of the standard is not the distinguishing criteria and so it is perfectly possible for (1) standards of review to be set by the legislature or self-generated by subsequent modification by an adjudicator or (2) standards of conduct to be promulgated by an adjudicator, eg where the common law ‘creates’ a new right which is expressed as a standard.

Standards of conduct prescribe ‘conduct rules’ and guide employers on how they ought to act in a given situation. It is more common for such standards of conduct to be crafted by the legislature than an adjudicator. For example, in terms of a statutory provision, an employment right may be expressed as a standard of conduct to the effect that all employers must ensure that their employees take an adequate and appropriate amount of leave in any successive annual period. The *internal* actions and decision making of employers are thus guided when they are engaged in fixing the annual leave requirements of their employees by reference to an ‘adequate and appropriate’ standard of conduct. An example is the command to employers in s 4A(1) of the Disability Discrimination Act 1995 (DDA)¹¹ to make ‘reasonable’ adjustments to the workplace in order to accommodate their disabled employees.

Meanwhile, standards of review prescribe ‘decision rules’ and determine how an adjudicator ought to analyse *externally* the decisions or actions of the employer to whom the standard of

conduct was addressed.¹² In contrast with standards of conduct, standards of review are directed towards adjudicators. The common law of the contract of employment prescribes an implied term that an employer's decision to award (or not award) discretionary bonuses or benefits must not be made irrationally, perversely or contrary to good faith.¹³ Here, in terms of the standard of review, the command to an adjudicator is to apply a rationality standard and so adjudicators must assess whether an employer's decision and actions were rational and bona fides.

In order to give the contours of the standard of review more substance, one can build on the above 'annual leave' example. Thus, in the case of a dispute about the legality of the decision of an employer in allocating a period of annual leave to an employee, in the absence of further guidance in the statutory provision, the adjudicator would be required to determine whether the period fixed by the employer met the test of 'adequa[cy] and appropriate[ness]'. In such an example, the standard of conduct and standard of review are conflated. That is to say, that the degree of scrutiny *internally* exerted by the employer over his own conduct is set at the same level as the intensity of scrutiny to be applied *externally* by the adjudicator, namely a test of what is 'adequate and appropriate'. Although standards of review are more commonly created by adjudicators, they may also be set by the legislature. An example of the latter process is the proportionality standard,¹⁴ which is addressed to adjudicators as a means of enabling them to assess the lawfulness of an employer's indirectly discriminatory practices.¹⁵ Moreover, when initially crafted by the legislature, the standard of review may be subsequently modified by an adjudicator.¹⁶ In the field of labour law, the classic example of such modification is the replacement of what appears to be a purely 'objective reasonableness' standard with the 'range of reasonable responses' test in the law of unfair dismissal in terms of s 98(4) of the Employment Rights Act 1996 (ERA).

3. FIXING THE STANDARD OF CONDUCT

The basic premise of part 2 above is that standards of conduct and standards of review can be evaluated in terms of the *internal* and *external* scrutiny which they exert over a particular actor. This section seeks to address the basis on which the legislature or adjudicator (ie the relevant law maker) fixes the intensity of scrutiny of the standard of conduct attached to a particular employment right. Furthermore, what does the chosen measure of scrutiny of the standard of conduct tell us about that specific employment right? Here, it is posited that there is considerable force in the argument that the more fundamental the values or principles which influence the promulgation, and inform the substance, of an employment right, the more stringent (in the sense of the intensity of scrutiny) the standard allocated to an employment right ought to be. To that extent, the level of scrutiny exerted upon managerial behaviour would intensify proportionately to the criticality of the right in terms of principle. Thus, if a person was entrusted with the task of designing a system of labour law afresh, it is argued that there is force in the proposition that that person ought to benchmark the intensity of the standard of conduct against the desirability of achieving certain fundamental values or objectives. Standards of conduct would be calibrated so that they were reflective of fundamental conceptions and values which currently underpin employment relations, such as dignity, respect, cooperation, partnership, inclusion and competitiveness.¹⁷ Such a conceptualisation of a standard has been advocated by commentators at an abstract level and in isolation from particular substantive areas of law, ie that underlying social, economic and other values and principles set the 'looseness' or stringency of the measure of scrutiny of a standard and that such values are conditioned by the right which the standard represents.¹⁸

Whilst such an approach is attractive, there are particular difficulties which must be overcome. First, one of the drawbacks of applying such an approach which focuses on a particular employment right in isolation is that it perhaps serves to cloud our ability to view

employment rights in the round. If the standards of conduct associated with different employment rights vary in levels of intensity due to the nature of the fundamental values which underpin each right, from a perspective which sees labour law as an autonomous body of law (to which those rights analysed duly belong), issues of internal coherence are somewhat elided. In other words, in diverse contexts, and sometimes in the same context, employers are enjoined to scrutinise internally their actions and decision making according to diverse standards which vary in the degree of scrutiny of managerial action. This is a fundamental point to which the writer will turn in greater detail in a future article. A more obvious difficulty is that any normative framework which seeks to fix a standard of conduct on this basis must itself first establish a wholly separate framework regarding a hierarchy of employment rights in terms of some being more fundamental than others – and this would be gauged with reference to the level of significance of the underpinning values and objectives.¹⁹ The difficulty with such an endeavour is that it is an inherently subjective pursuit which is value-laden in nature. Hence, an alternative way of approaching the normative significance of standards is to turn matters on their head and to argue that the intensity of scrutiny which is attached to a right tells us something about how fundamental a legislature or adjudicator (ie the law maker responsible for promulgating the standard and the associated employment right) considers the values underpinning that particular right to be. To articulate this point in another way, if one were to chart the standards of conduct attached to employment rights presently existing in the field of labour law, there would be some correlation between the extent of the internal deference to the employer associated with the selected standard and the significance with which the law would appear to treat the right and the latent values which influence its content and scope of application.²⁰ In terms of such a framework, one can begin to understand the level of importance which a system of labour law attaches to particular employment rights. Pursuing this point a little further, it also means that a selected number of employment rights can be scrutinised with a hierarchy of intensity of standards of conduct identified in terms of those rights, which, in turn, enables the

significance or relative strength of such employment rights to be charted against a reliable metric or spectrum.²¹

