ON NOT TREATING PEOPLE AS STATISTICS, OR STATISTICS AS PEOPLE: SOME REFLECTIONS ON DIRECT AND INDIRECT DISCRIMINATION

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One of the most admirable qualities of the Court of Appeal is the tactful courtesy with which it signals, from time to time, that it finds a decision of the House of Lords (or now, the Supreme Court) completely incomprehensible. It sometimes proceeds to grant leave to appeal itself,[1] which is its tactful and courteous way of telling us that we had better try again, and try harder this time.

I particularly have in mind the restraint shown by the Court of Appeal in at least three reported cases[2] when counsel cited the decision of the House of Lords, to which I was a party, in *Secretary of State for Trade and Industry v Rutherford (No 2)*[3]. Two men who were aged over 65, and still in employment, claimed that the provisions of the Employment Rights Act 1996 withdrawing protection against wrongful dismissal and redundancy for employees over 65 amounted to indirect discrimination against men. I shall come back to the mystery of the true principle of the decision in *Rutherford.* It comes into the second part of what I want to say about direct and indirect discrimination.

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[1] As in *Jones v Kernott* [2010] 1 WLR 2401 as a sequel to *Stack v Dowden* [2007] 2 AC 432, or *AXA Insurance Ltd v Akther & Darby* [2010] 1 WLR 1622 as a sequel to *Law Society v Sephton & Co* [2006] 2 AC 543

[2] *BMA v Chaudhary* [2007] IRLR 200, para 193; *Grundy v BA* [2008] IRLR 74, paras 23, 43-46, 47; *Pike v Somerset CC* [2010] ICR 46, para 13

[3] [2006] ICR 785

The first part is mainly concerned with the demarcation line between direct and indirect discrimination. The second part is mainly concerned with the identification of what is usually called – with a bold disregard for the structure of the Latin language – the comparator, that is the pool of persons with whom the putatively disadvantaged class is to be compared. Time constraints prevent me from taking even a limited look at justification, which in our domestic law may provide an answer to a claim for indirect discrimination, but never for direct discrimination: hence the importance of finding a line of demarcation between them. That is the course which I hope to take through what I regard as very challenging terrain.

A relatively early case is the decision of the House of Lords in the *Birmingham*[4] case. It was controversial at the time, but can now be seen as a clear case of direct discrimination. The city council had five boys' grammar schools with an annual intake of 540 boys and three girls' grammar schools with an annual intake of 360 girls. This amounted to direct discrimination on the ground of sex, whatever the intentions or motives of the members of the city council. Arguably there should have been more places for girls, since it is well known that teenage girls tend to be brighter and more diligent than teenage boys, and human rights are essentially individual rights, not group rights[5].

For present purposes the important point is that direct discrimination does not depend on establishing any sort of guilty mind on the part of the discriminator – it may be just something that has got into the system.

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[4] *R v Birmingham City Council ex parte Equal Opportunities Commission* [1989] AC 1155

[5] Lady Hale in *R (European Roma Rights) v Immigration Officer at Prague Airport* [2005] 2 AC 1, para 82, citing the Hong Kong case of *Equal Opportunities Commission v Director of Education* [2001] 2 HK LRD 690, para 86

Conversely indirect discrimination may be intentional, something deliberately built into the system by those who designed it, in order to produce a discriminatory effect while avoiding direct (or formal) discrimination.

This was first clearly articulated, I think, by Mummery LJ in the *Elias* case.[6] In that case Mrs Elias, who had as a teenager been interned in harsh conditions in Hong Kong between 1941 and 1945, was refused an award under a non-statutory compensation scheme because she could not comply with one of the conditions for qualification, that either she or one of her parents had been born in the United Kingdom. She was a British subject born in Hong Kong, and her parents were British subjects born in Iraq or India. She was "British enough to be interned but not British enough to be compensated".

The first-instance judge (by coincidence, Elias J) concluded that the compensation scheme was in general terms discriminatory, but not so as to amount to an identified form of direct discrimination under British law. Mummery LJ (with whom the other members of the Court of Appeal agreed) discussed this in a lengthy and closely-reasoned passage, the whole of which calls for close study.[7] I will limit myself to quoting three paragraphs[8]:

> "Why, Mr Singh [Rabinder Singh QC as he then was] forcefully protested, should peripheral cases of UK nationals, who are born outside the UK, and non-UK nationals, who are born in

[6] *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213
[7] Paras 83-123
[8] Paras 107, 113 and 114

the UK, on which the judge relied, be determinative of whether the grounds on which an applicant is refused compensation under the compensation scheme are racial or not? The real reason why Mrs Elias could not satisfy the birth link criteria was because she did not have UK national origins. The refusal of her application was less favourable treatment of her 'on racial grounds'.

