

**Allonby v Accrington & Rossendale College**

[2001] All ER (D) 285 (Mar) CA

**1. INTRODUCTION**

An employment practice which has a disproportionate impact on women and cannot be 'justified' amounts to indirect sex discrimination under s 1(1)(b), Sex Discrimination Act 1975 (SDA). It may also be unlawful under European Community law, in particular A 141 (equal pay) and the Equal Treatment Directive (76/207). The same formula is used to define indirect *racial* discrimination in s 1(1)(b), Race Relations Act 1976 (RRA). In *Allonby v Accrington & Rossendale College* the Court of Appeal scrutinised the meaning of 'justified' under the SDA. This is important for employers because the precise definition dictates how onerous their burden is to justify a challenged employment practice. This case concerned in particular justification where (i) less-discriminatory alternative measures existed to achieve the same goal and (ii) the employer's defence itself was based on discrimination.

Accrington & Rossendale College employed 341 part-time lecturers on successive one-year contracts. In 1996 legislation came into force obliging the College to afford to their part-time lecturers equal benefits to those given to their full-time lecturers. (Although not specified by the EAT or the CA this was presumably the Employment Protection (Part-Time Employees) Regulations 1995, passed in response to *R v Sec of State for Employment, ex p EOC* [1994] 1 All ER 910, where the House of Lords held that existing legislation prescribing inferior rights to part-time workers was incompatible with superior Community sex discrimination law.) Faced with the extra expense the College responded by terminating the contracts with all its part-time lecturers and re-employing them as sub-contractors, through an agency. As a consequence the part-timers were paid less and lost a series of benefits (*eg* sick pay). Ms Allonby, a part-time lecturer, brought several actions against the College. One was for indirect sex discrimination.

In the employment tribunal Ms Allonby proved her *prima facie* case that the new arrangement had caused a disparate impact on women, who made up some two-thirds of the part-time lecturers, but only about half of the full-timers. And so the dismissals fell disproportionately upon women. However the tribunal found that the new arrangement was *justified* for two reasons. First, to save money, estimated at about £13,000 per year. Second, to impose control over the hiring of part-time staff, which had in the past been left to individual team leaders. The tribunal also noted that 'any decision taken for sound business reasons would inevitably affect one group more than another group.' The Employment Appeal Tribunal agreed with that decision and Ms Allonby appealed to the Court of Appeal, arguing that the College had failed to justify the measures because (i) less-discriminatory alternative measures existed to achieve the College's goals, and (ii) the measures were themselves based on discrimination.

## 2. THE LAW AND DECISION

In the Court of Appeal Sedley, LJ gave the leading judgement. He first alluded to the equal pay case *Bilka Kauffhaus GmbH v Weber von Hartz* [1987] ICR 110, where (at 126) the European Court of Justice held that a disparity in pay could be justified if (a) the policy corresponded to a real need, and (b) was suitable to achieve the goal, and (c) was necessary to achieve the goal. Sedley, LJ then cited the 'objective balance' test from *Hampson v Department of Education* [1989] ICR 179 (at 191): "'justifiable" [from s1, SDA] requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition.' Sedley's, LJ conclusion of the law was that to justify the practice the College had to demonstrate a real need and show that this was not outweighed by its discriminatory effect upon women (at para. 29).

Having stated the law, Sedley, LJ found that the tribunal had erred in two respects. First, they did not consider any 'fairly obvious' alternative measures short of dismissal to save money and gain control over the hiring of part-time staff. The second (and 'major') error was that the tribunal, by accepting that any arrangement would inevitably have a discriminatory effect, disabled itself from applying the 'objective balance' test, that is weighing the effect of the measure against the College's needs. Accordingly the case was remitted to the employment tribunal for reconsideration.

## 3. ANALYSIS

### A. *Bilka* and *Hampson* reconciled

Sedley's, LJ reconciliation of *Bilka* and *Hampson* could be interpreted in two ways. First, that *Bilka* and *Hampson* were two stages of a compound definition of justification. We decide first if there was a 'real need' (*Bilka*) and second, if its discriminatory effect outweighed the College's needs (*Hampson*). This is an unlikely interpretation though. Sedley, LJ quoted Lord Nicholls in *Barry v Midland Bank* [1999] ICR 859 HL, (at 870): 'The more serious the disparate impact on women...the more cogent must be the objective justification.' This said Sedley, LJ, 'amplified' the *Hampson* test. Although Sedley, LJ failed to mention that Lord Nicholls was discussing the Community Law principle of proportionality (*Hampson* was not cited in *Barry*), we must assume that, Sedley, LJ (and Lord Nicholls) was equating the *Hampson* 'objective balance' test with the principle of *proportionality*. This undermines the theory that Sedley, LJ was crafting a two-stage test. This is because the principle of proportionality is *inherent* in the *Bilka* test, which demands that a measure must be 'suitable' and 'necessary' to achieve the goal. Proportionality, or *Hampson*, cannot work as a separate test. An employer who has shown that a practice was suitable and necessary, has at the same time shown that it was proportionate. It would be absurd to ask again, was it suitable and necessary? And in cases where an employer had *failed* to show that a practice was suitable and necessary, a separate question of proportionality would be pointless.