4. FIXING THE STANDARD OF REVIEW

Part 2 above proceeded generally on the implicit assumption that the standard of conduct and review would be conflated in terms of the measure of scrutiny. However, it is also perfectly possible for conceptual space to exist between them. What is meant by 'conceptual space' in this context? Here, an example is of assistance. To borrow from the aforementioned 'annual leave' example in part 2 above, imagine that the above statutory provision is supplemented by a further statutory provision. The latter provision directs an adjudicator towards further particular factors, to the effect that 'in ascertaining whether the period of leave set by the employer in a successive annual period is adequate and appropriate in terms of subsection [x] above, an employment tribunal or court shall (a) have regard to the financial resources, size and administrative resources of the employer and (b) assess whether such period of leave is justifiable, having regard to the legitimate business aims and needs of the employer'. In such an example, the notion of a distinction between the standard of conduct and the standard of review assumes great practical relevance. If the employer sought to resist liability by demonstrating to an adjudicator that the period of leave was 'adequate and appropriate', it would be missing the point. Although the employer is *internally* directed to consider the adequacy and appropriateness of the period which it has set, the intensity of scrutiny to be applied *externally* by the adjudicator represents a particularly diluted version of the intensity of the standard of conduct which is addressed towards the employer. The instruction to the adjudicator to take into account (1) the financial position of the employer and (2) the justifiability of the period of leave fixed by the employer in light of the employer's commercial interests, imports particularly subjective factors into the adjudicator's assessment, ie consideration of what is reasonable for the employer in the

instant factual setting rather than what is reasonable according to the mores of society at large or the court or tribunal itself. Thus, what is 'adequate and appropriate' in the circumstances is not to be analysed on a purely objective basis which would entitle the adjudicator to be more intrusive in its scrutiny. Instead, the standard of review points the adjudicator towards a mixed subjective and objective examination of the period of leave from the perspective of the employer, amounting to an approach which is more forgiving of the employer. Thus, the standard of conduct and standard of review may in theory diverge and the introduction of a more deferential standard of review is merely another technique available to the law to dilute or lighten normative controls imposed upon management.

Of course, one might argue that no such divergence in practical terms exists, ie that the distinction (1) has no application in practice in the field of labour law and so by necessity must be uninteresting or unsound and/or (2) is redundant. There are a number of possible rationales for the adoption of such a position. First, that since it is difficult to identify specific circumstances in which the standards of conduct and review diverge, the distinction should be cast aside. In part 5 below, this paper will draw out compelling examples from the field of labour law which serve to underscore the presence of the distinction. A second objection to the soundness of the distinction is related to the approach of the gatekeepers of the law, namely the legal practitioners or other professional advisers who communicate the intensity of the standards to employers. Solicitors and barristers may well opt to take the safest strategy available by advising management on the basis of the higher of the standard of conduct or standard of review in terms of the level of scrutiny of managerial action. In other words, the argument runs that the manner in which the intensities of scrutiny of the standards of conduct and review are communicated renders the distinction meaningless in theory and practice. However, it is submitted that the nature by which the standards are communicated to management does not mean that the messages which the law transmits to management and the adjudicator in separate strands are not distinct. Instead, it merely dictates that the means and methods by which these standards are expressed to

management may on occasion be undertaken by advisers with the better part of caution. A third possible reason for arguing that there is no such distinction is that adjudicators are simply engaged in a process of interpreting the standard which is set down in the particular source of law, whether it be common law or statute. If the adjudicator adopts or applies what appears to be a different standard from that which appears to have been suggested by the common law or the wording of the relevant legislation, this does not necessarily signify the presence of two distinctive standards. Rather, there is a simpler explanation and that is that the process is purely indicative of statutory or legal interpretation in operation. Whilst this is a compelling argument, the examples selected from the field of labour law, and considered below in part 5, will demonstrate that something more than an interpretative process is being pursued where there is evidence to suggest that standards of conduct and standards of review diverge. Indeed, that adjudicators are engaged in something much more profound than a process of construction.

5. EXAMPLES OF DIVERGENCE BETWEEN THE STANDARDS OF CONDUCT AND REVIEW IN LABOUR LAW

As a means of demonstrating that adjudicators are engaging in more than mere interpretation in forging a distinction between standards of conduct and standards of review, it is beneficial to take some real live examples from the field of labour law. First, consider the statutory employment right not to be unfairly dismissed. In determining whether an employee's dismissal is substantively 'unfair', s 98(4) of the ERA instructs employers to act reasonably in treating the employee's misconduct, incapability, lack of qualifications, redundancy, breach of duty or statute, retirement (or some other substantial reason identified by the employer) as a sufficient reason for dismissal, taking into account the employer's size and administrative resources. Moreover, and very importantly, the language of s 98(4) of the ERA is such that it is sufficiently clear that it is also addressed to an

adjudicator. Thus, it is submitted that s 98(4) amounts to a complex amalgam of a standard of conduct and standard of review. But what is the standard of conduct and review envisaged by s 98(4)? By treating the standard of conduct and review as one of 'reasonableness' in s 98(4) ERA for the purposes of the 'fairness' of the employer's decision to dismiss,²² one might well argue that the intention of Parliament was to command employers and adjudicators to apply an objective reasonableness test. An 'objective reasonableness' standard confers a power upon an adjudicator to subrogate itself to a legal person and freely apply its mind as to whether that person's decision, actions, conduct or omissions were 'reasonable' or not. As MacCormick has remarked, '[I]awyers . . . have not characterised the "reasonable" as involving a subjective test . . . [i]n law what is reasonable is commonly deemed an "objective" matter. . . .'²³ Such a rationalisation of s 98(4) of the ERA is advanced by Freer²⁴ and, so, employers and adjudicators would be guided towards a consideration as to whether dismissal would be, or was, objectively an unreasonable decision. However, this approach neglects the legislature's express invitation to employers and adjudicators to take into account the employer's size and administrative resources. This introduces certain subjective²⁵ considerations into the equation for the purposes of the exertion of internal and external scrutiny of the decision to dismiss. Thus, on the face of s 98(4), the effect appears to be that the standard of conduct and standard of review guides both employers and adjudicators towards the application of a 'strong' objective reasonableness test, duly tempered by the importation of a 'weak' subjective element into the equation.

However, the judiciary have consistently stated that s 98(4) of the ERA requires an adjudicator to apply the 'range of reasonable responses' test.²⁶ This formula represents a self-generated modification of the standard of review by an adjudicator. It channels the adjudicator towards a consideration of the band of responses which a reasonable employer might take in the face of the particular actions or omissions of the employee. Importantly, the 'range' test deprives the court or tribunal of a free hand to substitute its own judgment for

that of the employer or to articulate what ought to have been done by the employer by reference to its own standards or the mores of society at large. Instead, it entails the application of a mixture of objective and subjective considerations: objective to the extent that the tribunal or court must identify how different reasonable employers might react to the employee's actions or omissions; yet, subjective²⁷ in (1) a 'weak' form in the sense that s 98(4) of the ERA enjoins the tribunal or court to take into account subjective criteria, such as the size and administrative resources of the employer, thus enjoining the adjudicator to afford 'some allowance not only for external facts, but also for personal characteristics of the actor himself'²⁸ and (2) in a 'strong' sense to the extent that, by adopting internal practices and formal, written procedures and policies which underscore the particular economic interests of the organisation, there is clearly scope for the employer to channel the parameters of an adjudicator's evaluation of the employer's decision making and conduct towards a more lenient subjective assessment.²⁹