The powerful submissions of Mr Singh raised serious doubts in my mind about the correctness of the judge's ruling on this point, which, as Mr Singh pointed out, focused more on the edges of the effects of the criteria than on their central purpose or effect. In a general sense, discrimination with a discriminatory purpose, regardless of the particular form it takes, can be perceived as treating a person less favourably 'on racial grounds'.

I am, however, clear that in the present state of the law the particular *form* of discrimination matters, even if there are present in the circumstances of the case a discriminatory purpose and discriminatory effects. The [Race Relations Act 1976], as amended, makes an important broad distinction between two different forms of discrimination. This distinction is consistent with [Council Directive 2000/43/EC] and this Court must observe it."

Mummery LJ went on to refer[9] to the distinction (drawn in Lady Hale's speech in *Rutherford* and her judgment in the *JFS* case[10]) between "formal equality" and "substantive equality of results". Substantive

[9] Para 119, referring to *Rutherford* [2006] 1 ICR 785, para 71
[10] *R (E) v Governing Body of JFS* [2010] 2 AC 728, paras 65-70

equality of results is what is measured by statistics, provided that the figures are reliable and the methodology sound.

Elias raises the question whether the executive arm of the British government, with the help of its legal advisers, was using relatively elaborate drafting techniques, involving composite conditions, in order to achieve the same result as direct discrimination without actually going over the borderline.

So does the recent case of *Patmalneice*[11]. The European Commission has expressed concern about the Supreme Court's decision in that case. The same sort of issue arose at Luxembourg as long ago as 1977, in *Commission v Ireland*.[12] The Government of Ireland introduced restrictions on fishing in Irish waters which were described as being for the purposes of conservation, but which had the effect of sharply reducing competition from French and Dutch vessels. The restrictions operated by reference to the size of the fishing vessel, regardless of the area in which it was operating or the type of fish that was being caught. The French and Dutch vessels were larger, no doubt because they had to be at sea for longer periods. The Advocate General (Reischl) advised[13] that it was impossible to avoid the conclusion "that the criteria chosen involved virtually no effects for the Irish fleet which until that time was active in the area in question" but excluded about 25% of the French fleet and over 80% of the Dutch fleet. The Court of Justice agreed that there was unjustifiable discrimination. The case can be seen as a precursor to the *Factortame* saga.[14]

[11] *Patmalneice v Secretary of State for Work and Pensions* [2011] 1 WLR 783, para 72
[12] [1978] ECR 417
[13] At p464
[14] Notably [1990] ECR 1-2433, [1991] ECR 1-3905 and [1996] ECR 1-1029

In the *Bressol* case[15], decided last year by the Grand Chamber of the Court of Justice, Advocate General Sharpston addressed in detail the boundaries of direct and indirect discrimination. The case was concerned with whether a measure introduced in 2006 by the French community in Belgium contravened the EU's general prohibitions on discrimination on grounds of nationality. The measure was aimed at reducing the pressure on Belgium's resources for medical and paramedical education by the imposition of a 30% cap on non-resident students. In the measure residence was elaborately defined by reference to two cumulative conditions. The first was that the candidate's principal residence was in Belgium. The second condition had eight alternative limbs, the first being that the candidate had the right to remain permanently in Belgium; other alternatives were variations on this theme, for instance refugee status in Belgium, long-term residence in Belgium, or a close relationship to an individual with the right of permanent residence.

After referring to definitions in the relevant Directives[16] the Advocate General observed that the distinction lacked precision, especially in the key phrase "an apparently neutral provision". "It is quite clear", she stated, "that the distinction between overt and covert discrimination does not necessarily always coincide with that between direct and indirect discrimination."[17] She instanced the well-known case of *Dekker*[18] as a case of what she called covert direct discrimination.

