Rethinking Victimisation

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Abstract

In most western jurisdictions, discrimination law prohibits direct discrimination, indirect discrimination, and harassment, on protected grounds, such as race, sex, etc. Workers who use the legislation, or assist others to do so, need protection against retaliation by their employer. Accordingly, the legislation seeks to remove deterrents by creating a fourth instance of discrimination, known in Britain as victimisation. The statutory formulas are sparse, apparently providing employers no defence. Yet in some cases, courts sympathetic to the employer have strained the formula to provide what amounts to a benign motive defence. The result is an incoherent body of case law. This article explores the problem in Britain and the United States and attempts to settle upon a new statutory formula that would provide certainty and clarity, as well as fulfilling the ambition of the anti-victimisation doctrine.

1. INTRODUCTION

SCENARIO No. 1: A worker issues discrimination proceedings against her employer and pending the outcome applies (unsuccessfully) for another job. Acting on standard legal advice, her employer refuses to provide a reference, in case anything said in it could prejudice the employer’s defence. The reference would have been negative in any case and the refusal was not the cause of the worker failing to get the job. Nonetheless, the worker sues again, this time for victimisation.

SCENARIO No. 2: A worker issues discrimination proceedings against her employer, who, following standard practice, suspends the worker’s internal grievance procedure, pending the outcome of the proceedings. The worker now sues for victimisation.

In these scenarios the employer has responded to legal proceedings in a predictable manner. It does not wish to create evidence that could prejudice its defence at the trial, for instance, by making informal concessions in a grievance process, or omitting minor faults (relevant to the claim) in a job reference. Neither does it wish to state anything that could constrain its lawyers, in say, negotiation or tactics. In the second scenario, it may want to avoid the expense of duplicative proceedings. Yet, in these scenarios, the worker is denied a reference or grievance procedure because she issued a discrimination claim, and even if the she suffers no harm by this (as suggested in Scenario No 1), other workers, having seen that normal benefits of employment will be denied, will be deterred from making or supporting allegations of discrimination. From this perspective, policy dictates that these employers should be liable for victimisation.

The scenarios represent a universal ‘victimisation dilemma’. In the United States, the dilemma was characterised thus:

We recognize the countervailing concerns in this area of the law. On the one hand, we worry that employers will be paralyzed into inaction once an employee has lodged a complaint .... On the other hand, we are concerned about the chilling effect on employee complaints resulting from an employer’s retaliatory actions.[1]
The dilemma is one of policy. However, the courts are hampered in solving it by the constrained statutory formula, which provides for liability simply where the employer treats the worker less favourably by reason that, or because, the worker has been involved in a protected activity, such as bringing or supporting discrimination proceedings. There is no defence. And so, on the face of it, employers should be liable in these scenarios. However, in a series of cases, British courts have sided with the employers, save where the employer has exceeded normal practice. In the United States, courts have vacillated, whilst the scant case law of the ECJ suggests that courts should take the workers’ perspective. It follows that at least some of these decisions do not sit easily with the statutory formula and appear inconsistent with each other.

The aim of this article is to resolve, as far as possible, the victimisation dilemma. It investigates the problem exposed by the body of case law in both Britain and the United States. It will explore the dilemma, especially in the two scenarios presented, highlight any technical shortcomings or triumphs of the legislative formulas and case law, and evaluate the policy considerations behind the legislation and the decisions. It will explore analogies with conventional discrimination and alternative theories of victimisation, and conclude that some victimisation cases are more analogous to disability-related discrimination. Consequently it will suggest alternative statutory formulas to resolve the shortcomings and fulfil the statutory purpose. It will conclude that the victimisation dilemma cannot be fully resolved, but propose a new statutory formula with limited general and specific defences and guidelines which will produce clearer boundaries and make this area of the law more predictable for employers and workers alike.

2. THE LEGISLATION

The formula for victimisation is as follows:

**Race Relations Act 1976**

2. Discrimination by way of victimisation[2]

(1) A person (‘the discriminator’) discriminates against another person (‘the person victimised’) in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has-

(a) brought proceedings against the discriminator or any other person under this Act; or
(b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Act; or
(c) otherwise done anything under or by reference to this Act in relation to the discriminator or any other person; or
(d) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Act,

or by reason that the discriminator knows that the person victimised intends to do any of those things, or suspects that the person victimised has done, or intends to do, any of them.

(2) Subsection (1) does not apply to treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith.

Paragraphs (a) to (d) define the ‘protected acts’. The formula provides three elements: (1) the worker did a protected act; (2) the employer treated the worker less favourably than it treated (or would have treated) others; and (3) it did so ‘because’ (or ‘by reason that’) the worker did the protected act. In addition, the treatment must have been employment-related.

The Government has proposed abolishing the comparative element from this definition so that no comparison of how other workers were treated would be required for liability.[3] As such, element (2) above, would be reworded: ‘the employer subjected the worker to a detriment.’
The parent directives provide a more general, but essentially similar, formula. For instance, the Race Directive provides that that member States shall ‘protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing complying with the principle of equal treatment’. [4]

The federal legislation in the United States is formulated in a similar way to the UK version. Title VII of the Civil Rights Act 1964 outlaws employment discrimination ‘because of’ race, colour, sex, religion, and national origin. In addition section 704(a) outlaws victimisation thus:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[5]

For those unfamiliar with it, the hierarchy of American cases included in this article begins with District Court decisions, which may be appealed to a court of appeals which are distributed by 13 geographical Circuits (which accounts for some of the discrepancies between court of appeals' decisions). The final and unifying appeal forum is the Supreme Court of the United States.

A. The Protected Act

The British formula covers a broad range of acts. Note the 'catch-all' paragraph (1)(c). Sub-section (2) provides an exception only where an allegation was false and not made in good faith. The only significant case law on this matter restricts the formula in sub-section (1)(d) to allegations that actually amount to a contravention of the Act.[6] Title VII slightly looser formula simply protects those who have ‘opposed’ unlawful discrimination or ‘participated’ in proceedings.6a

B. Employment-related

Unlike Title VII, which outlaws simply discriminatory 'employment practices', the British legislation specifies the employment practices where discrimination is unlawful. This includes recruitment, and in addition:

(a) in the terms of employment which he affords him; or
(b) in the way he affords him access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford him access to them; or
(c) by dismissing him, or subjecting him to any other detriment.[7]

This rather specific list concludes with a 'catch-all' phrase, any other detriment. For liability, the victimisation must relate to recruitment, or paragraphs (a), (b), or for a dismissal, or any other detriment. The obvious purpose of this last element is, on the one hand, to catch any other unspecified treatment, whilst on the other, to preserve the limitation that the treatment complained of is employment-related.

However, courts have become preoccupied with the standard of harm required to meet this element. Thus, there is a class of cases where the issue of the standard of harm for liability has arisen twice: once for less favourable treatment, and again for subjecting to a detriment. Given that the courts in the series of victimisation cases each proceeded on the basis the denial of a reference or a grievance process fell under any other detriment, this element will require some exploration.

C. Less Favourable Treatment

(i) What is Less Favourable?

Under the statutory formula, the treatment of the worker must be less favourable than any treatment given to the comparator. British courts have been generous to claimants on this issue. The test is a mix of subjective and objective: if the claimant perceived the treatment as less favourable, and was not unreasonable to do so, then the test is met. In other words, it is not necessary that every reasonable person in the shoes of the claimant would have perceived the...
treatment as less favourable. All that is required is that the claimant did, and that the claimant’s perception was not unreasonable. The following examples illustrate this point.

In *Chief Constable of West Yorkshire v Khan*,[8] the Chief Constable refused to give a reference to Sergeant Khan in support of a job application with the Norfolk Police, because Khan was pursuing a claim of racial discrimination against the West Yorkshire Police, his current employer. Nonetheless, the Norfolk Police invited Khan for an interview, but failed to appoint him. It was common ground that had a reference been given, containing the Yorkshire Police’s low assessment of Sergeant Khan’s managerial skills, he would have stood less chance of being short-listed for an interview. Accordingly, in Khan’s action for victimisation, the Chief Constable argued that Khan had been treated more, not less, favourably. The House of Lords rejected that argument. Lord Scott concluded: ‘It cannot... be enough for section 2(1) purposes simply to show that the complainant has been treated differently. ..... I think it suffices if the complainant can reasonably say that he would have preferred not to have been treated differently.’[9] This approach echoes the direct sex discrimination case *R v Birmingham City Council, ex parte EOC*,[10] where it was held that the denial of a grammar school place (to a girl) was less favourable in spite of evidence that the education standards of grammar and comprehensive schools were comparable. In non-employment cases, the courts have been equally relaxed. In *Gill v El Vino*[11] a ‘traditional’ wine bar served only men at the counter, and provided table service for women. The wine bar argued that although women were being treated differently, the alternative was no less favourable. The Court of Appeal disagreed, holding that women had been treated less favourably because, unlike the men, they were denied a choice, which the female plaintiff, reasonably, valued.

In each of these cases, it could just as logically be concluded that a reasonable person in the shoes of the claimant would not have found the treatment less favourable. For instance, a worker may not have been worried by the refusal of a negative reference, a parent may have been happy with the evidence that the comprehensive and grammar schools provided the same standard of tuition, and a female customer may have been perfectly happy with the table service offered by the wine bar. But does not matter. So long as a reasonable person could have found the treatment less favourable (and the claimant did so), the element is met.

**(ii) The Comparison - Treated Less Favourably Than Whom?**

Until this element is repealed,[12] the comparison should be handled carefully. The phrase ‘he treats or would treat other persons’ in sub-section (1) (emphasis supplied) allows the comparator to be real or hypothetical. The proper comparison is between the treatment of alleged victim and the treatment that was, or would have been, given to another, who had not done any element of the protected act. It has proved rather too easy for tribunals to assume that the comparator has done part of the protected act as well, with predictable results. In *Kirby v Manpower Services Commission*,[13] an employee at a job centre was moved to less desirable work because he disclosed confidential information regarding suspected discrimination by some employers. The EAT rejected his claim of victimisation because any person disclosing confidential information of any nature would have been moved to other work, therefore the treatment was not less favourable.

In *Aziz v Trinity Street Taxis*,[14] the complainant was an Asian taxicab proprietor and a member of an association of taxicab operators. When the association required him to pay £1,000 to have a third taxi admitted to its radio system, he felt he was being unfairly treated on racial grounds. He recorded secretly conversations with other taxi drivers, and made an unsuccessful complaint to a tribunal about the additional fee. The recordings were revealed during the hearing of that complaint. As a result, the association expelled him on the ground that the making of the recordings was a serious breach of the trust that had to exist between members. *Aziz* complained of victimisation. The association argued that as it would expel any member making secret recordings, *Aziz* was not treated less favourably. The Court of Appeal, overruling *Kirby*, rejected this argument, noting that if the protected act itself constituted part of the comparison all complaints of victimisation would ‘necessarily fail’ if the defendant could show he would treat equally badly all those who did the protected act; ‘an absurd result.’[15] The comparator should be a non-Asian member of the taxi association who had not made secret tape recordings. Under this test, *Aziz* was treated less favourably than this comparator.