A further example of the divergence between the standard of conduct and review in labour law is provided by s 3A(1) and (3) of the DDA.³⁰ Section 3A(1) of the DDA articulates the standard of conduct which the legislature expects of an employer of disabled persons in the context of the concept of 'disability-related discrimination'. The command to the employer in s 3A(1) of the DDA is that it must not without justification treat a disabled person for a reason which relates to his disability any less favourably than it treats or would treat others to whom the reason does not or would not apply. For the purposes of evaluating whether the employer has advanced a valid justification for treating the disabled employee less favourably than others, the legislature stipulates in s 3A(3) of the DDA that an adjudicator must adopt a standard of review which seeks to assess whether the employer's reason for the treatment was 'both material to the circumstances of the particular case and substantial'. If the employer fails to show material and substantial reasons for such less favourable treatment, it will be deemed to have committed 'disability-related discrimination' and will be held liable. On the face of it, language such as 'the circumstances of the particular case'

suggests that the material and substantial reasons factor would involve the adjudicator applying an objective measure of scrutiny of the employer's actions and reasoning for the less favourable treatment. In that way, the adjudicator would be entitled to form its own opinion as to how it would have acted or decided matters and then substitute its own judgment for that of the employer as to what constituted 'material and substantial reasons'.³¹ However, by introducing a variant of the 'range of reasonable responses' test in *Jones v Post Office*,³² like s 98(4) of the ERA, the judiciary self-generated another modification of the applicable standard of review. In cases involving the employer's justification defence under s 3A(3) of the DDA, *Jones* directs that adjudicators must assess whether the employer's reason for the treatment fell within the 'range of material and substantial reasons'. Like the 'range of reasonable responses' test, the 'range of material and substantial reasons' test compels the adjudicator to proceed on the basis of a mixed objective/subjective approach. It is objective in the sense that an adjudicator must determine the reasons which different reasonable employers might recognise as material and substantial in a similar case, and subjective since the assumption of internal, formal and written procedures and policies by the employer which reveal its particular economic goals, objectives and interests enable it to guide the adjudicator's evaluation of the employer's decision making and conduct towards a more lenient subjective assessment.

It is clear that by adopting the 'range of reasonable responses' and 'range of material and substantial reasons' tests as the standards of review for s 98(4) of the ERA and s 3A(3) of the DDA, the judiciary have articulated a modification of the standard of review and, in doing so, have acted to craft a distinction between the standard of conduct which the law expects of the employer (ie the standard of conduct to which an employer should conform and internally evaluate its decision making in the context of dismissal and disability-related discrimination) and the standard of review which the adjudicator must apply to the employer's decision (ie the standard according to which the adjudicator must review the employer's decision to dismiss or its reasons for the less favourable treatment). Thus, the

modification results in clear conceptual space between the standard of conduct and the standard of review to be applied by an adjudicator in the case of unfair dismissal and disability-related discrimination. The standard of review is more deferential to the managerial prerogative and tolerant of the employer's discretionary power than the standard of conduct. It is submitted that the rationales for the articulation of such a distinction in the case of unfair dismissal and disability-related discrimination are demonstrative of something more symbolic than a process of construction. But, in what way?

6. JUSTIFICATIONS FOR DIVERGENCE

A number of rationales for divergence between standards of conduct and review have been propounded in the existing literature. For example, Eisenberg argues for bounded rationality as a rationale for divergence in terms of which the standard of review is set at a less intensive degree of scrutiny than the standard of conduct.³³ Here, the underlying notion is that there is a differential in legal knowledge between an employer and an adjudicator. Whilst an adjudicator will be instructed by counsel in the detailed aspects of employment law (or will be aware of the body of employment law as an experienced and qualified lawyer), an employer will labour under limited knowledge and will invariably decide how to act on the basis of incomplete information. Moreover, as a normative proposition, employers should not be expected to understand the entire body of employment law or consult legal practitioners before making decisions: the costs associated with such endeavours would be prohibitive to the employer. In such circumstances, Eisenberg argues that 'the legal messages which are primarily directed to [employers]— that is, standards of conduct – should be simple, so that they can be effectively communicated'.³⁴ Thus, the argument from simplicity/complexity provides explanatory force for a distinction between the intensity of scrutiny attached to the standard of conduct and standard of review.

Furthermore, in the context of the law of directors' duties in American corporate law, Allen, Jacobs and Strine have argued that divorcing the standard of conduct from the standard of review will be appropriate in certain factual contexts.³⁵ Allen, Jacobs and Strine argue that divorcing the standard of conduct from the standard of review, with the latter being set at a more lenient (from the perspective of the employer) level than the former, will be appropriate in two particular circumstances, which themselves tend to overlap to some degree: first, where (1) it is clear that more than one decision may be appropriate in response to a given set of circumstances; or, secondly, where (2) it is difficult for adjudicators to differentiate between 'bad' decisions taken by the employer from 'good' decisions taken by an employer which turn out 'badly'.³⁶ In some circumstances, eg where the law has to decide whether a person's actions were negligent in tort, it is common that only one decision is 'good', so that decisions which turn out to have harmful effects will usually amount to bad decisions; however, in other contexts, the assessment of a person's decision making may not be so straightforward, particularly where there is an expectation that it will be part of the decision-making process to take commercial risks. In circumstances where (1) and (2) exist, the divergence in the standard of conduct and standard of review is simply a matter of 'practical fairness' to the decision maker, resulting in a 'zone of protection'.³⁷

To confer greater clarity on the meaning of factor (2) above, consider the example of an employer who decides to expand its business by opening a new store and employing five employees. The venture is initially successful generating healthy returns, but ultimately, 6 years later, the store is closed with the loss of the five jobs. With the benefit of hindsight, it is tempting for an adjudicator to come to the view that the decision to expand the business was a 'bad' decision, that it was pre-ordained to result in the redundancies and that each of the economic dismissals were unfair in terms of ss 95 and 98 of the ERA. However, such a rationalisation of the position may be misguided, since it fails to countenance the possibility that the resolution of the employer to expand may have been a 'good' decision which, for faultless reasons, simply turned out badly. Here, the 'hindsight bias' phenomenon comes

into play. That is to say that when adjudicators evaluate the past decisions of third parties with the knowledge of how things actually turned out, as a matter of behavioural psychology they will inevitably overestimate the likelihood of the actual outcome at the time the decision was made by that third party.³⁸ The danger is that what was in fact a 'good' decision which turned out badly could be misclassified as a 'bad' decision *ab initio*. For that reason, a finding that the dismissals of the five employees were unfair would be misguided.

Applying the insights of Allen, Jacobs and Strine to the example of unfair dismissal in labour law, it could be argued that, in the context of disciplinary proceedings initiated by an employer against an employee for reasons of misconduct, capacity, etc.,³⁹ more than one decision may be reasonable or appropriate. One of the reasonable decisions may be dismissal, another to give the employee a final written warning, another to give the employee a second written warning, etc.⁴⁰ Thus, in terms of Allen, Jacobs and Strine's approach, on the grounds of being realistic and 'practically fair' to the decision maker, the judiciary are justified in affording a margin of discretion to the employer by modifying the standard of review to the less intrusive (in terms of the evaluative function) range of reasonable responses test. The outcome is the application of a more lenient standard of review than the standard of conduct. The alternative option of continuing to equate the standard of conduct and the standard of review as articulated by the legislature in s 98(4) of the ERA would be too strict and arguably unfair in practical terms on employers, since it would presuppose that only one course of conduct is reasonable – which in the case of an employer's decision-making task in the face of misconduct, incapacity, etc, is patently not the case. Thus, the adoption of the range of reasonable responses test as the standard of review by the courts and tribunals to the adjudication of the question of unfair dismissal imports further elements of subjectivity into proceedings for reasons of 'practical fairness'.