[15] *Bressol v Gouvernement de la Communaute Francaise* [2010] 3 CMLR 559
[16] Race Discrimination Directive 2000/43, Equal Treatment Framework Directive 2000/78 and Sex Discrimination Directive 2006/54
[17] Para AG 50
[18] *Dekker v Stichtinvormingscentrum* [1990] ECR I-3941

Actually there was nothing secretive about the conduct of the prospective employer in that case. Mrs Dekker was the best candidate for a job as instructor at a training centre. She told the selection committee that she was three months pregnant. The committee recommended her for the job. But the management decided not to appoint her, explaining quite openly that it would have to pay her salary in full during her maternity leave, and might not be able to obtain reimbursement from public funds, which would mean that it could not afford maternity cover. The Court of Justice lost no time in coming to the essential point[19]:

> "Only women can be refused employment on the grounds of pregnancy and such refusal therefore constitutes direct discrimination on grounds of sex. A refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy. Such discrimination cannot be justified."

This approach was carried forward by Advocate General Jacobs in *Schnorbus*[20]. That was a claim for sex discrimination by a female law student complaining that male students who had done compulsory military service received more favourable treatment in obtaining admission to the second stage of their professional training. The course was heavily over-subscribed and admission was by lottery unless a candidate came within one of four heads of hardship, one of which was completion of military service. The unfortunate Fraulein Schnorbus was twice unsuccessful in the lottery. The Advocate General observed[21]:

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[19] Para 12
[20] *Schnorbus v Land Hessen* [2001] CMLR 1025
[21] Para 33

> "The discrimination is direct where the difference in treatment is based on a criterion which is explicitly that of sex or necessarily linked to a characteristic indissociable from sex. It is indirect where some other criterion is applied but a substantially higher proportion of one sex than the other is in fact affected."

Liability for national service was linked by German law to being male, but it was not indissociably linked; that is what the legislation said for the time being. More and more countries are recruiting women into their armed services, even for dangerous front-line operations.

The Court of Justice did not comment on these interesting reflections. Noting that women students made over 60% of the hardship applications but that well over half the successful applications were made by men, it held that there was indirect discrimination unless objective justification was established (with a steer to the national court to find justification).

Commenting on this in *Patmalneice*[22], Lady Hale referred to the well-known decision in *James v Eastleigh Borough Council*[23], the case where free swimming at the municipal pool was linked to pensionable age: 65 for men, 60 for women. She commented[24] that the Advocate General's distinction between legal and physical characteristics might come as a surprise to readers of *James*, where there was "a legal requirement, the statutory retirement age, which was indissociable from sex." I usually agree with Lady Hale but here I very respectfully disagree. The statutory retirement age was different for men and women, so it could be seen as a

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[22] *Patmalneice v Secretary of State for Work and Pensions* [2011] 1 WLR 783
[23] [1990] 2 AC 751
[24] Para 90

coded form of direct discrimination. But there was not a difference *indissociably* linked to sex. Like liability for national service, it could be changed by legislation, and indeed the ponderous process of aligning male and female retirement ages is already under way in this country.

In Bressol Advocate General Sharpston went on to consider the effect of the complicated qualification requirements for residents – two cumulative conditions, the second of which had numerous alternative variations. She treated the two cumulative conditions separately, which must, I think, be the correct approach where direct discrimination is in point. In the *JFS* case[25] Lord Mance accepted the submission made by Ms Dinah Rose QC that "an organisation which admitted all men but only women graduates would be engaged in direct discrimination on the grounds of sex" – and so, I think, would an organisation which let in all female graduates but male graduates only if they got a first. One essential component of the qualification would in either case be different for men and women. The same general approach must be called for when gender is replaced by nationality, although nationality is a legal abstraction. The Advocate General treated the first part of the second condition as equivalent to letting in all persons of Belgian nationality whereas non-Belgians had to qualify (if they could) under another alternative head. So there was, she concluded, direct discrimination.

Regrettably the Grand Chamber did not address this analysis. It went straight to the proposition[26] that a measure is indirectly discriminatory if it is *intrinsically* (my emphasis) liable to affect non-nationals disproportionately. Where does "intrinsically" come, you may ask, on a

[25] [2002] 2 AC 728, para 89
[26] Para 41, stated to be derived from *Hartmann* [2007] ECR I-6303

scale between "indissociably" and "statistically"? Excavation of successive layers of repetitive decisions of the Court of Justice seems to lead to the *O'Flynn* case in 1996[27], where the issue turned on a social security funeral grant payable only in respect of an internment or cremation in the United Kingdom. Mr Flynn's son had died in England but was buried in the family grave in Ireland. The opinion of Advocate General Lenz seems to use the word "intrinsically" rather loosely, so as to cover both what seems likely to lead to a particular result and what can be shown to lead to it in practice; and that usage has become part of the vocabulary of the Court of Justice.