**D. Causation - ‘By Reason That’**

Perhaps the most straightforward interpretation of the phrase *by reason that* came from the House of Lords in
Nagarajan v London Regional Transport,[16] where the majority[17] followed the ‘objective and not subjective’[18] or ‘straightforward’,[19] approach, applied to the parallel element for direct discrimination (on the ground of (sex, race etc)), where Lord Goff adopted a but for test.[20] In Nagarajan, Lord Nicholls concluded ‘I can see no reason to apply a different approach to section 2 [RRA 1976].’[21] Thus, it seemed, the correct approach was to ask: ‘but for the protected act, would the claimant have been less favourably treated?’ It will become apparent below that in victimisation cases at least, the courts have drifted away from the but for test.

3. WITHHOLDING A REFERENCE

This scenario has two noticeable features. First, the employer has not acted out of malice, but merely to defend itself in litigation. Second, the claimant apparently suffered no harm.

In Chief Constable of West Yorkshire Police v Khan,[22] it will be recalled,[23] the employer refused to provide the claimant with a job reference (which would have been negative) save it ‘... might compromise the chief constable and other respondents’ handling of the case’.[24] Consequently, Khan brought a separate claim of victimisation. The House of Lords unanimously rejected this claim, holding that the Chief Constable had not acted ‘by reason that’ Khan had brought proceedings, because the employer had acted ‘honestly and reasonably’ in accordance with ‘perfectly understandable advice.’[25] In coming to this conclusion, the House relied on the distinction, made in Cornelius v University College of Swansea,[26] between a reaction to the bringing of proceedings (unlawful) and their existence (lawful). 26a

In the US case, Sparrow v Piedmont Health,[27] the claimant worked for a nursing agency, and after filing a complaint of sex discrimination, she requested a reference from her supervisor, Mr Clark, who refused. Instead, Piedmont wrote to her lawyer stating:

Under the circumstances presently existing as to the type of charge that Mrs. Sparrow has made, Mr. Clark does not feel at all comfortable with making any kind of recommendation. We would want you to understand that this is in no sense a form of retaliation, since whether he makes a recommendation at all is a choice that we feel he has. He would have no problem with a recommendation were this charge not still pending, but since it is pending it is his feeling that Mrs. Sparrow may attempt to use the recommendation adversely against the Agency whether it be very favourable, favourite or not at all favourable.

As in Khan, the reference was refused on legal advice that it could compromise the employer’s defence. The advice differed slightly, because in Khan the employer was minded to provide a negative reference. In Sparrow, the lawyers feared a reference of any sort (be it negative, neutral, or positive) could be used against the employer.

In the event, this refusal caused Ms Sparrow no harm, as her prospective employers did not ask for a reference. And so, like Khan, this is a ‘no reference-no harm’ case. However, in this case the employer was liable for victimisation. The District Court’s reasoning was sparse, stating simply that it ‘sympathises’ with the employer’s position, but employers are liable if they refuse to provide a reference ‘solely because’[28] an employee has issued Title VII proceedings.

4. SUSPENDING GRIEVANCE PROCEDURES

Before considering how this relates to the suspension of a grievance process, it is necessary to consider the impact of the relatively recent - but transitory - compulsory statutory grievance procedure, which lays down a minimum standard.

A. The Statutory Grievance Procedure

The dispute resolution procedures are set out in the Employment Act 2002, sections 29-33 and Schedule 2, with further details provided by the Employment Act 2002 (Dispute Resolution) Regulations 2004.[29] The legislation provides one scheme for discipline and dismissal, and a parallel one for grievances. The statutory procedure came into force on 1 October 2004. However, following an unfavourable reception, the scheme is due for repeal in April 2009.[30] So, what follows is of limited application.
The statutory grievance procedure consists of three steps.[31] Step one requires the aggrieved worker to send a written complaint to the employer. Step two is a meeting between the two and a decision by the employer. Step three arises where the worker wishes to appeal against the employer’s decision; here a further meeting and decision is required. In certain circumstances a ‘modified’ procedure applies, involving just two steps.[32] Step one requires a written complaint including its basis, whilst step two is a written response. The procedures do not apply at all if inter alia ‘the party has been subjected to harassment and has reasonable grounds to believe that ... complying with the procedure would result in his being subjected to further harassment.’[33]

The principal incentive for employees to comply with the statutory grievance procedure is that a claim cannot be presented to an employment tribunal until the employee has sent a ‘step one’ written complaint and waited 28 days for the employer to respond.[34] The sanction for not following the statutory procedure is a reduction, or increase, (depending on who was at fault) of up to 50 per cent of any award, as the tribunal considers just and equitable.[35] Further, if the employer is at fault, any dismissal is deemed automatically unfair.[36]

The corresponding scheme for discipline and dismissal follows the same lines, save that step one is initiated by the employer. In cases of dismissal, the grievance procedure does not apply. Thus, where an employee considers the dismissal was discriminatory, there is no need to follow the grievance procedure before presenting a claim to an employment tribunal.[37] However, where the employee considers that disciplinary action is discriminatory, the employee must issue a ‘step one’ written complaint to the employer, either before any appeal, or if no disciplinary procedure was followed, before presenting a claim to an employment tribunal.[38]

The essential rule here for the present purpose is that an employer cannot lawfully suspend this statutory grievance process. Thus, an employee who has waited 28 days after issuing the ‘step one’ letter of complaint may issue legal proceedings knowing that the statutory grievance procedure cannot be suspended in response. Of course, the statutory procedures are rudimentary, and fall well short of more elaborate procedures used by many large employers, or the ACAS recommendations.[39] Thus, where an employer suspends its more elaborate procedure and complies only with the statutory minimum, the suspension will fail to be judged under the victimisation provisions.

B. Suspending the Grievance Process and Victimisation

The various approaches to this issue are represented by three cases. First, in Cornelius v University College of Swansea,[40] Ms Cornelius brought proceedings against her employer under the Sex Discrimination Act 1975 and, pending the outcome, she was refused a transfer request and access to the grievance procedure. Consequently she brought a separate action of victimisation. The Court of Appeal rejected her claim for two reasons, the first centring on the causative element:

The existence of the proceedings plainly did influence [the employer’s] decisions. No doubt, like most experienced administrators, they recognised the risk of acting in a way which might embarrass the handling or be inconsistent with the outcome of current proceedings. They accordingly wished to defer action until the proceedings were over. But that had ... nothing to do with the appellant’s conduct in bringing proceedings under the Act.[41]

In other words, the Court distinguished between the bringing of proceedings and their existence. This enabled the Court to find that the protected act (the bringing of proceedings) was not the cause of the suspension of the grievance proceedings.

The second reason given was that Cornelius was not treated less favourably. The Court offered no reasoning for this decision, stating only, ‘There is no finding that ... [less favourable treatment] is made out, and it would certainly not be safe to infer that conclusion from the findings which have been made.’[42]

In the US case, EEOC v Board of Governors of State Colleges and Universities and University Professionals of Illinois,[43] the collective agreement provided a general policy to withdraw the grievance procedure from any worker who instigated legal proceedings against the employer. One Professor Lewis instigated the grievance procedure because he was not recommended for tenure. His complaint was that this decision breached University procedure. Lewis’s grievance claim took more than a year to process. In the meantime, he issued proceedings for age discrimination in relation to his tenure claim, under the federal Age Discrimination in Employment Act 1967 (ADEA 1967).[44] In accordance with its policy, the employer withdrew from the grievance process. On Lewis’ behalf, the EEOC[45] brought these proceedings for victimisation. The employer defended inter alia arguing that the policy was invoked in good faith to save duplicative litigation. The Court wholly rejected this:
[The legislation] is concerned with the effect of discrimination against employees who pursue their federal rights, not the motivation of the employer who discriminates. It explicitly prohibits discrimination against employees who engage in protected activity. An employer may offer a legitimate non-discriminatory reason for taking an adverse action against an employee who has engaged in protected activity, i.e., that the employer took the adverse action for some reason unrelated to the employee’s participation in protected activity. However, the employer may not proffer a good faith reason for taking retaliatory action.[46]

The Court bolstered its opinion using direct discrimination as an analogy, noting that ‘an employer’s alleged good faith is irrelevant, just as evidence of good faith has been held to be irrelevant in a case involving a discriminatory policy.’[47]

On a point of statutory interpretation, the Court noted that the legislation provided no exceptions to a retaliation claim, such as when retaliation would be rational or financially prudent, or in ‘good faith’, or otherwise. Without a hint of sarcasm, the Court advised: ‘If the Board wants to lobby for a benign discrimination exception ... its appeal would be appropriately directed to Congress rather than this Court.’[48]

A second argument, relating to the less favourable treatment element, was rejected also. The employer emphasised that the policy was not targeted at those who make discrimination claims; it was broader than that, aimed at any worker who brought proceedings, whatever their nature. Thus, the employer contended, the policy did not discriminate against those who brought discrimination claims. The Court rejected this argument:

The contention that the policy is any less discriminatory when its scope is broadened is unpersuasive. Employees’ rights under [the retaliation provisions] would be as effectively stifled under either policy.[49]

A third argument put forward was that the difference in treatment caused Lewis no harm. The Court rejected this, largely on the facts. If Professor Lewis had waited for the year-long grievance process to conclude, his litigation would have been time-barred. Second, his internal complaint related to the non-adherence to rules of tenure, rather than age discrimination, so different issues were to be decided.

The third case is US v New York City Transit Authority.[50] Here the employer operated a voluntary grievance procedure. However, if a complaint became formalised,[51] the employer would transfer it to its legal department and terminate the internal grievance procedure.

A court of appeals held that the policy did not amount to victimisation. It declared that ‘reasonable defensive measures’ were lawful, even though they result in adverse and differential adverse treatment. A decision otherwise, the Court stated, ‘would impair the ability of an employer to place its defence in the hands of counsel,’ preventing ‘the most basic precautions to defend against the claim’ and the securing of attorney-client privilege to ‘protect the fruits of investigation.’ Further, findings by the grievance process may be used to prejudice the employer’s defence at trial. Lastly, the policy is efficient and effective because it avoids parallel and duplicative proceedings. Overall, the employer should be ‘free to choose to act in a benign and sympathetic way by satisfying grievances and settling disputes, or to proceed aggressively with litigation.’[52]

C. Time Bars and the Grievance Process

There may be tactical reasons why a claimant launches legal action before the grievance process is complete. But one common reason will be to avoid being time-barred and losing any legal remedy. Where the employer’s grievance process is likely to drag on beyond the three-month limitation period,[53] the worker has little option but to issue proceedings. Indeed, one reason the worker in the Board of Governors case launched his litigation was that the grievance process was likely to take a year to complete. Perhaps surprisingly, the courts will not normally extend the time limit because the claimant has waited for the outcome of the grievance process before issuing proceedings.[54]

This procedural restriction is highly aggravating here. Effectively, the worker may choose either an informal (and presumably more amicable) solution or litigation.