Another argument put forward by Allen, Jacobs and Strine is that a divergence between the standard of conduct and the standard of review is justified where there is a role for the

pursuit of legitimate policy preferences.⁴¹ Therefore, the standard of review to be applied to determine whether an employer should be found liable ought to be reflective of substantive policy considerations. Are there strong arguments for policy preferences to be given particular weight in the context of an employer's decision to dismiss, which justify the downwards modification of the standard of review to an intensity of scrutiny which is more deferential to the managerial prerogative? In the context of dismissal, Collins has identified an implicit policy choice on the part of the judiciary in favour of an approach towards limited judicial interference in the managerial prerogative to dismiss its employees. That is to say that the policy preference is to legitimise the restriction of judicial intervention to circumstances where the actions of an employee have not resulted in harm to the employer's legitimate commercial interests.⁴² In cases where the commercial interests of employers are affected by the conduct, capacity, etc of an employee, such a policy choice endorses the construction of a standard of review such as the range test which affords a wider remit of discretion to the employer for the purposes of the evaluation of the 'substantive' fairness of the decision to dismiss.

However, what are the policy factors which justify the manipulation of the standard of review to a more deferential standard of review in the context of disability-related discrimination under s 3A(1) and (3) of the DDA? Here, the opinion of Elias J (as he then was) in the case of *Heathrow Express Operating Co Ltd v Jenkins*⁴³ is particularly instructive. The tenor of Elias J's judgment⁴⁴ is that the s 3A(3) DDA justification test in the context of disability-related discrimination operates at the more lenient standard of a range of material and substantial reasons test in order to respect the prerogative afforded to management in choosing how to organise its business practices. Here, there is an implicit recognition by adjudicators that there may be good commercial or other reasons for an employer to adopt a commercial function or practice which nevertheless inadvertently results in a person who is disabled suffering less favourable treatment on the basis of a reason related to that person's disability. Thus, the adjudicators' perception of the policy towards s 3A(1) and (3) is that it is

not concerned with changing the employer's commercial operations. Rather, adjudicators view it as a means of assessing the weight of the rationales for certain practices which result in less favourable treatment by reference to a 'material and substantial' criterion. This is in stark contrast with the adjudicators' perception of the policy objectives underpinning the disabled employee's right to enjoin his/her employer to make reasonable adjustments in ss 3A(2) and 4A(1) of the DDA, ie the notions of positive discrimination and substantive equality.⁴⁵

Davies has argued that 'there is a tendency among labour lawyers to regard the courts with suspicion [and that] the perception is that the judges are hostile to the interests of workers . . . [and] favour the interests of employers'.⁴⁶ Whilst there is considerable force in this sentiment, eg see the discussion above in the context of the judicial formulation of the more forgiving 'range of reasonable responses' and 'range of material and substantial reasons' standards of review, there are also examples where the courts have gone the other way and intervened to forge a distinction between the standard of conduct and the standard of review, whereby the level of scrutiny associated with the latter is pitched at a higher level than the former. It is interesting to assess the policy reasons which provided the basis for the adjudicator to adopt such a divergence. The 'duty to make reasonable adjustments',⁴⁷ which is encountered in the field of disability discrimination law, is quite revealing. In terms of s 4A(1) of the DDA,⁴⁸ in discharging its obligation to make adjustments to the physical aspects of premises or provisions, criteria and practices, the duty of the employer is to take such steps as are reasonable, in all the circumstances of the case. The language of s 4A(1) of the DDA is clear to the effect that it is addressed towards employers and so duly establishes the standard of conduct. Thus, the standard of conduct which is directed at the employer is to act reasonably. In determining what is 'reasonable', it is submitted that there are three possible formulations open to an adjudicator in crafting the standard of review. First, what is reasonable may be judged according to a subjective standard of review which is particularly lenient. According to such a prescription, the employer would be deemed to have discharged

its duty to make reasonable adjustments if the adjudicator was satisfied that the employer itself had a genuine belief (1) that its conduct was reasonable or lawful, (2) that it had complied with the duty or (3) that the reason for its conduct was reasonable or lawful. An alternative would be to apply the 'range of reasonable responses' standard. In terms of such a formulation, the employer would be deemed to have failed to discharge its duty to make reasonable adjustments if the court or tribunal had identified a band or range of responses which a reasonable employer would have taken and the decisions or actions taken, or sanctions adopted, by the employer did not feature on the list of reasonable responses identified by the court or tribunal. Whilst not as lenient as the first subjective standard of reasonableness, the range of reasonable responses standard is indeed relatively forgiving. However, it is the third possibility which has been adopted by the judiciary as the applicable standard of review. This is amply demonstrated by *Collins v Royal National Theatre Board Ltd*.⁴⁹ and the judgment of Kay LJ in *Smith v Churchills Stairlifts plc*.⁵⁰ Here it was ruled that the appropriate standard of review was one of objective reasonableness. An objective standard enjoins a more intrusive degree of intervention than the other two possibilities, since, as articulated above, the adjudicator has the right to substitute its own judgment for that of the employer by reference to a hypothetical reasonable employer. The selection of the objective reasonableness standard of review tells us a significant amount about the level of importance which adjudicators afford to the employment right. It also fits with our understanding of the philosophy which lies at the heart of the duty to make reasonable adjustments in the DDA. The duty to make reasonable adjustments is concerned with the encouragement of positive discrimination, ie substantive equality, in favour of disabled employees and the collective goal behind the policy initiative is to increase the number of disabled persons in the workplace. In *Archibald v Fife Council*, Baroness Hale of Richmond recognised 'that the [duty to make reasonable adjustments in the DDA] entails a measure of positive discrimination, in the sense that employers are required to take steps to help disabled people which they are not required to take for others'.⁵¹

Whilst it is useful to consider the circumstances in which a departure of the standard of review from the standard of conduct is justified, it is also worthwhile to pause for a moment to ask what the value in the distinction between the two standards is in more abstract terms. Here, it is submitted that, at a conceptual level, the courts are engaged in something more than a simple process of interpretation. Instead, implicit in the recognition of the distinction is the realisation that employers and adjudicators possess differing levels of knowledge about the employer's general managerial practices and behaviour, including the circumstances surrounding and influencing any managerial decision which an adjudicator may be required to evaluate. It is more often than not the case that there will be a knowledge deficit on the part of the adjudicator regarding the commercial environment of the employer. Thus the adjudicator will labour under an informational deficit in the sense that they are privy to imperfect information. In such circumstances, the distinction between the standard of conduct and the standard of review or the modification of the standard of review possesses practical force, since there is merit in the law prescribing differing intensities of scrutiny to both standards lest the law wishes to subject itself to the charge that it lacks legitimacy.