What are we to make of all this? I suggest two tentative answers. First, we should recognise that a verbal expression or formula (such as "pensioners") may be a coded reference (as it was in *James*) to a difference in treatment that amounts to direct discrimination. But that is not necessarily to say that the difference is "indissociably linked" to sex, or nationality, or some other ground of discrimination. Until very recently "a member of the Garrick" or "an officer in the Household Cavalry" would have been an unmistakeable coded reference to a man, but things can change, even in the upper reaches of the establishment – even, indeed, in succession to the Crown.

Second, for sex discrimination (which is much the clearest example) it can be confidently asserted that women's distinct biological functions – pregnancy, parturition, and lactation – are indissociably linked to their gender. Their traditional role as primary carers for young children is partly biological and partly societal, but in most societies so strongly established as not to call for statistical confirmation. For instance in

[27] *O'Flynn v Adjudicating Officer* [1996] ECR I-2617, para 17

London Underground Ltd v Edwards (No 2),[28] a complaint about a new rostering system made by a woman train driver who was a sole carer, there was statistical evidence that women sole carers outnumbered their male counterparts by ten to one. Potter LJ said,

> "An industrial tribunal does not sit in blinkers . . . the high proportion of single mothers having care of a child is a matter of common knowledge. Even if the 'statistic', ie the precise ratio referred to, is less well known, it was discussed at the hearing before the industrial tribunal without doubt or reservation on either side."

The same applies to most forms of part-time working, for the same reasons. Neither of these truths about society is likely to change in the foreseeable future. But beyond that, the tribunal or court will be looking for statistics if indirect discrimination is to be established. That brings us to my second main topic, the identification of the appropriate pool as a comparator.

But before moving on I would like to add a footnote about the *JFS* case, to which I have so far made only passing reference. On reflection – and I have reflected on it quite a lot since we gave judgment nearly two years ago – I think it is a striking example of a clash between what Rabinder Singh QC (as he then was) referred to in *Elias* as looking at the edges, or at the centre, of the problem. The issue, in simplified terms, was whether the over-subscribed faith school's admission criteria discriminated on the ground of religion (which was acceptable) or on the ground of race (which was unacceptable). The criteria followed the tenets of orthodox

[28] [1999] ICR 494, para 24

Judaism as laid down by the Office of the Chief Rabbi. On analysis the criteria laid down alternative conditions – unbroken matrilineal descent from Jews (which the candidate did not have) or descent from a mother converted to Judaism in an orthodox Jewish synagogue (which again the candidate did not have, but came close to having, as his mother had been converted in a Masorti synagogue in Italy). The first condition was no doubt the relevant one for most candidates (and so was in that sense central); the second was relevant for this particular candidate (who was referred to as M), and no doubt a handful of others, but it could fairly be described as more peripheral – a special case. The two ways of looking at the issue appear most closely from the judgment of Lady Hale, in the majority, and Lord Rodger, in the minority.

Lady Hale put it like this[29]:

> "M was rejected because of his mother's ethnic origins, which were Italian and Roman Catholic. The fact that the Office of the Chief Rabbi would have overlooked his mother's Italian origins, had she converted to Judaism in a procedure which they would recognise, makes no difference to this fundamental fact. M was rejected, not because of who he is, but because of who his mother is . . . It was because his mother was not descended in the matrilineal line from the original Jewish people that he was rejected."

[29] Para 66

She then went on to discuss the difference between formal and substantive equality.

Lord Rodger disagreed in characteristically vivid language.[30]

> "I respectfully disagree. His mother could have been as Italian in origin as Sophia Loren and as Roman Catholic as the Pope for all that the governors cared: the only thing that mattered was that she was not converted to Judaism under orthodox auspices. It was her resulting non-Jewish religious status in the Chief Rabbi's eyes, not the fact that her ethnic origins were Italian and Roman Catholic, which meant that M was not considered for admission."

There could hardly be a clearer example of the contrast between substance and form, or centre and edges.