5. TECHNICAL EVALUATION OF THE CASES

To evaluate technically this apparent diversity of opinion in the cases, it is necessary to examine them element-by-
A. Less Favourable Treatment

In *Cornelius*, the Court of Appeal ruled, albeit obscurely, that the suspension did not amount to less favourable treatment. To reach this conclusion it must have used the since-discredited Kirby comparator. This is revealed by imposing the correct (‘Aziz’) comparator, that is a person who had brought no proceedings at all. The College would not have denied the grievance procedure to this person. The only way it could have concluded that Cornelius had not been treated less favourably is by using a comparator who had brought proceedings, but not for discrimination; that is a Kirby comparator.[57]

This result was achieved with an apparently different approach to the same element in *New York City Transit*. The Court of Appeals’ reasoning fell under this element, as the employer conceded the other elements.[59] As noted above,[60] in the court’s view, it did not matter that the suspension could ‘result in adverse and differential adverse treatment’, if this was brought about by the employer taking ‘reasonable defensive measures’. It reconciled these apparently conflicting statements by distinguishing between discrimination (unlawful) and adverse treatment (not inherently unlawful). The court did not expand this logic, and as such it appears rather brutal. However, imposing an Aziz comparator on the facts once again reveals that the reasoning is rooted in the choice of comparator. An Aziz comparator would have been a worker who had not filed legal proceedings of any nature. The employer would not have suspended the grievance process for this comparator. Only if the comparator were an employee who had filed legal proceedings, but not for discrimination, would he have been treated the same. Thus, the court’s decision is dependant on a Kirby comparator, and the basis of its decision on this element is identical to that of *Cornelius*.

This latent use of the Kirby comparator reveals a good deal of sympathy for the employers’ perspective. After all, the essence of their argument is that they are treating the (discrimination) claimant no less favourably than they would treat any other claimant. But there are overriding objections to this approach. First, it fails to appreciate the worker’s perspective, a requirement of EC law.[61] Second, as Lord Scott observed in *Khan*:

‘It would enable employers to victimise employees who brought race discrimination proceedings against them provided they, the employers, were prepared similarly to victimise any employee who had the temerity to sue them for anything.’[62]

Third, as noted in *Aziz*, where the comparator is endowed with doing the protected act, the ‘absurd result’ would be that claims would necessarily fail where the employer would treat the claimant and the comparator equally badly.[63] Given this stark choice, the better solution is to opt for the Aziz comparator, which at least allows the merits of the employer’s case to be decided under one of the other perhaps more flexible elements, rather than scupper all claims from the outset.[64]

A different approach is apparent in *EEOC v Board of Governors*. A court of appeals rejected the employer’s argument that as it suspends its grievance process for any worker who files a complaint, of whatever nature, it did not discriminate against the plaintiff. The comparison with ‘any worker’ indicates that the employer envisaged a Kirby comparator. However, as noted above, the court of appeals rejected this argument because broadening the challenged practice to cover all workers did not change the plaintiff’s position, whose rights remained ‘effectively stifled’. [66]

The court is less concerned with how the employer would treat others, than how it has treated this discrimination claimant. This suggests that the court is not concerned with a comparison at all. Instead, it is concerned with what it perceives as the statutory purpose, which is stretching somewhat the statutory word ‘discriminate’, but arrives at a sensible solution, which is to jettison the comparative element and focus on the treatment of the claimant. Of course, in Britain, this may become a reality should the Government fulfil its proposal to replace the comparative element with a simple requirement that the employer has ‘caused a detriment’. [67] Until such a time courts should use the Aziz comparator.

B. ‘By Reason That’, Causation and Motive

This element was discussed explicitly in *Cornelius, Board of Governors, Khan*, and *Sparrow* (briefly); and implicitly in *New York City Transit*. In essence, the arguments centre on a benign motive defence. This was expressed by the
employer in Board of Governors, and roundly rejected.[68] It can also be detected in Cornelius, where the Court of Appeal compared the employer to ‘most experienced administrators,’ when distinguishing the bringing from the existence of the proceedings.[69] The House of Lords built on this logic in Khan, and ventured a step further, holding that an employer acting honestly and reasonably should not be liable for victimisation.[70] More recently, in St Helens BC v Derbyshire,[71] the House of Lords has rowed back from this position by ‘reinterpreting’ Khan as a case turning on the element of any other detriment.

(i) The Distinction Between the Bringing and the Existence of Proceedings

This distinction is as artificial as it sounds. Its futility is realised by adding a second protected act to the claim, which could arise, for instance, if the claimant had ‘otherwise done anything under or by reference to this Act’. As well as having brought proceedings, the claimant was ‘otherwise maintaining’ them in existence. After all, on the court’s logic, if maintaining proceedings is different from commencing them, sub-paragraph (c) seems the appropriate place for such a claim.[73]

Further, this fine distinction between the bringing and existing of proceedings shows a drift away from the ‘straightforward’ approach adopted by the House of Lords in Nagarajan, where Lord Nicholls said: ‘... in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible.’[74]

This distinction, which asks why the employer so acted, is based on the employer’s perspective. According the House of Lords in St Helens, EC law now dictates it is the worker’s perspective that should prevail.[75]

It is artificial, unduly legalistic, and contrary to EC law. As such it serves no useful purpose.

(ii) A Benign Motive Defence?

Of course, what the courts were trying to achieve with this distinction (between the bringing and existence of proceedings) is exoneration for employers who defend litigation in the normal way. This is apparent from Lord Hoffman’s observation in Khan:

... once proceedings have been commenced, a new relationship is created between the parties. They are not only employer and employee but also adversaries in litigation. The existence of that adversarial relationship may reasonably cause the employer to behave in a way which treats the employee less favourably than someone who had not commenced such proceedings. But the treatment need not be, consciously or unconsciously, a response to the commencement of proceedings. It may simply be a reasonable response to the need to protect the employer’s interests as a party to the litigation.[76]

Here, in one piece of reasoning, Lord Hoffman combines the distinction with a ‘reasonable’ response ‘to protect the employer’s interests’.

This approach is also apparent in New York City Transit.[77] Although the causative element was conceded by the employer, parts of the judgment suggest that the employer’s motive was the real reason for the decision:

At some level of generality, any action taken by an employer for the purpose of defending against the employee’s charge can be characterized as adverse to the employee. Ordinary defensive measures are taken for the very purpose of defeating the employee’s claim. Even mediation and settlement are steps that an employer takes to promote its ultimate self-interest.[78]

In addition, the court alluded to an employer’s ‘reasonable defensive measures’[79] to prevent prejudicing the employer’s defence at trial. The judgment placed the ‘ordinary’ and ‘reasonable’ conduct of the employer above any consequential adverse effect to the plaintiff. None of it relates to the comparison, and it suggests that that much of the reasoning in this decision was based around the causative element, despite the employer’s concession.

This sympathy for the ‘reasonable’ employer suggests that British and American judges have recognised a benign motive defence. The first suggestion of a benign motive defence in British victimisation cases arose in Aziz v Trinity Street Taxis.[80] Here, it will be recalled, a taxi association expelled a member for making secret tape recordings to support a complaint of racial discrimination. Although the Court of Appeal found he had been treated
less favourably, it then went on to hold that this was not because of the protected act, but because of a breach of confidence.[81] On behalf of the court, Slade LJ explained that the victimisation provisions:

... are concerned with the motive which caused the alleged discriminator to treat the complainant less favourably than other persons. In our judgment... [it] contemplates a motive which is consciously connected with the race relations legislation.[82]

The House of Lords later disapproved of this quote, but not the decision.[83] Nonetheless, the theme returned in Khan, with Lord Scott stating that the statutory phrase by reason that suggested ‘motive’, [84] whilst Lord Nicholls said, ‘Unlike causation, this is a subjective test’. [85] implying the defendant’s motive was the key. Elsewhere in Khan, the judges used different language to express the same thing, holding that an employer acting ‘honestly and reasonably’ should not be liable for victimisation.[86]

But, in St Helens BC v Derbyshire,[87] the House of Lords reinterpret Khan, stating that the honest and reasonable ‘defence’ was simply another way of expressing that the worker had suffered no detriment: if the employer acted honestly and reasonably, it could not cause the worker a detriment.[88] Only Baroness Hale was more trenchant, stating: ‘It would be better if the [honest and reasonable] “defence” were laid to rest and the language of the legislation, construed in the light of the requirements of the Directives, applied.’ [89]

The flaw in the majority’s logic is that in most cases an employer defending litigation will cause a detriment, even though it acted just as ‘honestly and reasonably’ as Khan’s employer.[90] The denial of a grievance process or a job reference normally will cause a detriment. If a case came before the House precisely the same as Khan, save that the denial of the reference did cause the claimant harm (eg because it would have been positive), a court either would have to find for the claimant, leaving Khan marooned and fit only to be distinguished to death, or find for the employer on the basis that it acted honestly and reasonably even though the claimant had been harmed. Thus, an honest and reasonable response by an employer normally cannot be equated with causing a worker no detriment.[91] Despite the opinions in St Helens, the deciding factor in Khan was the employer’s reason, or motive, for acting, not the effect on the claimant, and the honest and reasonable defence survives.[92]

Once it is established that the decisions in Cornelius and Khan (and New York City Transit) turned on the employer’s benign motive, it becomes easier to evaluate them. The first and most obvious problem for a benign motive defence is that it does not appear in the legislation.[93]

The legitimacy of such a defence has often been questioned using the meaning of the apparently parallel definition of direct discrimination. Here, there is discrimination if the employer treats the worker less favourably on the ground of sex, or race, etc. The phrase on the ground of is the supposed counterpart of the phrase by reason that. In the United States, Title VII of the Civil Rights Act 1964 more simply repeats the word because for this element.[94] For direct discrimination, a benign motive defence strictly is outlawed. This is because it could allow employers to cite ‘customer preference’ or ‘appeasing the workforce’ as the motive for treating protected groups less favourably.

For instance, in Diaz v Pan American World Airways[95] a ‘customer preference’ for female cabin crew was rejected by a court of appeals as a defence to direct discrimination claim brought by a male applicant. In R v Commission for Racial Equality ex parte Westminster City Council,[96] the council dismissed a newly-hired black worker because of pressure from the white workforce to revert to the word-of-mouth hiring practice. The Court of Appeal found the council liable for direct discrimination. Likewise, in Goodman v Lukens Steel[97] the US Supreme Court found a union liable for direct discrimination against its black membership for failing to challenge the employer’s racially discriminatory practices, even though the union’s stance was not based in racial prejudice, but in deference to its white membership, and/or to gain favour with the employer to achieve other goals. Similarly, the US Supreme Court found an employer liable for refusing to hire fertile women on health grounds.[98] The Court stated that direct discrimination: ‘... does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.... The beneficence of an employer’s purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination.’[99]

This was the thinking behind the but for test decreed by Lord Goff in James v Eastleigh,[100] and adopted for the victimisation provisions in Nagarajan.[101] In the Board of Governors case, the court similarly used the parallel with direct discrimination when rejecting the benign motive defence.[102]

The point of the but for test, according to Lord Goff, was to avoid questions of motive.[103] But more recently, the House of Lords has drifted away from the but for test. Most notably, in Shamoona v Chief Constable of the RUC,[104] a sex direct discrimination claim, the but for test was not mentioned. Instead, the Law Lords’ speeches asked why the claimant was treated so. What few other comments were made on the issue suggested that tribunals
should look for a discriminatory motive;[105] and that the relevant circumstances for the comparison should be those that the employer took into account,[106] again pointing to a subjective approach.