So we must accept the second interpretation, that *Hampson* merely reflects parts (b) and (c) of the *Bilka* test. This is the neatest integration yet of the *Bilka* and *Hampson* 'tests'. Hitherto, British courts have done no more than treat the tests as expressing the same thing in different language. (See for instance Balcombe, LJ in *Hampson*, who (at 34) traced his 'objective balance' test to *Bilka* via the decision in *Rainey v Greater Glasgow Health Bd* [1987] AC 224 HL; the House of Lords approved this in *Webb v EMO* [1992] 4 All ER 929, at 936.)

## **B. Alternative Measures**

However, Sedley's, LJ assimilation of *Bilka* - or more precisely *proportionality* - and *Hampson* is not perfect. The obvious difference is in the language. The word 'necessary' appears nowhere in the *Hampson* test. But there is a difference in substance as well. Asking if a practice is suitable and necessary is different from asking whether it is outweighed by its discriminatory effect. This becomes clear where, as Ms Allonby argued, there exists an alternative. Under *Hampson* the existence of a less-discriminatory alternative practice achieving the same goal is merely an ingredient in the 'balance' test; under *Bilka* it will always defeat a justification defence. The case of *Enderby v Frenchay Health Authority* [1994] 1 All ER 495 illustrates the point.

In *Enderby* the Health Authority was trying to justify a difference in pay between speech therapists (98 per cent female) and pharmacists (63 per cent female). The pharmacists were paid about 40 per cent more than the speech therapists. As women were over-represented in the lower paid group the Health Authority were obliged to justify the difference. It argued that market forces caused the difference. But the evidence was that only an extra ten per cent pay was needed to recruit a sufficient number of pharmacists. Thus there existed a less-discriminatory alternative of paying the pharmacists a ten per cent premium. The ECJ held (at para 27): 'If...the National Court has been able to determine precisely what proportion of the increase in pay is attributable to market forces, it must necessarily accept that that the pay differential is objectively justified to the extent of that proportion.' In other words, proportionality means *no more than* necessary.

If we applied the *Hampson* 'objective balance' test to the facts of *Enderby* the result may be different. On the one hand there is the 40 per cent difference in pay, on the other, the need for sufficient pharmacists. Given that stark choice, a tribunal could easily hold that the difference in pay was justified. Indeed that was the result in the EAT in *Enderby* [1991] ICR 382.

Case law history also demonstrates that the British judiciary understood that there was a lower standard of justification than *Bilka*. In the early years of the British legislation, tribunals (influenced by US case law, upon which our legislation was based), spoke of 'necessity'. For example, in *Steel v Union of Post Office Workers* [1978] ICR 181, Phillips, J, President of the EAT, said, (at 187) that the practice must be *inter alia* 'genuine and necessary'.

In 1982, however, the Court of Appeal in *Ojutiku v Manpower Services Commission* [1982] ICR 661 contrasted the word 'necessary' with the statutory word 'justified'; Kerr, LJ stated (at 670) that 'justifiable...clearly applies a lower standard

than...necessary'. Eveleigh, LJ considered (at 668) it to mean 'something...acceptable to right-thinking people as sound and tolerable.' Balcombe, LJ in *Hampson* retrieved the situation somewhat with his 'objective justification' test. However, he did not restore the standard to the pre-*Ojutiku* position. Otherwise he would have simply used the word 'necessary'. Obvious support for a lower standard lies in the legislative history. The RRA and SDA use the term 'justified' rather than 'necessary'. In Parliament, the Government resisted amendments to the Sex Discrimination Bill that would have replaced 'justifiable' with 'necessary'. Lord Harris stated that where a body offered reduced fares for pensioners, the policy might be justifiable, but not necessary (362 HL Deb 14 July 1975 cols 10116-17).

Meanwhile, the ECJ was developing its jurisprudence on indirect discrimination. The *Bilka* test expressly demanded that any measure should be 'necessary' to achieve the goal. The existence of a less-discriminatory alternative will defeat a defence of justification. However, under *Hampson*, the mere existence of a less-discriminatory alternative is not enough to defeat a defence. As *Enderby* (above) illustrates, if the discriminatory effect of the disputed measure is 'outweighed' by the employer's needs, then the defence will succeed, no matter how many less-discriminatory alternatives exist. This approach slowly permeated the British cases until the Court of Appeal in *Hampson* felt compelled to reconcile it with the British position.