I have already made a few references to statistics but it is in the search for the comparator that they take centre stage. The report of an international project on the measurement of discrimination[31] put it like this:

> "The indirect discrimination concept . . . [is] intrinsically linked to statistics by their logic and objectives. The definition of indirect discrimination is based on quantitative concepts: significant effects and comparisons between groups. The cognitive tools used to capture indirect discrimination . . . are statistics."

[30] Para 228
[31] Simon, INED Media Project (Measurement of Discrimination) (2004) p82, quoted by Fredman, Discrimination Law, 2nd ed (2011) p183

It has to be said that this stirring message is not fully reflected in the jurisprudence of domestic and European courts. British courts and tribunals have on the whole put a lot of weight on statistical evidence. But Professor Sir Bob Hepple has commented in his latest work on equality[32]:

> "It was never made clear whether, in addition to making a comparison between the proportion of men and women able to satisfy (or 'can comply' with) the provision (the qualifiers), a comparison should also be made of the proportion of men and women who are unable to satisfy the requirement (the non-qualifiers). The latter comparison could produce a very different statistical result from the former."

Rutherford is a notorious illustration of that truth. Hepple has also commented more generally that

> "In Britain, the courts and tribunals found it difficult to interpret statistics correctly, and controversially resorted to taking judicial notice of social facts without supporting evidence."

On that point I have already referred to what the Court of Appeal said in *London Underground Ltd v Edwards No. 2*, though I do not myself find it particularly controversial.

In developing its jurisprudence the British court has tried to follow faithfully advisory opinions from the Court of Justice. Some of the early

[32] Equality: the new legal framework [2011] pp 65, 66

guidance makes surprising reading today. In particular, in *Jenkins*[33] in 1981, part-time workers at a clothes factory in Harlow received an hourly rate 10% below that of full-time workers. Among the part-time workers women outnumbered men by five to one. The Court of Justice[34] concluded that it was not discrimination "unless it is in reality merely an indirect way of reducing the level of pay of part-time workers on the ground that that group of workers is composed exclusively or predominantly of women." This form of words seemed to make indirect discrimination a matter of intention. The jurisprudence only really got on track with *Bilka-Kaufhaus*[35], a case in which German part-time workers in the retail trade were excluded from the company pension scheme. The Court of Justice had detailed figures: of the whole workforce, 2.8% were male part-time workers and 27.7% were female part-time workers. The German Court sought guidance as to whether *Jenkins* applied only to disguised, that is intentional, discrimination. The Court of Justice[36] seem to me to have evaded the question, stating that the conclusion in *Jenkins* was valid, but then contradicting itself by stating that the mere fact of disparity itself amounted to indirect discrimination, unless it could be explained by factors unrelated to discrimination on the ground of sex. A similar approach can be seen in two subsequent cases concerned with part-time women employees in the German public service.[37] All this is clearly explained in the Court of Appeal's admirable judgment in *Seymour-Smith.*[38]

[33] *Jenkins v Kingsgate Ltd* [1981] ICR 592
[34] Para 15
[35] *Bilka-Kaufhaus v Von Hartz* [1987] ICR 110
[36] Paras 28 and 29
[37] *Nimz* [1991] ECR I-297 and *Kowalska* [1992] ICR 29
[38] *R v Secretary of State for Employment Ex p Seymour-Smith* [1995] ICR 889, 926

In *Neath*[39] it was a male employee who was complaining about statistics. He complained that under his contributory pension scheme (to which men and women contributed on the same scale) retirement benefits were calculated on sex-based actuarial assumptions, with the result that his lump sum payment on retirement would be little more than £17,000 whereas if he were a woman it would be more than £21,000. The European Commission's view[40] was that "statistical data based on the life expectancy of the two sexes do not, in its view, constitute an objective justification because they reflect averages calculated on the basis of the entire male and female population, whereas the right to equal treatment in the matter of pay is a right given to employees individually." The Court of Justice appeared to accept this view, but avoided its natural consequence by deciding that funding arrangements were outside the scope of an employer's equal pay obligation.