However, it is inconceivable on policy grounds that the House of Lords would decide any of the above customer preference or appeasing the workforce examples differently.[107] The move could be explained by the House’s perceived need to loosen the shackles of the but for test in victimisation cases, thus validating the decisions in Cornelius and Khan. The struggle with the but for test in victimisation cases is most evident in Lord Hoffman’s speech in Khan. He first stated that the causal questions in the direct discrimination and victimisation provisions were ‘not identical.’[108] This enabled him to distance the but for test from the victimisation cases.[109] And this was because under the victimisation provisions, the reason for the treatment may be ‘...a reasonable response to the need to protect the employer’s interests as a party to the litigation’ which is not the same reason as the commencement of the proceedings.[110] By contrast, Lord Hoffman reasoned, ‘Under section 1 [direct discrimination], one would have needed to go no further’ than establish ‘that an employee who had not commenced proceedings would not have been treated in the same way.’[111]

With respect, this is saying no more than that because the employers in these victimisation cases acted ‘reasonably’ the victimisation provisions are different and should accommodate a benign motive defence. The same could be said of direct discrimination where defendants have acted ‘reasonably’ by trying to help pensioners,[112] or protect women’s fertility, or perhaps, avoid industrial unrest or accommodate customer preferences. The shortcoming of Lord Hoffman’s reasoning is that it does not explain why ‘reasonable’ acts of victimisation should be defendable, whilst ‘reasonable’ acts of direct discrimination should not. This is in stark contrast to Lord Steyn’s view in Nagarajan ‘that victimisation is as serious a mischief as direct discrimination.’[113]

A more obvious difference between the formulas is that only direct discrimination carries specific Genuine Occupational Requirement or Qualification defences,[114] tempting a suggestion that courts should compensate for their absence victimisation cases. But, as the court in the Board of Governors case observed, if the legislature intended to validate victimisation where it would be rational, or financially prudent, or in ‘good faith’, or otherwise, it would have expressed this.[115] Shamooun removed one obstacle (the but for test) to a benign motive defence for victimisation cases, but it did not go so far as to validate such a defence.

This establishes the technical objection to a benign motive defence in victimisation cases. None appears in the legislation, and distinguishing the victimisation from the direct discrimination provisions cannot validate implying such a defence.

However, the practical benefit of a benign motive defence is that it provides a compromise of sorts to the victimisation dilemma. It permits employers to defend litigation, but confers some control over their conduct to tribunals. For example, in St Helens BC v Derbyshire,[116] the employer announced publicly that a minority of the workforce persisting with an equal pay claim were likely to cause redundancies. This effective threat was intimidating, and worry which may be induced by the employer’s honest and reasonable conduct in the course of his defence or in the conduct of any settlement negotiations, cannot (save, possibly, in the most unusual circumstances) constitute ‘detriment’ for the purposes of sections 4 and 6 of the 1975 Act.[119]

If ... the employer’s solicitor were to write to the employee’s solicitor setting out, in appropriately measured and accurate terms, the financial or employment consequences of the claim succeeding, or the risks to the employee if the claim fails, or terms of settlement which are unattractive to the employee, I do not see how any distress thereby induced in the employee could be said to constitute ‘detriment’ ... The bringing of an equal pay claim, however strong the claim may be, carries with it, like any other litigation inevitable distress and worry. Distress and worry which may be induced by the employer’s honest and reasonable conduct in the course of his defence or in the conduct of any settlement negotiations, cannot (save, possibly, in the most unusual circumstances) constitute ‘detriment’ for the purposes of sections 4 and 6 of the 1975 Act.[119]

This employer went beyond what was ‘reasonable’ by going public with the threat,[120] and so could not rely on a benign motive in its defence. However, perhaps to escape accusations that it had created a benign motive defence, the Lord Neuberger has labelled the decision as turning on the element of ‘detriment’. As such, in the context of victimisation, the element of any other detriment and the notion of harm require further consideration.

C. Harm, Less Favourable, and Detriment

The question of harm appears to arise twice in the British case law: first, when assessing if the treatment was less favourable, and second, when assessing whether the claimant suffered a detriment. Khan and EOC v Birmingham
City Council show the House of Lords consistently holding that the treatment is less favourable if the claimant perceived the treatment as less favourable, and that that perception was not unreasonable.[121] However, the courts have also applied a standard of harm to the element any other detriment. And unlike the less favourable element, this standard has varied somewhat. The general standard required was confirmed in the sex discrimination case Shamoon v Chief Constable of the RUC,[122] where the House of Lords stated the question was: ‘Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?’[123] In Shamoon, one of the duties of a police inspector was the appraisal of officers. Following complaints by some of these officers, she was relieved of the appraisal duty. She brought a claim of sex discrimination.[124] The Northern Ireland Court of Appeal[125] held that Ms Shamoon had not suffered a detriment because she had no ‘right’ to carry out appraisals and there was no accompanying loss of rank or financial loss. The House of Lords reversed, and held that the loss of the appraisal work was a detriment simply because it would reduce her standing amongst colleagues,[126] Accordingly, in Khan,[127] Lord Nicholls reasoned: ‘I accept Sergeant Khan’s claim that the refusal to provide a reference for him constituted a detriment ... even though ... this did not cause him any financial loss. Provision of a reference is a normal feature of employment.’[128] Lord Hoffman held: ‘Mr Khan plainly did take the view ... that not having his assessment forwarded was to his detriment and I do not think that, in his state of knowledge at the time, he can be said to have been unreasonable.’[129] His view was influenced by the statutory provision allowing damages solely for injury to feelings.[130]

(i) Specific Limits to the Meaning of Detriment

On this element, Shamoon and Khan are consistent with each other and with the established meaning of what amounts to less favourable treatment. It is same mix of the subjective and objective and does not require some economic or physical consequence. However, case law has also provided one - or possibly two - limits specific to the element of any other detriment which could affect the victimisation cases.

First, there is Court of Appeal authority that the de minimis principle applies to the element of any other detriment. In Peake v Automotive Products[131] an employer permitted female staff to leave the factory five minutes earlier ‘for reasons of safety and to avoid the rush.’ The Court of Appeal held that this did not cause the men a ‘detriment.’ Lord Denning (who presided in Peake) explained the decision later as being based solely on the de minimis principle.[132] To date, the Court of Appeal considers this good law. Although no cases have been decided de minimis, in Jiad v Byford, May LJ observed obiter that ‘Transitory hurt feelings may not (depending on the facts) suffice’ for a detriment.[133]

Ascribing the de minimis principle to the element of ‘detriment’ brings two problems. First, most of the parent European Directives mandate that there should be ‘no discrimination whatsoever’ on the protected grounds.[134] Thus, it is questionable if the de minimis principle is compatible with European law.[135] Second, as noted by Lord Hoffman in Khan (above), as the legislation allows for damages for injury to feelings, it would seem that even ‘transitory hurt feelings’ fall under this head. In Vento Chief Constable v West Yorkshire Police,[136] the Court of Appeal placed cases under the head of injury to feelings into three bands. The lowest band, for ‘less serious’ cases, such as an ‘isolated or one-off occurrence’ should attract awards of between £500 and £5,000. In general, lower awards should not be made as they risk not showing a proper recognition of the injury to feelings.[137] The court did not mention if it envisaged a de minimis incident falling into this lowest band, but the reference to an isolated or one-off incident suggests that it could.

A possible second limit to the meaning of detriment could come about if its ‘test’ (see Shamoon and Khan, above) were reduced to a purely objective one, and required tangible harm. This is the implication of the House of Lords’ reinterpretation of Khan in St Helens BC v Derbyshire,[138] where Lord Neuberger (with whom the whole House agreed)[139] explained Khan as turning on the element of any other detriment. Although he repeated the standard from Shamoon (above), he then stated that because the denial of the reference did not reduce Sergeant Khan’s chances, the denial did not cause him a detriment.[140] This suggests, contrary to Shamoon, and indeed a differently constituted House in Khan itself, that the matter is purely objective and turns on whether the claimant actually suffered tangible harm. If this logic were taken up, all no reference-no harm cases will fail on this element, irrespective of any causative issue.

This reinterpretation of Khan raises more questions than it solves. First, by suggesting that Khan was decided correctly because looked at objectively, Sergeant Khan had suffered no tangible harm, the House of Lords ignored their own opinion and ECJ authority that the matter should be judged from the worker’s perspective.[141]

Second, the usefulness of St Helens analysis is reduced virtually to nil once it is appreciated that in most cases withholding a reference will harm the claimant. Normally, a reference would be positive or neutral, and so its
withholding is very likely to damage the claimant’s job prospects. There are less obvious possibilities as well, even where the reference would have been negative. For instance, an employer may damage the worker by informing the prospective employer of the reason for withholding the reference. Indeed, in *Khan*, the Chief Constable wrote to the Norfolk Police explaining that he had withheld the reference because Khan had brought industrial tribunal proceedings. In the US case *Rutherford v American Bank of Commerce* an employer had been held liable for victimisation after it ‘eliminated’ Ms Rutherford’s chance of employment with another bank by informing it that she had brought a sex discrimination claim. This is enough to dissuade many employers from selecting a candidate. Even on a purely objective test, this alone would be detrimental to the worker. And even if it proved not detrimental to Khan, a reasonable worker would be entitled to fear so, which would lead to liability under the *Khan* or *Shamoon* ‘reasonable worker’ test. It is also the case that even where the employer does not provide a reason, the claimant could suffer a detriment simply because she would still present an incomplete application, excluding her from any selection process.

Third, all these harmful outcomes could arise for exactly the same reason as the ‘harmless’ scenario in *Khan*: that the employer was acting on legal advice to protect its position in the principal proceedings. As such, the message sent out by *Cornelius* and *Khan* that employers may defend litigation in the normal way is highly misleading. The logic of *St Helens* places the employer’s defence into the hands of fortune. The examples above show that only rarely will the claimant suffer no detriment, and where a reference is withheld, this normally will be beyond the control of the employer. Harm is even more likely when suspending a grievance process (which suggests the House’s tacit approval of *Cornelius* is suspect). The irony of the House of Lords’ analysis of *Khan* is that in trying to legitimise the reactions of ‘reasonable’ employers, it has reduced their defence virtually to nil.

(ii) Other Issues with the Harm Principle

More generally, associating the element *any other detriment* with a harm principle raises four issues. First, it overlooks the deterrent effect on claimants. Second, it omits deterrent effect on other workers. Third, it restricts tribunals’ ability to order an appropriate remedy to prevent damage. Fourth, it could produce an anomaly.