Moreover, the importance of the distinction between the two standards lies in its correlation to the conception of law as an instrument which possesses symbolical value in its own right, in the sense that the law is more than simply a coercive tool and functions to communicate authoritative moral guidance about the manner in which employers ought to behave and exercise the managerial prerogative. In such a way, the law articulates the expectations which it has of the employer via the standard of conduct, and the message which the law sends to the employer is morally and politically charged. Of course, there may well be dissonance between that message and the message which is communicated to the adjudicator via the standard of review, which itself contains a moral component. But the utility in the distinction between the two standards in that scenario lies not so much in the way that it coerces or enjoins the employer and adjudicator to comply with the standard, than in the symbolic value attached to the different messages which are sent to the recipients.

The insights afforded by the 'practical fairness' and 'policy' perspectives identified above as justifications for the erection of differing standards of conduct and standards of review represent useful instruments of analysis in the context of employment rights articulated as standards in the field of labour law more generally. For example, consider the situation where calls are being made for the reform of an employment right with a particularly lax standard of review on the basis that the standards of review applied in the context of a series of other employment rights attract a greater intensity of scrutiny. Rather than invoking the comparative strength of other standards of review as a rationale for reform, it is submitted that the consideration and evaluation of the 'practical fairness' and policy constructs identified by Allen, Jacobs and Strine represent particularly useful criteria. Their application in the case of the particular employment right under attack can function to supply justificatory foundations for a relevant package of reform which are much more conceptually forceful than rationales based on casual formalistic observations that, since a lax standard of review exists in such a context, labour law inevitably suffers from condemnable incoherence and that measures ought to be taken to initiate change. By focusing on the nature of the decision taken by the employer (which will obviously be conditioned by the relevant employment right under examination), whether it is clear that more than one decision may be appropriate taking into account the underlying facts surrounding that decision and the policy issues informing and underpinning such decisions, law makers or law reformers can come to a more informed and balanced view as to the manner in which adjudicators should approach the task of review. If more than one decision may be appropriate in a given set of circumstances, then, on fairness grounds, absent any consideration of policy factors, articulating a standard of review based on a lower degree of scrutiny than the standard of conduct may be warranted. Moreover, where there are good policy reasons for selecting a standard of review which is more deferential to management than the standard of conduct, again this may be a valid choice. However, where the 'fairness' criteria or policy considerations travel in opposite directions, the strength of each will be important in fashioning the standard of review.⁵² In other contexts, the overwhelming force of policy

factors surrounding an employment right may provide an adjudicator with sufficient guidance and justification for drawing a standard of review at a more exacting level of scrutiny than the standard of conduct (eg s 4A of the DDA). In this way, one can seek to extract the defining conditions for standards of adjudicatory review which, in the circumstances, may suggest criteria which are less or more lenient towards the evaluation of an employer's conduct or decision making than the standard of conduct.⁵³

7. FIXED AND 'FLOATING' STANDARDS

Standards may be fixed or 'floating' when evaluated in terms of the internal and/or external intensity of scrutiny which they entail. Objective reasonableness and subjective reasonableness standards are examples of fixed standards, since the intensity of scrutiny which they envisage is uniform once it has been set. For example, in the case of a subjective reasonableness standard of review, the adjudicator must ensure that the employer itself had a genuine belief (1) that its conduct was reasonable or lawful or (2) that the reason for its conduct was reasonable or lawful. Meanwhile, in the case of an objective reasonableness standard of review, a more intrusive degree of intervention is demanded. In terms of such a standard, what the employer thought was reasonable or what a range of differing reasonable employers might have decided or done in similar or different circumstances is irrelevant. Instead, an adjudicator is empowered to substitute its own judgment for that of the employer by reference to a hypothetical reasonable employer, the characteristics of which it has a free hand to craft.

Fixed standards can be contrasted with floating standards. Floating standards are context-dependent and so the intensity of scrutiny (which is exerted internally by a decision maker pursuant to the standard of conduct or externally by an adjudicator pursuant to the standard of review) varies in accordance with the facts of each particular case. Two classic examples which are found in labour law are the 'range of reasonable responses' and the proportionality

tests. In the case of the range test, certain subjective criteria which are fixed by reference to the size, resources, nature, practices and/or pursuits of the employer in each case at hand operate to influence the degree of intensity of scrutiny.⁵⁴ As a result, the intensity of scrutiny must necessarily fluctuate according to the facts of each case. The *Barry v Midland Bank plc*⁵⁵ conception⁵⁶ of the proportionality standard, which applies in the context of an indirect discrimination claim, entails the balancing of the impact or harm suffered by the claimant (as a result of the employer applying a provision, criterion or practice) against the requirement of the employer to achieve a legitimate aim or objective.⁵⁷ In each case, the strength of the requirement of the employer to achieve the legitimate aim and the harm caused to the employee will vary in depth and, thus, so will the intensity of scrutiny of managerial action. However, there are two particular ways in which the proportionality standard can be contrasted with the range test. First, proportionality is two-dimensional in the sense that an adjudicator must evaluate the harm caused to the employee and the aims and objectives of the employer. This can be contrasted with the range of reasonable responses test which is one-dimensional in its focus, since it generally ignores the effect of the employer's decision on the employee⁵⁸ and instead concentrates on the practices of the employer and reasonable employers generally. Secondly, it is submitted that the proportionality standard is more intrusive in its scrutiny than the range test on the basis that the former commands the adjudicator to engage in value judgments about the desirability and legitimacy of the exercise of the employer's prerogative by requiring engagement with the practices and policies of the employer and to direct that they be altered or removed if need be. This explains cases such as *X v Y*⁵⁹ and *Pay v Lancashire Probation Service*,⁶⁰ where claimants who had been held to have been dismissed in accordance with the range test sought to challenge those dismissals as disproportionate infringements of their human rights to private life or freedom of expression.⁶¹ Whilst the Court of Appeal in *X v Y* and the Employment Appeal Tribunal in *Pay v Lancashire Probation Service* were of the view that the range of reasonable responses test was more or less the same thing as a proportionality standard, as

the European Court of Human Rights in *Pay v UK*⁶² and the arguments of Mantouvalou and Collins⁶³ show, this reasoning is arguably unsound.

8. A NORMATIVE FRAMEWORK FOR STANDARDS OF REVIEW

The level of scrutiny of managerial action attached to a standard of review enables us to appreciate the degree of importance which the judiciary allocates to a particular employment right, including the inherent values, 'practical fairness' pointers and policy issues. To that extent, the general antipathetic judicial attitude to the interests of labour can be laid bare. With this in mind, one ought to take tentative steps towards constructing a normative framework by which such an hypothesis can be given greater clarity and strength. This can be achieved by painting a picture in terms of a spectrum against which intensities of scrutiny attached to standards can be charted.