At the turn of the century, on the reference for an advisory opinion in the *Seymour-Smith* case[41] the Court of Justice clearly stated the importance of statistics in determining the disparate impact of conditions of employment, as between men and women. But with the advent of new directives in wider terms the Court of Justice has tended, as Professor Sandra Fredman has put it, to veer away from the statistical approach and attach importance to the general notion of "particular disadvantage".[42] It is also worth noting that during the passage through Parliament of the Bill that became the Equality Act 2010, the expression "less favourably" was changed to "unfavourably", so reducing the emphasis on comparison. The new Act has also replaced the expression "on grounds of" by

[39] *Neath v Hugh Steeper Ltd* [1994] IRLR 91
[40] Para 27
[41] *R v Secretary of State for Employment Ex parte Seymour-Smith* [1999] 2 AC 554
[42] Discrimination Law, 2nd ed (2011) pp187-188

"because of", although with official assurances[43] that the two are "absolutely synonymous."

In striking contrast to both the domestic courts and the Luxembourg Court, the European Court of Human Rights at Strasbourg has been very slow to recognise indirect discrimination as such. But when it did so in 2007, in the judgment of the Grand Chamber in *DH v Czech Republic*[44], it made up for lost time. The majority judgment (the Grand Chamber was split fifteen-four) contains a masterly survey of the oppressed position of Roma people, and in particular the exclusion from the Czech Republic's mainstream educational system of large numbers of Roma children, who were regarded as having learning difficulties that made it necessary for them to attend special schools with poor facilities and standards. At a previous hearing the Chamber took the view that no discriminatory intention had been proved, and gave little weight to the statistical evidence, which showed that Roma children were twenty-seven times more likely than other Czech children to be placed in special schools. The Grand Chamber corrected this, emphasising that "statistics which appear on critical examination to be reliable and significant will be sufficient" as prima facie evidence; no discriminatory intention need be proved.[45] Professor Fredman recognises this case as an important milestone.[46]

Where the statistical approach is adopted, there are two main issues: what pool of persons is to be used as a comparator? And what degree of disparity in the result is to be regarded as sufficient? I will deal briefly

[43] PBC (EB) 8th sitting col 244 (the Solicitor General)
[44] (2008) 47 EHRR 59
[45] Paras 188, 200
[46] Discrimination Law, 2nd ed (2011) pp184, 223, 226, 258

with the second issue, in order to concentrate on the first. In *Seymour-Smith* the European Commission favoured a test of "statistical significance" in the technical sense, but the Court of Justice[47] preferred the "considerably smaller" formula, with "a lesser but persistent and relatively constant disparity over a long period" as an alternative test. In the USA a four-fifths disparity is used as a rule of thumb.

However no test can be applied until the relevant data have been ascertained, which gets us into comparators. In the early cases the issue was simply whether women were particularly disadvantaged by less generous work conditions afforded to part-time workers: for instance no holiday pay, no annual increments, or exclusion from the company's pension scheme. In those cases the disadvantage was so obvious that the court sometimes took shortcuts and did not go through the full exercise of comparison.

Seymour-Smith[48] is the first important case in which the courts have had to cope with a more complex, multifactorial situation, and in it the Court of Justice spelled out the full exercise:

> "The best approach to the comparison of statistics is to consider, on the one hand, the respective proportions of men in the workforce able to satisfy the requirement of two years' employment under the disputed rule and of those unable to do so, and, on the other, to compare those proportions as regards women in the workforce."

[47] [1999] 2 AC 554, paras 60 and 61
[48] [1999] 2 AC 554, para 59

The facts of *Seymour-Smith* were that in 1985 the British Government used a statutory instrument to extend from one to two years the qualifying period of employment before an employee could make a claim for unfair dismissal. The statutory instrument left intact the further qualification requirement of working for at least sixteen hours a week. Claims that the amendment was contrary to EU law were made by two women, both full-time workers who had been dismissed during the second year of their employment.

It is fairly obvious that women workers as a class would be less likely to qualify to make claims for unfair dismissal, because of the sixteen-hour requirement. But the challenge was the extension of the one-year period to two years. If part-timers were excluded this made the issue turn, in practice, on whether full-time women workers changed their jobs more often. The appropriate comparator pool was therefore to be composed of full-time male and female workers. This point was not, so far as I can see, expressly mentioned in the Court of Justice or in the House of Lords, but it is apparent from the judgment of McCullough J in the Divisional Court. Lord Nicholls, who gave the leading speech in the House of Lords, was almost certainly aware of it, as he referred to the judgments in the Divisional Court. There was a difference of opinion in the House of Lords as to whether a persistent disparity of about 10:9 was significant, but all held that the extension to two years was justified as a measure to encourage recruitment and reduce unemployment.