A similar uncertainty has dogged American case law. In the seminal US Supreme Court case *Griggs v Duke Power* (1971) 401 US 424, Burger, CJ stated (at 431): 'The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.' However, later he said (at 432): 'Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.' Here we have two standards ('business necessity' and 'manifest relationship') in the same speech. Subsequent Supreme Court pronouncements have vacillated between the two, giving for instance, 'significant correlation' and 'necessary'. (From respectively *Albermarle Paper v Moody* 1975 422 US 405, at 431 and *Dothard v Rawlinson* 1977 433 US 321, at 331.) This uncertainty was codified by the Civil Rights Act 1991, which stated that a practice must be 'job related for the position in question and consistent with business necessity.' (42 USCS s. 2000e-2, (k)(1)(A)(i)).

However, different standards of justification in the United States matter little where alternatives exist because the Supreme Court has developed a separate 'alternative practice' doctrine. A plaintiff may defeat a justification defence by proposing an alternative business practice which has a less (or no) discriminatory effect. The rubric generally used was set in *Albermarle Paper Co v Moody* (422 US 405, at 425): the alternative should 'also serve the employer's legitimate interest in "efficient and trustworthy workmanship."'

None of this is to say that British courts will refuse to *consider* alternatives in the justification debate. Sedley's, LJ judgement was not as clear-cut as that. Indeed the Court of Appeal remitted *Allonby's* case for reconsideration because, among other things, the tribunal had not considered the 'obvious' alternatives open to the College. Of course asking a tribunal to 'consider' an alternative in the 'balance' test is different from ruling that the mere existence of an alternative will defeat the justification defence. Sedley's, LJ judgement further departs from *Bilka* with his attendant

comments. He noted (at para. 28) that the tribunal had failed 'to evaluate...whether the dismissals were reasonably necessary - a test which, while of course not demanding indispensability, requires proof of a real need'. Here Sedley, LJ has diluted *Bilka* by qualifying 'necessary' with '*reasonably necessary*' and *not indispensable*. He spoke only of *obvious* alternatives. This is the language of compromise. One can only conclude that he intended a broad-brush approach. Tribunals should only consider 'fairly obvious' alternatives. This deepens the impression (*eg* given in *Ojutiku* and *Hampson*) that the English courts will apply *Bilka* in form only, whilst actually subjecting employers to the lower *Hampson* standard of justification.

Finally, this does not mean that the difference between *Hampson* and *Bilka* is merely a matter of degree. It is a fundamental difference. The compromise in the *Hampson* test upsets the theory of indirect discrimination. Where a practice having a disparate impact is shown to be absolutely necessary to achieve a genuine non-discriminatory goal, then the cause of the disparate impact lies elsewhere. No action lies against the employer. The cause(s) of any disparate impact can only be identified if the courts impose a strict test of necessity. A lesser standard gives employers leeway to discriminate and blurs the causes of a disparate impact. As *Enderby's* case illustrates, 'excess' disparate impact amounts to discrimination. Further, a strict test of necessity forces employers to eliminate discriminatory employment practices, which by their nature, are inefficiencies. The irony is that as many men as women, and far more whites than non-whites, would benefit from that.

### **C. Defence Based On Sex**

Ms Allonby's alternative argument suggested that where the measure was based on discrimination, it could never be justified. It will be recalled that the dismissals were a response to the Employment Protection (Part-Time Employees) Regulations 1995, which were passed in deference to Community sex discrimination law. One reason for remitting the case given by Sedley, LJ was that: 'In particular there is no recognition [by the tribunal] that if the aim of the dismissal was itself discriminatory...it could never afford justification.' (At para. 29) Surprisingly, the judge said no more than that on the issue.

Ms Allonby cited *R v Sec of State, ex p EOC* [1994] 1 All ER 910 and *R v Sec of State, ex p Seymour-Smith* [1999] All ER (EC) 97. In *Ex p EOC* (the case that led to the Regulations) Lord Keith held (at 922) that the existing Regulations that afforded lesser benefits to part-time workers constituted a 'gross breach of the principle of equal pay and could not be possibly regarded as a suitable means of achieving an increase in part-time employment.' In *ex p Seymour-Smith* the ECJ, when giving a ruling on justification, stated (at para 75) that a Government measure 'cannot have the effect of frustrating the implementation of a fundamental principle of Community law such as that of equal pay...'