First, the *St Helens* reinterpretation of *Khan* was described above as a possible limit to the element of detriment because on the facts before it the House of Lords found St Helens Borough Council liable. Yet, just as in *Khan*, the claimants were not physically or financially damaged by the council’s public threat. The decision in *St Helens* is better explained by reverting to the purpose of the victimisation provisions. This was articulated by the ECJ in *Coote v Granada*. Here, Mrs Coote sued her employer following her dismissal for being pregnant. Subsequently, and after those proceedings were dead, the employer refused to give her a reference and Mrs Coote sued again, this time for victimisation. The ECJ held that ex-workers must be protected from victimisation, otherwise:

> Fear of such measures, where no legal remedy is available against them, might deter workers who considered themselves the victims of discrimination from pursuing their claims by judicial process, and would consequently be liable seriously to jeopardise implementation of the aim pursued by the [Equal Treatment] Directive.

Similarly in the United States, in *Robinson v Shell*, the Supreme Court stated that a primary purpose of the victimisation provisions is ‘Maintaining unfettered access to statutory remedial mechanisms.’ The Court held that providing a retaliatory negative reference for an ex-employee whilst discrimination proceedings were pending was unlawful. It noted that a decision otherwise would effectively vitiate much of the protection afforded by Title VII of the Civil Rights Act 1964, by allowing the threat of post-employment retaliation to deter victims of discrimination from complaining, and providing a perverse incentive for employers to fire workers who might bring Title VII claims.

In both *Coote* and *Robinson*, the central issue was whether ex-workers were protected, but the underlying principle in each decision is that the purpose of the victimisation provisions is to outlaw deterrents to using the discrimination legislation.

Clearly, the claimants in *St Helens* could have been deterred from pursuing their equal pay claim, even though they were caused no tangible harm. This reasoning was not apparent in the speeches as the reinterpretation of *Khan* overshadowed the *ratio decidendi* of *St Helens*, which, logically, centred on the deterrent effect of the employer’s action, rather than any notion of harm.

Second, a principle demanding that the claimant suffers harm, or is deterred, excludes conduct that could deter others from complaining about discrimination (or supporting such complaints). This has been characterised in some US courts as the ‘chilling’ effect of victimisation and is most apparent in the job-reference cases.
In the United States, the ‘fear of deterrent’ purpose articulated in Robinson v Shell was presumed to cover third parties by the reputedly progressive Ninth Circuit. In Hashimoto v Dalton Ms Hashimoto made a Title VII complaint whilst working for the Navy. After she was made redundant, but whilst her complaint was pending, she applied for a post with the Army. Her supervisor, Lowery, provided an undue negative job reference in retaliation for her discrimination complaint. However, Hashimoto’s job application failed for other reasons and so the reference caused her no harm. Nonetheless, she brought a subsequent case of victimisation. The Court of Appeals upheld her claim. It was concerned with ‘... the chilling effect which Lowery’s retaliatory conduct might have on the remaining employees under his supervision ...’ and concluded that

... the retaliatory dissemination of a negative employment reference violates Title VII, even if the negative reference does not affect the prospective employer’s decision not to hire the victim of the discriminatory action.[150]

Robinson and Hashimoto differ from Khan because references (albeit negative) were provided. Hashimoto and Khan stand out because the workers’ job prospects were not damaged. Coote is distinguishable because although the claimant’s job prospects were damaged (it was alleged), she could not have been deterred from pursuing her principal claim, as that had already been settled. Given that the ECJ expressed its judgment as based on the deterrent principle, their finding for Mrs Coote appears curious. An explanation is discernable in the US case Smith v SEIU.[151] Here, the plaintiff brought discrimination proceedings against his ex-employer, a trade union. After these proceedings were dead, the employer ‘bad-mouthed’ Smith in the industry, making it difficult for him to get further work. He sued for victimisation. The defendant employer argued that no reasonable person in Smith’s position would be deterred by this retaliatory conduct. The principal proceedings were dead and Smith was no longer employed by the union. In other words, Smith ‘had nothing to fear, and nothing to lose.’ A district court rejected this argument. Citing Hashimoto, it stated: ‘If defendants’ interpretation were correct, a retaliation claim could never arise from conduct that occurs after protected activity. This is untenable.’[152]

This gets closer to the issue. It would be ‘untenable’ if it were lawful for employers simply to wait for the principal action to conclude, and then victimise the claimant. Indeed, this point was made by Lord Hoffmann in Khan.[153] The effect would be two-fold. It would punish (or ‘harm’) the claimant for having complained about discrimination, and it would deter others from making such complaints. The only ‘deterrent’ here is to others, as the claimant’s case has concluded. The same could be said of Coote. If - as the ECJ declared - the purpose of the law of victimisation is to allay fears of deterrents, and the claimant can no longer be deterred from pursuing her principal claim because it has been settled, the only persons who possibly could be deterred from making or supporting complaints are other workers. Thus, it could be said logically that the decision in Coote did not depend on whether Mrs Coote’s job prospects actually were damaged; the deciding factor was that the employer’s conduct could deter others from ‘pursuing their claims by judicial process.’[154] Focussing on tangible harm to the claimant misses the broader purpose of victimisation law, which is to outlaw conduct that could deter the claimant or other workers from enforcing anti-discrimination law.

A third issue arising from the requirement of harm is that it restricts remedies preventing future damage. For instance, a worker in fear of her job prospects being damaged by the absence of a reference would have to wait until damage was done before bringing an action for victimisation. In Hashimoto, costs and a remedial order, but not damages, were awarded to the victim.[155] Thus, if liability depended on whether the refusal could deter the claimant or others from using the legislation, a tribunal could make a recommendation[156] that the employer provides a reference, thus preventing damage to the claimant and dispelling the deterrent to others. If the problem were remedied at this early stage, damages would be minimal.

Fourth, demanding a certain degree of harm for the element any other detriment overlooks that this element is only one of many categories of employment-related conduct which is unlawful. Where, for instance, a case falls within terms of employment or access to training, benefits etc.[157] there can be no workable de minimis principle: if the less favourable treatment relates to the terms of employment or training, benefits etc, the employment element is met. There can be no question of degree with this element.[158] The anomaly is that less favourable treatment that produced no tangible harm would be unlawful if it related to a term or benefit of employment, but lawful if it related only to any other detriment. Thus, had Khan couched his claim as a deprivation of a benefit[159] (as Lord Mackay presumed)[160] no question of detriment would have arisen, leaving no scope for the House of Lords in St Helens to explain the Khan decision as turning on the absence of a detriment.

British courts have taken the element any other detriment and ascribed to it various standards of harm required for liability. This focus on harm resembles the question of whether the treatment was less favourable, and
tends to duplicate that question, save that the limits placed on what amounts to a detriment have produced an anomaly and thrown up a number of problems. These limits, especially as suggested in *St Helens*, will: (1) only apply to cases where the claim is pleaded under *any other detriment* and the claimant suffered no harm; (2) exclude from the provisions conduct that only deters the (unharmed) claimant or other workers; and (3) in some cases deny a remedy that would prevent an employer causing future damage to the claimant. Further, these limits enfeeble any so-called *honest and reasonable* defence because they render the employer’s defence (of protecting its legal position) dependant on whether per chance the claimant suffered no harm, which in any event would be most unusual.

(iii) Distinguishing Detrimental from Less Favourable

At the root of these problems is the blurring of two distinct elements. The standard of treatment and harm (if any) required should belong to the element *treats less favourably*, whilst the element *subjecting him to any other detriment* is concerned principally to ensure that the treatment is employment-related. The problem is the undue emphasis towards harm given to this second element and the differing standards ascribed to it.

A logical solution is to hold that establishing less favourable treatment is sufficient to establish *any other detriment*. However, in *Khan*, Lord Hoffman observed: ‘A person may be treated less favourably and yet suffer no detriment.’[161] He explained how the absence of a reference was *less favourable* (because of injury to feelings) but not detrimental because it caused Khan no economic loss.[162] But then curiously in the same paragraph he stated, ‘But, bearing in mind that the employment tribunal has jurisdiction to award compensation to injury to feelings, the courts have given the term “detriment” a wide meaning.’[163] Upon this, Lord Hoffman held that Khan *had* suffered a detriment, because given his state of knowledge at the time, Khan’s view that he had suffered a detriment was not unreasonable.[164] The matter was further confused by the analysis of Khan by a differently constituted House in *St Helens*, who considered that Sergeant Khan had *not* suffered a detriment.[165] This confusion alone is enough to support an equalising of standards. And with respect to Lord Hoffman, to layperson and lawyer alike, the notion that the same treatment is less favourable but not detrimental is anomalous, confusing,[166] and shows another drift away from the ‘straightforward’ approach urged by the House of Lords in *Nagarajan*.[167]

Although an equalising of standards is a logical solution, it is also a distraction from the proper function of this element, which is ensuring that treatment was work-related. For claims falling under *any other detriment*, liability should depend upon whether there was work-related less favourable treatment on a prohibited ground (in this context a protected act). The practical solution for claimants is, where possible, to plead a case under one of the other ‘employment-related’ headings, such as *other benefits*. For this purpose, references[168] and grievance procedures should be considered *benefits* of employment.

This American approach is more clear-cut. In its most recent pronouncement on victimisation, the Supreme Court, in *Burlington Northern v White*,[169] addressed the two elements separately: first, holding that the range of *employment-related* treatment was not confined just to altering the terms of employment;[170] and second, explaining the degree of harm required for liability (the *less favourable* question).[171]

A change of approach will be forced upon the British courts should the Government fulfil its proposal to abolish the comparative element (*less favourable treatment*) and replace it with ‘subjected to a detriment’.[172] This would bring the victimisation provisions in discrimination law into line with the growing number of victimisation provisions provided by Part V of the Employment Rights Act 1996, which cover areas such as whistle blowing, jury service, health and safety, Sunday working, family leave, and working time rights.

Whilst the disposal of the comparative element and any anomalies between *less favourable* and *detriment* is welcome, the danger is that it permits courts more discretion on what standard of harm is required for liability. If the courts import the limited meaning of detriment (incorporating *say, de minimis* and the *St Helens* ‘objective harm’ standard), the limits will apply to *all* employment victimisation claims, rather than just those falling under the catch-all phrase *any other detriment*. Thus, the benefit of losing any anomalies is offset by the more restrictive regime. The scant case law on this phrase in the Employment Rights Act points to this outcome. In *Harrow LB v Knight*,[173] Mr Recorder Underhill QC ruled that the claimant should have suffered ‘some identifiable detriment’.[174] suggesting an ‘objective harm’ standard.

A better amendment would be to replace the comparative element with the phrase *treats unfavourably*. This should be accompanied by a replacement of the phrase *any other detriment* with a ‘catch-all’ phrase *other employment-related treatment*,[175] thus signalling that its purpose merely is to ensure that the unfavourable treatment was employment-related. Of course, for the avoidance of doubt, it would be better if these purposes were spelt out. Unless otherwise expressed in the legislation, this will catch cases where the claimant is harmed or deterred,
or where third parties are deterred.

6. POLICY CONSIDERATIONS - THE VICTIMISATION DILEMMA

The case law signals that both employer and worker have a claim on the court’s sympathy. The prominent policies are to preclude deterrents to using the discrimination legislation, and to allow employers to defend litigation. The cases show that these aims often conflict and a benign motive defence (however it is dressed-up) provides a compromise.