It is submitted that substance to the notion of varying intensities of scrutiny attached to standards can be afforded by adopting and constructing a single reliable metric. The most effective metric is to chart standards in terms of the level of interference which they internally (by the employer itself) or externally (by an adjudicator) exert over the managerial prerogative, ie the degree to which managerial action is called to account internally or externally by that standard. For example, a rationality standard – which is essentially the same as the *Wednesbury*⁶⁴ unreasonableness standard in public law⁶⁵ and posits that liability will only fall upon an employer where no rational employer would have made the decision taken – is not particularly intrusive. It is clear that a rationality standard is not as interfering from the viewpoint of the employer than a proportionality standard which (as argued above) enjoins an adjudicator to evaluate the desirability and legitimacy of the practices and policies of the employer. In such circumstances, since the engagement with the employer's managerial prerogative in the case of the rationality standard is comparatively limited, we can conclude that rationality entails a more limited form of policing

of the decisions and actions of employers than the proportionality standard and is thus less intensive in terms of the scrutiny involved.

Of course, matters are complicated by the fact that standards may be fixed (eg rationality standards, subjective reasonableness and objective reasonableness standards) or floating, ie variable (eg the range of reasonable responses and proportionality standards). One might argue that it is impracticable to compare fixed standards against variable standards in terms of relative intensity of scrutiny for the reason that their diverse natures renders such a comparative exercise meaningless. However, it is argued that it is possible, at the very least, to identify a 'baseline', which is representative of a minimum level of scrutiny associated with the floating standard and which increases proportionately with (1) the subjective characteristics of the employer, in the case of the range test, or (2) the degree of harm suffered by the claimant employee, in the case of the proportionality standard.

Equipped with this spectrum or metric against which standards may be plotted, it is possible to evaluate a legislature's and an adjudicator's attitude to employment rights. In terms of the hypothesis advanced above, where the fundamental values, practical fairness issues or policy goals associated with an employment right are deemed by a legislature or adjudicator to be extremely important, one would expect to see the intensity of scrutiny attached to the standards of conduct and review inclined more towards an objective reasonableness or proportionality standard. Conversely, standards of conduct and review will be pitched at a rationality, subjective reasonableness or range of reasonable responses threshold, where employment rights are deemed by the legislature or adjudicators to be comparatively less significant or worthy of more limited protection. In such a way, employment rights expressed as standards can be benchmarked against the factors which influence the manner in which they are articulated.

CONCLUSION

The formulation advanced in this paper enables a researcher to examine differing employment rights and build up a hierarchy of standards, which, in turn, enables the significance or relative strength of those employment rights to be charted against a spectrum ranging from 'extremely significant' to 'not significant'. A transparent mechanism is thus designed in terms of which it is possible to unearth the generally deferential judicial attitude to the managerial prerogative in the adjudication of disputes involving employment rights, which labour lawyers rightly perceive to be a pervasive phenomenon. This perspective is suggestive of an in-built natural drift or movement in standards which is an observational point, ie that secondary agents such as adjudicators may (1) provide some latitude to actors to whom a standard of conduct is addressed or (2) intervene to render the level of scrutiny harsher. Indeed, the marking out of this dynamic is another means of acknowledging the incontrovertible proposition that the judiciary are engaged in the development of legal policy in the labour law field. The examination of standards of conduct independently from standards of review and vice versa is useful inasmuch as it functions to reveal situations in which the level of scrutiny exerted externally by the adjudicator pursuant to the standard of review may be less, but also more, acute than that attached to the internal standard of conduct.

However, from the perspective of a philosophy which places great value on the internal intelligibility and doctrinal coherence of a system of rules, principles and standards in an autonomous area of law such as labour law, conceivably, there could be difficulties caused by standards of conduct and review which are attached to differing employment rights being pitched at differing levels of intensity. The presence of differing intensities of scrutiny of the managerial function in the context of different employment rights can be attacked on the basis that labour law lacks coherence and is internally contradictory as an independent discipline. The point here becomes particularly acute where one conducts a descriptive

examination of the law governing the regulation of the employment relationship as it currently stands in UK law. It soon becomes clear that there are a number of standards or approaches to the internal and external scrutiny of the exercise of the managerial prerogative. The intensity of these standards of review can be classified within a hierarchy, with each set exerting greater or lesser control over the employer's freedom of autonomy in terms of the normative framework established in this paper. It is submitted that future research can reveal the extent of those difficulties, which will be exposed and explored in another paper.

Footnotes

1. 'Standards' in this paper are perceived as open-textured legal commands, rather than Dworkin's 'principles'; on which, see *H Hart and A Sacks The Legal Process (Based on Tentative Edition of 1958, New York: Foundation Press, 1994) pp 139–143.*
2. For example, theoretical enquiries have investigated the means by which the mandatory or permissive status of an employment right (which is crafted as a rule) might inform our understanding of the level of significance of that right in policy and normative terms; on which, see *B Hepple Rights at Work: Global, European and British Perspectives (London: Sweet & Maxwell, 2005) pp 53–63; S Deakin and F Wilkinson 'Labour law and economic theory: a reappraisal' in H Collins, P Davies and R Rideout (eds) Legal Regulation of the Employment Relation (London: Kluwer, 2000) p 33; H Collins 'Legal responses to the standard form contract of employment' (2007) 36 Industrial Law Journal 2 at 7–10; O Kahn-Freund 'The shifting frontiers of the law: law and custom in labour relations' (1969) 22 Current Legal Problems 1 at 2; B Rudden 'Ius Cogens, Ius Dispositivum' (1980) 11 Cambrian Law Review 87 at 89–90; M Freedland 'Ius Cogens, Ius Dispositivum, and the law of personal work contracts' in P Birks and A Pretto (eds) Themes in Comparative Law (Oxford: Oxford University Press, 2002) p 165.*
3. *A Davies 'Judicial self-restraint in labour law' (2009) 38 Industrial Law Journal 278.*
4. On the basis that there is a rich body of academic literature dedicated to the task, it is not proposed to explore the circumstances in which it may be more appropriate to draw an employment right in terms of a standard rather than a rule. For a comprehensive treatment of this issue, see the economic and jurisprudential insights offered in *L Kaplow 'Rules versus standards: an economic analysis' (1992/1993) 42*

Duke Law Journal 557, F Schauer *Profiles Probabilities and Stereotypes* (Cambridge MA: Harvard University Press, 2003) pp 199–201, I Ayres 'Preliminary thoughts on optimal tailoring of contractual rules' (1993) 3 *Southern California Interdisciplinary Law Journal* 1 at 7, N MacCormick *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford: Oxford University Press, 2005) p 170, HLA Hart *The Concept of Law* (Oxford: Oxford University Press, 2nd edn, 1994) p 131 and D Kennedy 'Form and substance in private law adjudication' (1975) 89 *Harvard Law Review* 1685 at 1687. The basic idea is that it may be more efficient and less costly for a rule maker to frame the employment right in terms of an open-ended standard and defer the evaluation of liability to an adjudicator in particular cases which emerge in the future. A standard affords a law maker the luxury of avoiding the upfront expenditure of resources by devolving responsibility for dispute resolution to adjudicators to ascertain whether an employer has infringed the standard, or not, as the case may be.