Those cases concerned Government measures made in pursuance of a social policy. In such cases the ECJ allows a Government a 'broad margin of discretion' (see *eg ex p Seymour-Smith* at para 74), which is less onerous than the *Bilka* test. In *Allonby* the 'measure' (*ie* dismissals) was taken by a College employer and should be judged by the stricter *Bilka* standard. The express aim of the measure was to give

(predominantly female) part-time lecturers less benefits and pay. That too was a gross breach of the fundamental principle of equal pay and accordingly should never be justified. On this point alone Ms Allonby should prevail.

There lies a related line of argument here. Section 1(1)(b), SDA provides that the measure must be justified 'irrespective' of sex. According to the ECJ the measures must be 'explained by factors which exclude any discrimination on grounds of sex.' (See *Jenkins v Kingsgate* [1981] 1 WLR 973 (at para 13) and *Bilka* (at para 29.)) The dismissals were made in response to the Regulations of 1995 passed to afford equal benefits to part-time workers because they are predominantly female. The reports are vague as to the relationship between the stated goals - to save money and control the hiring of part-time lecturers - and the introduction of the Regulations. In the EAT (EAT/1081/98, Transcript) Lindsay's, J sole observation was (at para. 6): 'The College took the view that the costs attendant upon recent changes in the law as to part-time workers were too high for it'. In the Court of Appeal, Sedley, LJ noted only (at para. 3) that things had become 'financially more onerous because of legislative changes which required part-time lecturers to be afforded equal...benefits to full-time lecturers.'

It can be said, at the least, the new Regulations were the background of the dismissals. The question is, were the dismissals unrelated to sex? The immediate goal was to save money and gain control over hiring part-time staff. In *Orphanos v Queen Mary College* [1985] 2 All ER 233 the plaintiff challenged a requirement to be three-years ordinarily resident within the European Community, so to be exempt from full overseas student fees. The immediate goal for the requirement was to curtail public expenditure on education. The House of Lords held (at 239-230) that the requirement was 'so closely related' to nationality that it could not be justified and amounted to indirect racial discrimination. In *Allonby* the dismissals of a predominantly female group were inspired by Regulations aimed to afford equal benefits to women. It is at least arguable that the requirement is 'so closely related' to sex that it should not be justifiable.

#### 4. CONCLUSION

This case was remitted because the tribunal failed to apply any sort of objective test of justification. The tribunal's failure to consider an alternative was evidence of this and no more. The Court of Appeal did *not* recommend that the justification defence necessarily should fail because there was a 'fairly obvious' alternative. This reveals that the Court of Appeal did not apply the *Bilka* standard, only the lower *Hampson* one.

*Allonby* follows a series of cases in our senior courts (*eg Hampson, Barry, Webb*) where a 'balance' test has been equated with the principle of proportionality, first set out in *Bilka*. Clearly *Hampson* does not reflect fully the proportionality principle, which means *no more than necessary*. The effect of this is notable where there exists a less-discriminatory alternative able to achieve the employer's goal. Under *Bilka*, the mere existence of one will defeat a justification defence; *Enderby* illustrates that. But according to *Allonby*, only 'obvious' alternatives qualify to be balanced against the 'reasonable' and 'not indispensable' needs of the employer. This less onerous test

upsets the theory of indirect discrimination by sanctioning a certain amount of discrimination and blurring its cause(s). It also weakens the attack on business inefficiencies that benefits all.

As the law stands, the existence of less-discriminatory alternative practice achieving the same goal will, under EU legislation and in the United States, defeat a defence of justification. However, under domestic legislation an alternative practice is merely an ingredient in a 'balance' test. Where the claimant can identify an alternative practice they would be well advised to bring their claim under EU legislation, where possible.

Employers are obliged to justify a disparate impact under A141, the Equal Treatment Directive (76/207), the Equal Pay Act 1970, the SDA and RRA. Balcombe, LJ stated in *Hampson* (at 192) that it was 'obviously desirable that the tests of justifiability in applied in all these closely related fields should be consistent with each other'. Clearly they are not. Yet there is no excuse for this state of affairs. British courts are not bound by Parliamentary debates and so can disregard the *Government's* apparent intended meaning of the word 'justified'. *Parliament* clearly intends that domestic law is consistent with EU law. The *Bilka* test could easily be read into the statutory term 'justified'. This would not be straining statutory words; after all, for years the British courts for years have been purporting to do this. In addition there is the doctrine of indirect effect (to construe, where possible, domestic statutes consistent with EU law) to bolster them.

Finally, it was surprising that the Court of Appeal made no comment on the law cited to support Ms Allonby's alternative argument that a defence based on discrimination could never succeed. Could this be an early sign of another long-running difference between UK and EU discrimination law?

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