Further multifactorial problems were presented to the Court of Appeal in *Grundy*[49] and *Pike*,[50] two of the cases in which the Court of Appeal was

[49] *Grundy v BA* [2008] IRLR 74
[50] *Pike v Somerset CC* [2010] ICR 46

faced with the problem of what *Rutherford* decided (I am varying the chronology to pass over *Rutherford* for the moment).

Grundy concerned a system of support cabin crew (SCC) introduced by BA in 1987, under which cabin crew could agree to work between fifteen and twenty days in a twenty-eight day period. They were less well paid than full-time cabin crew (CC) because they did not get annual increments. A complaint by a woman SCC employee was upheld by the employment tribunal, which focused on the fact that the ratio of women to men employed as SCC was sixteen to one. The EAT treated that as an error of law, saying that the tribunal should have focused on full-time cabin crew. The Court of Appeal allowed the appeal. Sedley LJ explained what was at issue[51]:

> "The table [prepared by counsel] showed clearly enough that, while the ratio of women to men in CC was constant at about 2: 1 throughout the years [1994-2002] the female: male ratio in SCC averaged almost 18:1 and at its lowest level was 14:1. In other words, anything which impacted adversely on SCC was going to hurt a far larger proportion of women than if it were to impact on CC. But because of the relative size of the two groups, it was going to hurt far fewer women in absolute terms . . . in 2002, 42 as against 8,592. The disadvantaged female: male ratio with the total cabin crew workforce moved in these years from above 9: 1 to 7: 1, but the advantaged ratio remained almost constant. Everything therefore depended on where the employment tribunal decided to focus its analysis."

[51] Para 17

Sedley LJ added some general comments which I find very helpful[52]:

> "Carrying this broad methodology into the assessment of adverse impact, the tribunal will be concerned to make a comparison which illuminates such of those questions as seem to them potentially critical (here, for instance, the need for female cabin crew with childcare responsibilities to have shorter and more flexible working hours) and to find a pool which best helps to do this. A pool so narrow that no comparison at all can be made is unlikely to serve this end; nor a pool so large that the comparison is no longer of like with like.
>
> The dilemma for fact-finding tribunals is that they can neither select a pool to give a desired result, or be bound always to take the widest or narrowest available pool, yet there is no principle which tells them what is a legally correct or defensible pool.
>
> Provided it tests the allegation in a suitable pool, the tribunal cannot be said to have erred in law even if a different pool, with a different outcome, could equally legitimately have been chosen."

Pike was concerned with teachers' pensions. Ms Pike retired on grounds of ill-health with a pension, but then returned to part-time teaching. Under the Teachers Pension Scheme this part-time work was not pensionable, because she was (a) working part-time and (b) in receipt of a pension. Had either condition not been satisfied her employment would have been pensionable. The tribunal took as a comparator the entire teachers' profession and concluded that the adverse impact on women

[52] Paras 28, 30, 31

was minimal. The EAT held that this was too wide, and that the appropriate pool was those returning to teaching (whether full-time or part-time) after a break. The Court of Appeal upheld this in an admirably brief judgment of Maurice Kay LJ, who quoted Lady Hale in *Rutherford*[53]:

> "Indirect discrimination cannot be shown by bringing into the equation people who have no interest in the advantage or disadvantage in question."

Finally – I have tried your patience more than enough already – I come to *Rutherford* itself, in which male workers aged over 65 challenged the exclusion, after age 65, of statutory rights enjoyed by workers under that age.

The proceedings were dogged by delays. Both employers became insolvent, which is why the Secretary of State came into the matter. The employment tribunal, trying to find the right comparator ("those for whom retirement by 65 has some real meaning"), focused on a group in the age range 55 to 64 and a group in the age range 65 to 74. It rejected the Secretary of State's argument that the comparator group should cover the whole age range from 16 to 79, which led to the proportion of women *not* disadvantaged by the cut-off being virtually the same as that for non-disadvantaged men (99.01% to 98.88%). The fact that I have to speak of "not disadvantaged" rather than "advantaged" suggests that there is something odd here – whether or not it is an advantage to work after 65 is very much matter of opinion.