5. P Davies and M Freedland *Kahn-Freund's Labour and the Law* (London: Stevens, 1983) p 15.

6. Hart, above n 4, pp 131–134; R Posner *Economic Analysis of Law* (New York: Aspen, 7th edn, 2007) pp 587–590; Hart and Sacks, above n 1, pp 139–141.

7. Diver has forged a distinction between rules and standards in terms of the degree of transparency and accessibility of the legal command: CS Diver 'The optimal precision of administrative rules' (1983) 93 *Yale Law Journal* 65 at 67; see also Kaplow, above n 4, at 561.

8. Kennedy, above n 4, at 1688.

9. MA Eisenberg 'The divergence of standards of conduct and standards of review in corporate law' (1993) 62 *Fordham Law Review* 437 at 437.

10. On the importance of isolating the addressee of the command, see Hart and Sacks, above n 1, pp 118–119.

11. Which will be replicated in very similar terms by ss 21 and 22 of the Equality Act 2010 (EA) when it (and regulations pursuant to s 22 of the EA) comes into force.

12. Eisenberg, above n 9, at 462.

13. *Clark v Nomura International plc* [2000] IRLR 766 at [40] per Burton J; *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287, [2004] IRLR 942 at [51] per Potter LJ; and *Commerzbank AG v Keen* [2006] EWCA Civ 1536, [2007] IRLR 132 at [59]–[60] per Mummery LJ.

14. See s 1(2)(b)(iii) of the Sex Discrimination Act 1975, s 1(1A)(c) of the Race Relations Act 1976, reg 3(1)(b)(iii) of the Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660, reg 3(1)(b)(iii) of the Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661 and reg 3(1) of the Employment

Equality (Age) Regulations 2006, SI 2006/1031. These provisions will be replicated in very similar terms – and supplemented to extend the proportionality standard to cases of indirect disability, gender reassignment, marriage and civil partnership discrimination – by s 19(2) and (3) of the EA when it comes into force.

15. Another example of a standard of review is the ‘reasonableness’ standard in the Employment Rights Act 1996, s 98(4). However, it is more sophisticated, since it is a provision which is clearly directed towards both employers and adjudicators, thus amounting to a highly complex combination of a standard of conduct and standard of review rolled into one.

16. In the sense that the adjudicators alter the intensity of scrutiny.

17. Although such an endeavour is open to the accusation that it is particularly vague and lacking in specification, the force of such a sentiment should not be taken to be so compelling that its abandonment is justified. Indeed, a number of jurists in recent times have sought to benchmark a whole series of employment rights (to which such standards attach) against the aforementioned fundamental conceptions, on which, see *H Collins Employment Law (Oxford: Oxford University Press, 2003) chs 1–7*; *D Brodie ‘Legal coherence and the employment revolution’ (2001) 117 LQR 604 at 620–621*; *H Collins ‘Regulating the employment relationship for competitiveness’ (2001) 30 Industrial Law Journal 17*. With some justification, one might argue that what can be done for employment rights can equally be achieved for the standards which capture the content and scope of application of such rights.

18. Hart and Sacks, above n 1, p 140; Kennedy, above n 4, at 1688.

19. A Herculean task which Robert Alexy has tackled in his magisterial work, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002).

20. See the interesting analysis of the potential rationales for judicial deference to management in *A Davies ‘Judicial self-restraint in labour law’ (2009) 38 Industrial Law Journal 278 at 289–291*.

21. One might oppose such a line of argument on the basis that other factors serve to influence the intensity of the standard of conduct, such as transaction costs and political or judicial compromise. As such, the argument would run that the directness of the connection between the intensity of scrutiny and the significance of an employment right is tenuous at best. However, it is submitted that such an objection can be addressed on two fronts. First, whilst it is recognised that political or judicial compromise are indeed influential factors, transaction costs analyses are more useful when one is required to decide *the form* which an employment right ought to take, that is to say, whether it is articulated as a rule or a standard. In such a case, it is clear that a cost–benefit analysis is a useful instrument. However, in the case of the level of intensity of scrutiny attached to a standard of conduct, it is perhaps not so useful, since the concern is more about the moral or policy message which is communicated to the employer being duly reflective of the symbolical force attached to the law in that context. Secondly, and more importantly, the argument is not that

there is a direct connection between the significance of the employment right and the intensity of scrutiny. Instead, it is contended that the connection is slightly looser in the sense that it represents a broad-brush correlation. Such a contention recognises that other factors do indeed operate to influence the level of intensity of the standard of conduct, whilst preserving the fundamental importance of that correlation intact.

22. See *W Devis & Sons Ltd v Atkins*[1977] AC 931 at 952 per Viscount Dilhorne.

23. N MacCormick, above n 4, p 163 and see p 177; see also OW Holmes Jr *The Common Law* (Boston MA, 1881) pp 110–111 and Lord Reid 'The law and the reasonable man' (1968) 54 Proceedings of the British Academy 189 at 201.

24. A Freer 'The range of reasonable responses test – from guidelines to statute' (1998) 27 *Industrial Law Journal* 335 at 344.

25. From the viewpoint of the employer, not the adjudicator.

26. *Post Office v Foley*[2000] IRLR 827 at [9] per Mummery LJ.

27. From the viewpoint of the employer, not the adjudicator.

28. *J Fleming The Law of Torts* (Sydney: Law Book Co, 9th edn, 1998) p 119. See also W Seavey 'Negligence – subjective or objective' (1927) 41 *Harvard Law Review* 1 at 27–28.

29. See *H Collins Justice in Dismissal* (Oxford: Oxford University Press, 1992) pp 97–98 and 100. To that extent, the argument that the range test excludes subjective considerations is rejected, on which, see Freer, above n 24, at 342–343.

30. When s 15 of the EA comes into force, s 3A(1) and (3) of the DDA will be repealed.

31. An objective standard enables an adjudicator to substitute its own judgment for that of the decision maker, thus harnessing a more intensive appraisal of the employer's actings. For a particularly emphatic version of this view, see the judgment of Rix LJ in *Socimer International Bank Ltd (In Liquidation) v Standard Bank London Ltd*[2008] 1 *Lloyd's Rep* 558 at [66] where his Lordship stated that on the application of an objective standard, 'the decision maker becomes the court itself'.

32. [2001] IRLR 384. In *Jones*, the Court of Appeal held that a tribunal should consider whether the reason advanced by the employer for the treatment of the disabled person fell within the range of what a reasonable employer would have relied on as a material and substantial reason for the less favourable treatment. Thus, an adjudicator is not entitled to enquire whether the employer's reason for the disability-related discrimination was material and substantial and then substitute its own judgment for that of the employer if it disagrees with the judgment of the employer, since this would involve the application of a purely objective standard (*ibid*, at 388 per Pill LJ). Instead, the tribunal must make a list of the reasons which

reasonable employers would consider to be material and substantial reasons for the less favourable treatment. If the reason advanced by the employer for the less favourable treatment in a particular case is not included on the adjudicator's list, the employer will not have satisfied the s 3A(1)(b) and (3) of the DDA defence. In shorthand, this variant of the 'range of reasonable responses test' may be referred to as the 'range of material and substantial reasons' test.