The employer facing litigation from a worker is in a difficult position. At some stage in litigation the employer will treat the claimant less favourably than it would treat a person who has brought no proceedings. For example, no one would suggest that a tribunal should excuse a claimant or her witnesses from rigorous cross-examination. If the employer must treat the litigant as it would treat a person who had not brought proceedings of any nature, the logical conclusion is that the employer cannot defend its case. By default the employer would lose most, if not all, claims of victimisation.

Sympathy for this perspective was cogently expressed by Lord Scott in Khan who stated that an employer would ‘otherwise be placed...in an unacceptable Morton’s fork.’[177] It was robustly expressed by Circuit Judge Jacobs in New York City Transit, who declared that employers should be ‘free to choose to act in a benign and sympathetic way by satisfying grievances and settling disputes, or to proceed aggressively with litigation.’[178]

On the other hand, focussing on the predicament of the employer undermines the policy of the provisions, which is to preclude deterrents to the enforcement of the anti-discrimination legislation. This means looking at the conduct from the perspective of the workers, and was advanced with some force in St Helens, citing ECJ authority on the matter.[179] In Khan, the Law Lords’ speeches are replete with statements sympathetic to the employers’ dilemma. Nowhere did a judge express sympathy for the workers whose reference is withheld; as well as having acted just as ‘honestly and reasonably’ as the employer, these workers will have their career frozen for the duration (conceivably several years) of the proceedings, simply because they complained of discrimination. This approach also places the worker in an ‘unacceptable Morton’s fork’, choosing to suffer either discrimination or a frozen career. In cases of suspended grievance processes, the worker loses the chance of an informal resolution to a complaint, instead having the choice of the costs, time and stress of formal proceedings, or dropping the complaint altogether. Indeed, where the grievance process is likely to exceed the limitation period, the worker’s hand is forced.[180] A further potential disadvantage with suspending the grievance process is that the worker’s opportunity to have unlitigated matters resolved may be lost altogether.[181]

These competing interests should be a matter for Parliament to resolve, within the bounds of the ‘deterrent’ principle set out by the ECJ in Coote. As such, employers should given all possible scope to defend litigation, save where it injures or deters the claimant, or deters other employees.[182]

7. ALTERNATIVE THEORIES

The consistent factor in the Khan and St Helens judgments is the House of Lords’ sympathy with the ‘honest and reasonable’ employer’s dilemma. The distinction between the bringing and existence of proceedings, the honest and reasonable ‘defence’, and the finding of no tangible detriment, were all vehicles to deliver this sympathy. The reasoning carries technical flaws, the essence of which is that the statutory formula carries no scope for this sympathy. If, as suggested, policy dictates that employers should have some scope to defend proceedings, an alternative theory of victimisation is required.

A. Parallels with Direct and Indirect Discrimination

In both Nagarajan and the Board of Governors, one reason for rejecting the benign motive defence was the analogy with the ‘parallel’ provision of direct discrimination, where such a defence strictly is outlawed. Only Lord Hoffman, in Khan, attempted openly to distinguish the direct discrimination and the victimisation formulas, although his reasoning was unconvincing.[183] Lord Hoffman overlooked a significant difference between the two formulas: only direct discrimination carries specific Genuine Occupational Requirement defences. As such, the victimisation formula is more restrictive, as the legislature has provided no defence, specific or general.

However, the employer’s predicament provides a clue to a more fundamental flaw in an analogy with direct
discrimination. The employer’s argument in defence of its policy to deny a reference or grievance process is two-fold. First, it wants to defend its case properly. Second, it is a general policy that does not single out those who complain of discrimination. This second argument provides the clue. If the policy is of general application, then it is arguable that it is neutral on its face. This makes it more akin to indirect discrimination, which, of course, carries a general justification defence, which would accommodate an employer’s benign motive. In the US case, EEOC v Huber,[184] a worker sued for discriminatory dismissal, seeking reinstatement. Her employer withheld her retirement benefits because she sought reinstatement. This was because if the employer paid benefits to persons while the validity of her dismissal was uncertain and who had a realistic possibility of being reinstated, the tax-exempt status of the plan could be lost for all participants. This was the policy for all dismissed workers who sought reinstatement, not just for those whose claims were based on discrimination.[185] The court held that the policy was permissible because:

[G]iven Huber’s fiduciary obligations to the other plan participants, the policy of withholding benefit plan funds is not facially pretextual and appears to be significantly related to a legitimate business concern.[186]

The court embraced the employer’s ‘benign motive’ defence by treating the case as one of indirect discrimination. This was achieved by analysing the policy as a facially neutral one, which affected any dismissed worker seeking reinstatement.[187]

This is an attractive approach which equally could be applied to Cornelius, Khan, Sparrow, Board of Governors, and New York City Transit, because, as in Huber, general policies to suspend a grievance process or withhold a reference would affect all workers who issued proceedings, not just those claiming discrimination. But this conclusion starkly contrasts with the analysis in Board of Governors, which reasoned that ‘broadening’ a policy made it no less effective against the plaintiff who had brought a (protected) discrimination claim.

So, here are two apparently logical conclusions that conflict. Any reconciliation comes from understanding that each is half-right. Huber may appear to be an unconventional decision, but in fact it perpetuates the notion that discrimination and victimisation are parallel concepts, which facilitates the direct/indirect discrimination analysis for victimisation cases. The error with this analysis is that in most conventional discrimination cases there is a protected class identifiable by one single characteristic, be it sex, sexual orientation, religion, or race, etc. Normally, it is a straightforward task to distinguish a facially discriminatory from a facially neutral practice.[188] The reason for this is that the protected class is easily identified by a single factor, be it the sex, sexual orientation, religion, or race, of the claimant. By contrast, the protected persons in victimisation cases are identified by what they have done: the protected activity. And in the instant cases, the protected activity requires two factors to be identified: (1) issuing proceedings and (2) for discrimination.[189] The challenged practice, triggered by just ‘issuing proceedings,’ is in part, facially neutral and in part facially discriminatory, as in these cases the nature of the proceedings is discrimination. So Huber was half right in identifying claiming reinstatement as the (facially neutral) ground of the retaliation, and Board of Governors was half right when identifying an age discrimination complaint (facially discriminatory) as the ground for the retaliation. The court in Huber omitted the facially discriminatory element whilst in Board of Governors it omitted the facially neutral element. For victimisation, the distinction between direct and indirect discrimination becomes ‘fuzzy at the border’[190] and analogies with director or indirect discrimination theory are not particularly rational or helpful.

B. Parallels with Disability-Related Discrimination - Victimisation by Proxy

A more appropriate and useful analogy can be made with disability discrimination, which has its own solution to ‘fuzzy border’ cases. Disability discrimination is prone to these ‘fuzzy border’ cases because frequently apparently neutral policies are directed at a manifestation of a disability, rather than the disability itself. Examples include a restaurant’s no dogs rule,[191] or the dismissal of any worker on long-term sick leave[192] or of postal workers who walk slowly, or of typists who produce misspelt letters.[193]

These examples compare with some victimisation cases, where the employer’s apparently neutral policy is directed at a manifestation of the worker’s protected act (proceedings) rather than the nature of the act (discrimination or harassment). These cases are also on the fuzzy border between direct and indirect discrimination.[194]

The solution for disability law is provided by an additional model of discrimination. The Disability Discrimination Act 1995 (DDA 1995) provides a hybrid theory of disability-related discrimination.[195] Under the Americans with Disabilities Act 1990, the US courts developed a similar hybrid model: direct discrimination by proxy.[196] Either variety comes with a justification defence.[197] In a similar way, some victimisation cases are more accurately analysed as protected act-related discrimination, or less awkwardly, victimisation by proxy. The
manifestation of the protected act is the issuing of legal proceedings, which is the target of the employer’s retaliatory policy. But the policy is related to the protected act, and so should attract scrutiny under the victimisation laws. Although this theory provides a neater analysis of these victimisation cases, its chief attraction, and perhaps practical benefit, is its justification defence.

(i) The Justification Defence

The next issue is defining the justification defence for this purpose. Under the DDA 1995, the defence, provided in Jones v Post Office,[198] is somewhat lax and anomalous, requiring only that the employer acted within a range of reasonable responses.[199] This laxity does not present such a problem in disability law because in most cases the employer would also have a duty to make reasonable adjustments, nonetheless, the Government plans to replace this defence with the standard ‘proportionate means of achieving a legitimate aim’ formula.[200] Therefore, the better path is to avoid the anomalous Jones formula. This still leaves a number of options.

The standard justification formula - used in equal pay and indirect discrimination cases - requires the employer to show that the policy is genuine (legitimate aim), appropriate and necessary (proportionate). This is known as the ‘Bilka test’.[201] The formula requires the aim to be ‘irrespective’ of the protected ground, eg sex or race etc.[202] Here, because the prime facie victimisation is related to a protected act, the defence cannot necessarily be ‘irrespective’ of the protected act - by its nature, the defence must have more leeway than usual. Nevertheless, it should be able to be applied with some coherence, as the ‘legitimate aim’ should be related to the ‘manifestation’ of the protected act, such as legal proceedings, whatever their nature. If the aim were related to the nature of discrimination proceedings (eg sex or race etc), then there should be liability under ‘direct’ victimisation, or even direct (eg sex or race) discrimination.

Take the scenarios where the employer has suspended a grievance process or denied a reference, with the stated aim of defending itself in the forthcoming trial. This response is likely to be genuine if it is no more than an invocation of a general policy that applies across a class of cases, not just discrimination ones. If it were invoked for the first time in a discrimination case, it would be suspicious.[203] The response should be appropriate. This rules out underhand or even illegal tactics (and so in part coincides with the honest and reasonable test.) Two American cases illustrate this. In Berry v Stevenson Chevrolet[204] a sales manager paid his salesman their due bonuses out of his own pocket, and later, when the manufacturers’ cheque arrived, he forged a signature and cashed it for himself. His employer discovered the forgery and formed a reasonable suspicion that the manager had committed a fraud. Later, the manager sued for racial discrimination. The employer retaliated by reporting the suspected fraud to the police. The manager was acquitted of any criminal wrongdoing and his claim for victimisation succeeded. Similarly, in Rochon v Gonzales,[205] the FBI was held to have victimised an agent (who had previously complained of racial harassment) by refusing, contrary to policy, to investigate death threats a federal prisoner made against the agent and his wife. The conclusion reached by the House of Lords in St Helens also accords with this analysis, as the employer acted inappropriately by ‘going public’.

The response should also be necessary to achieve the aim. An employer cannot try to win at all costs. The indications from Cornelius, Khan, and St Helens, are that the employer is permitted to do what the courts consider is normal legal practice. A further consideration at the ‘necessity’ stage is weighing the employer’s interests against the harm done, such as damage to the claimant, and/or the deterrent effect on the claimant and others.

This provides a neat, technically sound solution that restores some logic and certainty to the law. Its merit is that it would encompass all genuine and proportionate reactions to litigation, even those undreamt of, or not strictly related to defending the claim, such as in Huber.205a This would allow the courts - legitimately - to evaluate each defence on its merits according to known and predictable criteria.