[53] [2006] ICR 785, para 82

The EAT[54] accepted the Secretary of State's argument and allowed the appeal. The Court of Appeal[55] agreed, Mummery LJ starting with a much-quoted complaint that "it has become virtually impossible and almost unacceptable to decide points of this sort in short form. The legal materials on indirect discrimination and equal pay are increasingly voluminous and incredibly intractable." Mummery LJ relied heavily on *Seymour-Smith*, quoting the guidance given by the Court of Appeal and Lord Nicholls' discussion of that guidance. Mummery LJ pointed out[56] that a requirement with which 99.5% of men and 99% of women can comply is one with which twice as many women as men *cannot* comply. "That would not," he commented, "be a sound or sensible basis for holding that the disputed requirement with which the vast majority of both men and women can comply, had a disparate impact on women."

He concluded[57]:

> "In concentrating exclusively on the state of those who cannot comply and on the older members of the workforce, for whom it was thought that retirement has 'a real meaning', instead of on the entire workforce and those in it who can comply with the requirement, the tribunal reduced the size of the pool and thereby departed from the approach laid down in *Seymour-Smith*."

Again, there is something odd here. Stopping work at 65 at latest is being referred to as "a requirement" – a requirement, that is, in order to avoid being unprotected against unfair dismissal or redundancy after 65.

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[54] [2003] IRLR 858
[55] [2004] IRLR 892, para 3
[56] Para 28
[57] Para 30

The House of Lords agreed unanimously in the result, that is dismissing the further appeal. But there was, as Carnwath LJ delicately put it,[58] plenty of room for argument about the precise ratio. Lord Nicholls, Lord Scott, Lord Rodger, Lady Hale and I all gave separate opinions. I am not going to try to summarise them, but it is generally agreed that the law reporter faced an almost impossible task in extracting a ratio for the head-note – it was, in truth, simply a result. But on reflection – and I have reflected a good deal on this case too – I would draw attention in particular to remarks by Lord Scott and Lady Hale. Lord Scott observed[59]:

> "It is not possible to speak coherently of those who are 'able to satisfy' the condition and those who are not able to satisfy it. The only persons who will be affected by the age-related disadvantage will be those who decide to continue in employment after the specified age . . . the conclusion I would draw is that a difference in treatment of individuals that is based purely on age cannot be transformed by statistics from age discrimination, which it certainly is, to sex discrimination."

Lady Hale put it like this[60]:

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[58] [2008] IRLR 74, para 43
[59] Para 16
[60] Paras 75 and 76

> "The advantage or disadvantage in question here is going on working over the age of 65 while still enjoying the protection from unfair dismissal and redundancy which younger workers enjoy. The people who want the protection are the people who are still in the workforce at the age of 65 . . . there is no comparison group who wants this particular benefit and can more easily obtain it. One should not bring into the comparison people who have no interest in the advantage in question."

As I said earlier I usually agree with Lady Hale, and I think she was here expressing the real reason why statistics were wholly or largely irrelevant in *Rutherford*. Another way of putting the same point might be that in this case men and women were not in an analogous position, because Parliament (and employers in line with Parliament) had fixed differential retirement ages for men and women, a differential which was linked, but not indissociably linked, to sex. But that would be to get into the still more challenging terrain of the borderline between analogous circumstances and impermissible justification, and I am not going to go there.[61]

We do not treat human beings as statistics because stereotyping by gender, or race, or sexual orientation is an affront to human dignity. We do use statistics, in a considered way, to establish patterns of disproportionate disadvantage which call for justification; but statistics do not have a mind of their own, and they must not be allowed to take over, as may have happened in *Rutherford.* I add, as a final footnote, that eight months ago the Grand Chamber delivered its judgment in the *Test-Achats*

[61] See *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434, para 27

case[62] which has the effect of accelerating the operation of Article 5 of Directive 2004/113. That Article forbids the use of sex as a factor in the calculation of insurance premiums and benefits so as to result in different rates of individuals' premiums or benefits. I find it a strange form of equal treatment if the propensity of young men, well established by statistics, to drive too fast and have road traffic accidents is to result in higher premiums for careful women drivers. If insurance companies try to draft their way out of Article 5, a new species of litigation on indirect discrimination may be on its way.

[62] *Association Belge De Consommateurs Test-Achats ASBL v Council of Ministers* [2011] 2 CMLR 38