33. See above 9, at 466.

34. Ibid, at 466.

35. *WT Allen, JE Jacobs and LB Strine Jr 'Realigning the standard of review of director due care with Delaware public policy: a critique of van Gorkom and its progeny as a standard of review problem' (2002) 96 North Western University Law Review 449.*

36. Ibid, at 454–455.

37. See above n 9, at 444. The analysis here is reflective of the 'burdens of judgment' conception advanced by Rawls in contemporary political theory, on which, see J Rawls *Political Liberalism* (New York: Columbia University Press, 1993) pp 54–66. The 'burdens of judgment' is a leitmotif in terms of which Rawls seeks to explain why reasonable persons may reasonably disagree or reach contrasting positions when faced with a decision-making task. In exercising judgment, the 'way we assess evidence and weigh moral and political values is shaped by our total experience . . . [and so] in a modern society with its numerous offices and positions . . . judgments . . . diverge, at least to some degree, on many if not most cases of any significant complexity'.

38. *B Fischhoff 'For those condemned to study the past: heuristics and biases in hindsight' and 'Debiasing' in DKahneman, PSlovic and ATversky (eds) Judgment Under Uncertainty: Hueristics and Biases (Cambridge: Cambridge University Press, 1982) pp 341–343 and 427–431.*

39. In terms of the reasons itemised in the ERA, s 98(1) and (2).

40. That much is acknowledged by Ackner LJ in *British Leyland UK Ltd v Swift*[1981] IRLR 91 at 93.

41. *WT Allen, JE Jacobs, LB Strine Jr 'Function over form: a reassessment of standards of review in Delaware corporation law' (2001) 26 Delaware Journal of Corporate Law 859 at 868–869.*

42. Collins, above n 29, pp 97–102.

43. UKEAT/0497/06/MAA, [2007] All ER (D) 144 (Feb).

44. *Heathrow Express Operating Co Ltd v Jenkins* UKEAT/0497/06/MAA, [2007] All ER (D) 144 (Feb) at [40]–[41].
45. Which Elias J noted in *Heathrow Express*, *ibid*, at [40]–[41]. See also C Barnard and B Hepple ‘Substantive equality’ (2000) 59 CLJ 562.
46. Davies, above n 3, at 287.
47. DDA, ss 3A(2), 4A(1) and 18B.
48. Which will be replicated in very similar terms by ss 21 and 22 of the EA when it (and regulations pursuant to s 22 of the EA) comes into force.
49. [2004] EWCA Civ 144, [2004] IRLR 395.
50. [2005] EWCA Civ 1220, [2006] IRLR 41 at [44]–[49].
51. *Archibald v Fife Council*[2004] ICR 954 at [57]. Although the above passage from the speech of Baroness Hale refers to the ‘DDA’, it is clear from a later section of her speech that she was confining the wider proposition in the above excerpt to the ‘duty to make reasonable adjustments’ in ss 3A(2) and 4A(1) of the DDA. See also the judgment of Mummery LJ in *Aylott v Stockton-on-Tees Borough Council*[2010] EWCA Civ 910 at [72].
52. For example, although policy factors may suggest a more lenient standard of review, nevertheless it may be that the weight of the justifications in terms of the fairness criteria operate as a sufficient counter-balance to support the rejection of such an indulgent standard of review.
53. An alternative argument put forward by MacCormick is that the identity and nature of the fundamental values, interests and purposes which underlie an employment right will influence the judgment of the adjudicator in the task of applying the standard of review to a particular case. That is to say that in determining whether the applicable standard of review has been discharged in a particular case, an adjudicator will engage in the impartial balancing and assigning of relative importance to intrinsic values, interests, etc, which will exercise significant clout over the issue of liability in that case, on which, see MacCormick, above n 4, p 168. However, as argued above, rather than functioning to determine the outcome of the application of the standard of review to a set of facts in a particular case *ex post*, it is submitted that the relative strength of the fundamental values and interests which underpin an employment right will operate to fashion the intensity attached to the standard of conduct *ex ante*. It is submitted that in identifying the ‘practical fairness’ criteria or policy considerations which operate to modify the standard of review and/or draw it at a different level of intensity of scrutiny than the standard of conduct, adjudicators are necessarily engaged in an exercise which involves an implicit appreciation of the fundamental values and interests which underpin a particular employment right. Another way of expressing the same point is to say that such ‘fairness’ criteria or policy considerations are conditioned by, and informed by, those

fundamental values and interests. The distinction here between policy preferences and fundamental values is reflective of the Dworkinian distinction between policy considerations as 'collective goals' of the community and fundamental values in the sense of precepts which operate to organise and explain subsets of principles and other legal materials more generally such as rules, norms, standards, etc; on which, see *R Dworkin Taking Rights Seriously* (London: Harvard University Press, 1977) p 90; MacCormick, above n 4, pp 192–193. Having been taken into account ex ante to fix the level of intensity of the standard of review, fundamental values and interests ought not also to be applied as a means of resolving particular cases on the basis of a different standard of review ex post. Otherwise, the process would be open to the charge that it lacked legitimacy on the basis of the unwarranted 'double-counting' of those fundamental values and interests.

54. See above.

55. [1999] 3 All ER 974, which is applicable in the UK.

56. This conception can be contrasted with the 'least restrictive means' approach which has been adopted by the European Court of Justice in cases such as *Bilka-Kaufhaus v Weber von Hartz*[1987] IRLR 317 at para 36 and *Enderby v Frenchay Health Authority*[1993] IRLR 591, on which see A Baker 'Proportionality and employment discrimination in the UK' (2008) 37 *Industrial Law Journal* 305.

57. See above n 55, at 984h–j per Lord Nicholls of Birkenhead.

58. This is taken into account in fixing compensation.

59. [2004] IRLR 625.

60. [2004] IRLR 129 at [26]–[27] and [34] per McMullen J.

61. In terms of the Human Rights Act 1998, Sch 1, arts 8 and 10.

62. Application No 32792/05, [2009] IRLR 139 (ECtHR) paras 44–50.

63. *H Collins 'The protection of civil liberties in the workplace'* (2006) 69 *MLR* 619 at 630–631; *V Mantouvalou 'Human rights and unfair dismissal: private acts in public spaces'* (2008) 71 *MLR* 912 at 914 and 937; and *V Mantouvalou and H Collins 'Private life and dismissal: Pay v UK'* (2009) 38 *Industrial Law Journal* 133 at 134 and 137–138. See also *L Vickers 'Unfair dismissal and human rights'* (2004) 33 *Industrial Law Journal* 52.

64. *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[1948] 1 KB 223 (CA).

65. As noted by Jacob LJ in *Khatri v Cooperative Centrale Raiffeisen-Boerenleenbank BA*[2010] EWCA Civ 397, [2010] IRLR 715 at [8].