There would remain less predictable borderline cases, such as where issues other than those litigated were also part of the grievance (Board of Governors).[206] On the face of it, a denial of a grievance process for the unlitigated matters would appear disproportionate. But an employer may show that it is impossible to untangle the facts relating to both matters and so a grievance process for the unlitigated matter could compromise its defence of the litigated matter. Here, at least the parties would know by what criteria the matter would be judged, unlike at the present, where, unpredictably, the matter could be turn on defences such as reacting to the existence rather than the commencement of proceedings, or not causing a detriment (varying standards), or acting honestly and reasonably.

The demerit of this general justification defence is that it would hand to the courts formally a discretion over policy and could legitimise other undreamt-of or pernicious arguments that have nothing to do with defending litigation. Indeed the Court of Appeal in St Helens accepted that the employer had acted honestly and reasonably by making its ‘effective threat’ to the claimants.206a Alternatively, an employer may argue it defends ruthlessly all
worker-litigation whatever its merit just to signal that it is not a soft touch, an aim barely related (if at all) to any one particular claim. Of course, such an aim defeats the ‘deterrent’ purpose of the victimisation law, but this purpose could become lost (as it was inter alia in St Helens206b) in a general justification defence. This prompts a notion of a narrower justification defence, confined to defending the claimant’s litigation. But this would exclude defences worthy of consideration, such as that in Huber, and so should be discarded.

A further objection to a defence rooted in Bilka is that the starting point for objective justification is the employer’s goal. As such, it reverses the principle advanced in Coote v Granada,[207] that the matter should be viewed from the workers’ perspective. So, for instance, an employer arguing that things said in a grievance hearing, or job reference, may prejudice its defence at trial, is doing so from its perspective. Such evidence may prejudice the employer’s defence, but it may not necessarily prejudice the trial or justice per se. This leaves the court with the discretion of deciding how much leeway the employer should be given, a situation once again leading to uncertainty. For instance, the leeway suggested in New York City Transit (employers should be ‘free to ... proceed aggressively’)[208] goes further than that suggested in Khan (‘honest and reasonable’). And in St Helens, honest and reasonable meant something quite different to the Court of Appeal than it did to the House of Lords. As such, it may be better to enact some more specific exceptions, in a similar way to the Genuine Occupational Requirements laid down for direct discrimination. Parliament should decide policy and expressly permit or outlaw specific reactions such as suspending a grievance process and withholding a reference. The general doctrine of the parent Directives would ensure that any exceptions should be genuine, and applied proportionately.

Thus, the optimum solution is to combine the objective justification defence with some specified examples of what is and what is not permissible. This allows Parliament to dictate policy while leaving scope for unpredicted or innovative defences to be assessed by common criteria.

(ii) One or Two Cause of Action?

There remains the question of whether victimisation by proxy should stand as the only cause of action for victimisation, or be in addition to the existing ‘direct’ victimisation provision. If it were the only option, every defendant would have a chance to justify its conduct, no matter how pernicious the retaliation. For the sake of clarity, it would be better to preserve the original provision - ‘direct victimisation’ - with the suggested amendments,[209] accompanied by guidance, similar to that provided for direct discrimination in the DDA 1995,[210] confining it to where the unfavourable treatment was in response to the protected act, rather than a manifestation of it.

A technical concern here is that it is hard to imagine a case like this (where the defendant’s motive included the discrimination element of the protected act) that does not amount also to a case of direct discrimination. For instance, an employer who singles out for victimisation a worker who complains of racial discrimination is acting on the ground of race, even where that worker complained on behalf of a colleague. This implies that a direct victimisation provision would be redundant. However, this coincidence will be less common in cases where direct discrimination must on the ground of the complainant’s sex, or gender reassignment, or age, or disability.[211] For example, an employer may deny a pay rise to a male worker for giving evidence in support of female colleague’s sexual harassment complaint. The victimisation was not on the ground of the witnesses’ sex and so could not amount to direct sex discrimination under the present definition. Thus, a direct victimisation provision should be preserved for these grounds at least, and to avoid any undreamt-of cases escaping liability, it would be better to preserve it in all the statutes.

8. RECOMMENDATIONS

1. Reframe the existing victimisation definition, with the qualification that it applies only to ‘direct’ victimisation. Guidance on this should be provided in a similar way to that provided for direct discrimination under the DDA 1995. In addition, the comparative element should be repealed as planned, but replaced with treats unfavourably, rather than the planned cause a detriment.

2. Enact an additional cause of action: victimisation by proxy, with a general justification defence based on the Bilka model, but with some defences specified as lawful or unlawful.
3. The purpose of the provisions should be expressed in the legislation, which is to ensure that workers can enforce the discrimination legislation without fear of deterrents. These workers include complainants, those who support them, and third parties who could be deterred from making or supporting complaints in the future. For example, where other workers could be deterred by the employer’s action, it is not necessary for the claimant to suffer tangible harm for liability.[212] This allows a tribunal to order that the employer cease the challenged practice, and provide costs for the claimant.

4. Replace the phrase any other detriment in the employment sections with a ‘catch-all’ phrase other employment-related treatment.

5. Consider reversing the time-bar rule in Robinson v Post Office.[213] and enact a rule that time begins to run in the normal way after the grievance process has been exhausted.[214]

9. CONCLUSION

The two scenarios, and the variations discussed, are representative of the victimisation dilemma. The US cases show that this is not a peculiarly British problem. At present, the constrained statutory formula provides no leeway for the employer’s position. Yet courts sympathetic to employers have dictated policy and, under a variety of guises, provides employers with a benign motive defence. This has produced an incoherent and technically flawed body of case law. In essence, the courts have produced an honest and reasonable defence (which does not appear in the legislation), and fallacious notions that reasonable conduct will rarely cause a detriment, or that there is a substantial difference between the bringing and the existence of proceedings. Further, there has been covert use of the flawed Kirby comparison. The fault does not lie entirely with the courts. They have been compelled to squeeze a broad range of cases into a single narrow statutory formula, which does not envisage the more subtle facts represented by the two scenarios.

At the heart of the problem is the constrained statutory formula and absence of policy expressed by Parliament. The law of victimisation requires redefining to recognise different classes of victimisation and provide leeway for employers to defend litigation, but under a predictable and controlled regime. The predictability would benefit employers and claimants alike.

This article poses more policy questions than it solves. But these questions are likely to require solutions in any case. It would be better for Parliament to do this than the courts to carry on ad hoc under a constractive statutory formula. Parliament can decide more precisely where the line should be drawn between the conflicting interests. It can research and single out particular scenarios and designate particular responses as lawful or unlawful. However, the overriding principle in this exercise must be the purpose of this law, which is to ensure that workers can enforce the discrimination legislation without fear of deterrents.

The tension, between this principle and an employer’s right to defend litigation, is not fully resolvable. But a new regime would at least ease the tension somewhat by defining policy and providing clearer and predictable boundaries.


6a See n 83 and accompanying text.

[7] See RRA 1976, s 4(2); SDA 1975, s 6(2) (although terms predominantly are governed by the Equal Pay Act 1970, s 1); DDA 1995, s 4(4); Religion or Belief Regulations 2003, reg 6(2); Sexual Orientation Regulations 2003, reg 6(2); Age Regulations 2006, reg 6(2); Fair Employment and Treatment Order 1998 (NI), art 19.


[9] Ibid. [76].


[22] [2001] ICR 1065. For RRA 1976, s 2, see text to n 2.

[23] See text to n 8.

[24] [2001] ICR 1065, [79].

[25] Ibid, respectively [31], [44].

[26] [1987] IRLR 141 (CA) 145-146. See text to n 40.


[28] Ibid, 1118-1119.


[31] EA 2002, Ch 1, Part 2, Sch 2.


[34] EA 2002, s 32 (2) & (3).


[36] This may prove a rather hollow victory if the tribunal holds that no compensation should be awarded, say where the employee entirely contributed to his dismissal. See Ingram v Bristol Street Parts (2007) UKEAT/0601/06/CEA; Sahatciu v DPP Restaurants (2007) UKEAT/0177/06/RN (both at www.employmentappeals.gov.uk); Alexander v Bridgen Enterprises [2006] IRLR 422 EAT

[37] SI 2004/752 reg 6(5).

[38] SI 2004/752, reg 7. This is also the case where ‘the grounds on which the employer took the action or is contemplating taking it were or are unrelated to the grounds on which he asserted that he took the action or is asserting that he is contemplating taking it’ (reg 7(1)(b)). Otherwise, the grievance procedure does not apply (reg 6(6)).

[39] See ‘Discipline and Grievances at Work’, available at www.acas.org.uk/media/pdf/o/q/H02_1.pdf). According to the Government, the lower standard was adopted because many employers (given as 48% of those going before tribunals) lacked any internal procedures, and so ‘Jumping straight from that situation to the best practice ... would be wrong and difficult for small business to cope with.’ Standing Committee F Hansard HC Col 140 [afternoon 2.20] (13 December 2001) (Alan Johnson).

[40] [1987] IRLR 141.
Ibid. 145-146.

145-146.

The Equal Employment Opportunity Commission, which is Federal enforcement body. See www.eeoc.gov.

957 F 2d 424 (7th Cir 1992).

Ibid, 429.

Ibid, 428.

Ibid., 431.

It is normally 180 days.

That is, either by litigation or by a charge filed with the EEOC.

97 F 3d 672, 677-678 (2nd Cir 1996).


Delaware State College v Ricks 449 US 250, 261 (Sup Ct 1980).

[55] [1987] IRLR 141.


Otherwise the comparator would identical to the claimant in every sense, a meaningless exercise.

97 F 3d 672 (2nd Cir 1996).

The comparator would identical to the claimant in every sense, a meaningless exercise.

97 F 3d 672 (7th Cir 1992).

That is, either by litigation or by a charge filed with the EEOC.

Ibid, 429.

Ibid, 428.

Ibid., 431.


[51] That is, either by litigation or by a charge filed with the EEOC.

[52] 97 F 3d 672, 677-678 (2nd Cir 1996).

That is, either by litigation or by a charge filed with the EEOC.

[53] In the US, it is normally 180 days.

[54] Robinson v Post Office [2000] IRLR 804 (EAT) [29]-[31]. Lindsay J in a speech later approved by the Court of Appeal (Apeologun-Gabriels v Lambeth LBC [2002] ICR 713, [16] and [24]), made it clear that delay because of an internal, or ‘domestic,’ process, was just one factor in the question of whether it was ‘just equitable’ to extend the time limit. Applied in Hanwicks v Royal Mail (2007) EAT (UKEAT/0003/07/ZT), and distinguished in Mouteng v Select Services Partner Ltd UKEAT/0059/08/DA (both available at www.employmentappeals.gov.uk). The position is similar in the US: ‘But entertaining a grievance complaining of the tenure decision does not suggest that the earlier decision was in any respect tentative. The grievance procedure, by its nature, is a remedy for a prior decision, not an opportunity to influence that decision before it is made. ... we already have held that the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods. Electrical Workers v. Robbins & Myer 429 US 250, 261 (Sup Ct 1980).

[55] [1987] IRLR 141.


[57] Otherwise the comparator would identical to the claimant in every sense, a meaningless exercise.

[58] 97 F 3d 672 (2nd Cir 1996).

[59] Ibid, 677.

[60] Text to n 50.


[62] [2001] ICR 1065, [72].

[63] [1989] QB 463, 483. See text to n 14.

[64] Despite its rejection in Aziz, there remains judicial sympathy for the Kirby comparator. When Khan was before the Court of Appeal, Lord Woolf, MR opined, ‘I would like to look favourably on ... [the] submission that you should ask whether the respondent was treated any differently from anyone else who brought proceedings.’ But he ‘felt driven’ by precedent and his interpretation of RRA 1976, s 2 to follow Aziz ([2000] ICR 1169, [24]). The House of Lords opted to follow Aziz, but not emphatically. Lord Nicholls stated, ‘There are arguments in favour of both approaches ...’ but he saw ‘no sufficient reason for departing from’ Aziz ([2001] ICR 1065, [72]). Only Lords Hoffman (ibid, [49]) and Scott (ibid, [72]) gave reasons for rejecting Kirby. See generally Michael Connolly, ‘Khan’s Fork: Victimisation and Discriminatory Intent’ [2002] 31 ILJ 161, 163-164.


[66] Ibid, 431. See text to n 49.


[68] See text to n 43.

[69] See text to n 41.

[70] See section 2 above and n 86 and accompanying text.

[71] [2007] ICR 841.

[72] See eg RRA 1976, s 2(1)(c).

[73] The distinction became even less credible when the employment tribunal in St Helens v Derbyshire made a third distinction: that the employer reacted not to the commencement or existence of proceedings, but to their ‘continuance’. (§ 4(e) of the ET Decision, cited [2007] ICR 841 (HL) [55].) See text to n 116.

[74] [2001] AC 501, 513 (HL).

[75] [2007] ICR 841 (HL)[24]-[27], [66], citing Case C-185/97 Coote v Granada [1998] ECR-I 5199, [24], where the
ECJ focused on the deterrent effect of the employer’s act on workers. In other words, the consideration was from the perspective of the worker, rather than the employer. See text to n 145.

[76] [2001] ICR 1065, [59].
[77] 97 F 3d 672, (2nd Cir 1996). See text to n 50.
[78] Ibid, 677.
[79] Ibid.
[80] [1989] QB 463. See text to n 14.
[81] Ibid, 483-485.
[82] Ibid, 485.

[83] Nagarajan v LRT [2000] 1 AC 501, 512. The decision is easily explained in the United States, because it is unlikely that the breach of confidence would be regarded as a protected act, permitting a linguistically neater - if substantially the same - solution: see Hochstadt v Worcester Foundation for Experimental Biology, 545 F 2d 222, 228, 230 & 233 (1st Cir 1976). In the UK, the courts have less latitude, as an act is unprotected only if it is a false allegation and not made in good faith. This makes it more difficult to separate the breach of confidence from the collecting of evidence. See Aziz [1989] QB 463, 479 (holding that the secret recording was a protected act) and Connolly, M, ‘Race, gender and mens rea’ [2001] 06/2 JO CIV LIB 150.

[84] [2001] ICR 1065, [77].
[85] Ibid, [29].
[86] ‘Employers, acting reasonably and honestly, ought to be able to take steps to preserve their position in pending proceedings without laying themselves open to a charge of victimisation.’ Ibid [31] (Lord Nicholls). Lord Mackay noted (ibid [44]) that the Chief Constable ‘acted in accordance with perfectly understandable advice.’ Lord Scott said (ibid [80]) that this approach still allowed for the case where the employer ‘singled out’ a worker for less favourable treatment but allowed ‘justice to be done to an employer who...would otherwise be placed...in an unacceptable Morton’s fork’. And Lord Hoffman observed (ibid [59]) that the Chief Constable’s act may have been ‘a reasonable response to the need to protect the employer’s interests as a party to litigation.’

[87] [2007] ICR 841.
[88] Ibid, [68]. See text to n 119.
[89] Ibid, [36].

[91] For a discussion of whether harm or detriment should be necessary for liability, see section 5C below.

[92] It was applied, post-St Helens, in Bird v Sylvester [2008] ICR 208, [10], where the Court of Appeal also repeated the inaccurate equation that honest and reasonable conduct cause no detriment.
[93] Noted in EEOC v Board of Governors, 957 F 2d 424, 428 (7th Cir 1992), text to n 48.
[94] Sections 703(a) (discrimination) and 704(a) (victimisation) (42 USC § 2000e-2(a) and 42 USC § 2000e-3). See text to n 5. Note however, that s 703(a) provides only a general rubric against discrimination. The notions of direct and indirect discrimination (known as disparate treatment and disparate impact) were developed by the federal courts, who, for disparate treatment, hold that ‘because’ incorporates a discriminatory motive. For a summary, see eg Teamsters v US 431 US 324 335 n15 (Sup Ct 1977). For the differences between the discrimination and victimisation provisions, see Burlington Northern v White 126 S Ct 2405, 2411-2415 (Sup Ct 2006).


[96] [1985] ICR 827 (CA).
[98] United Automobile Workers v Johnson Controls 499 US 187 (Sup Ct 1991). (Holding that decisions about the welfare of future children should be left to the parents.)
[99] Ibid, 199-200 (Blackmun J) emphasis supplied.
[100] [1990] AC 751 (HL), 774B-C; see also EOC v Birmingham City Council [1989] 1 AC 1156 (HL). See section 2D above.
[104] [2003] ICR 337 (HL).
An possible explanation is a fear that the but for test could raise liability for direct discrimination in cases that should be analysed as indirect discrimination (which carries a justification defence). See Lord Lowry (dissenting) in James v Eastleigh BC [1990] 2 AC 751, 775. For a technical objection to the but for test, see Price Waterhouse v Hopkins 490 US 228, at 241 (Sup Ct 1989) and more generally, Michael Connolly, Discrimination Law (Thomson: Sweet & Maxwell, London 2006) 68-72.


[2007] ICR 841 (HL).

Ibid, [59].

Known in the US as Bona Fide Occupational Qualifications.


[1980] QB 87, 98. Lord Denning noted that the House of Lords had refused leave to appeal for that reason.

In fact the employer argued, relying on Khan, that it was acting honestly and reasonably, an argument accepted by a majority of the Court of Appeal [2006] ICR 90, [49], [55], and [75]. For an argument that the conduct amounted to contempt of court see Michael Connolly, ‘Reinterpreting Khan: Easy Case Makes Bad Law’ (2007) 36 ILJ 364, 372.

See section 2C(i) above.

Ibid, [35], citing Ministry of Defence v Jeremiah [1980] QB 87 (CA) 104. The same objective/subjective formula is used in the US. However, it is applied more robustly. In Burlington Northern v White 126 S Ct 2405, 2414-2415 (2006), the Supreme Court noted that ‘personality conflicts at work that generate antipathy’ and ‘“snubbing” by supervisors and co-workers’ are not actionable.


[1980] QB 233. Followed in Schmidt v Austicks Bookshops [1978] ICR 85 (EAT), where Phillips J said the detriment had to be ‘something serious or important’ (at 87).


The only case law on the question is equivocal. See the Court of Appeal hearing of the indirect sex discrimination case of R v Secretary of State for Employment ex p Seymour-Smith [1995] ICR 889. According to ECJ case law at the time, a prima facie case was established by showing that there was a ‘considerable difference’ between the impact on men and women of the challenged measure. Neill J, speaking for the panel of five judges, held that ‘considerable’ was not ‘simply a difference which is more than de minimis’ (950), but cautioned, ‘It will be remembered that by article 2(1) of the Equal Treatment Directive the principle of equal treatment means that “there shall be no discrimination whatsoever on grounds of sex.” Accordingly, the weight to be attached to the word
“considerable” must not be exaggerated’ (952). The House of Lords upheld this part of the decision [2000] ICR 244. [136] [2002] ICR 318.
[137] Ibid, [65].
[138] [2007] ICR 841. See further text to n 116.
[139] See n 118.
[140] [2007] ICR 841, [68].
[141] St Helens v Derbyshire [2007] ICR 841 (HL) [24]-[27], [66], citing Case C-185/97 Coote v Granada ECR-I 5199, [24].
[142] 565 F 2d 1162, 1164 (10th Cir 1977).
[143] Save perhaps, in the unusual situation where a grievance process would have made no difference to the outcome. In context of unfair dismissal, see ERA 1996, s 98A(2): ‘[F]ailure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded ... as by itself making the employer’s action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure.’ See Hepple, B, and Morris, G, ‘The Employment Act 2002 and the Crisis of Individual Employment Rights’ (2002) 31 ILJ 245, 263-265. For a robust view that suspending a grievance process will not cause harm, see Lynch v Baylor 2006 US Dist. LEXIS 62408, 31 (ND Tex 2006), affirmed 236 Fed Appx 918 (5th Cir 2007). ‘Plaintiff suffered no harm from her inability to use Defendant’s internal grievance procedure. By filing an EEOC complaint, Plaintiff could secure all the relief available from the internal grievance plus additional relief not available through Defendant’s procedure.’
[144] [2007] ICR 841, [4], [9], [15], [18], [21], [23].
[146] Ibid, [24].
[148] Ibid, 345-346. Cited by the Supreme Court more recently in Burlington Northern v White 126 S Ct 2405, 2415 (Sup Ct 2006), where the majority stated that for liability the victimisation must have been such that it ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’ (Emphasis supplied.)
[150] Ibid, 676. In its most recent pronouncement on victimisation, the Supreme Court, in Burlington Northern v White 126 S Ct 2405, 2414-2415 (2006), stated that there is liability if ‘a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.’ In Carmona-Rivera v Commonwealth of Puerto Rico 464 F 3d 14, 20 (2006), the 1st Circuit took this ‘reasonable worker’ to include other workers. After citing White the court observed: ‘In addition, there is little indication that the actions of the defendants would have the chilling effect of deterring others’. This is also the view of the Federal enforcement commission, the Equal Employment Opportunity Commission: 2 EEOC Compliance Manual §8, 8-12,13 (1998). According to the Supreme Court, the EEOC’s interpretations ‘enjoy great deference’: McDonald v Santa Fe 427 US 273, 279 (1976); United States v City of Chicago 400 US 8 (1970); Griggs v Duke Power 401 US 424, 433 (1971). .
[151] 153 Lab Cas (CCH) P35, 171 (ND Cal 2006).
[152] Ibid, 12.
[153] [2001] ICR 1065, [60].
[154] Case C-185/97, [1999] ICR 100, [24].
[155] Ibid, 677: the order upheld was to (1) cease the practice of notifying prospective employers of its employees’ or former employees’ participation in protected activities; (2) remove from Hashimoto’s personnel files the negative character reference; (3) provide equal opportunities training to all supervisory staff; and (4) post copies of an EEOC notice throughout the camp. See further, cases cited within, ibid 677-678. Note that this remedy extends benefits all employees. By contrast, British tribunals can make orders that benefit the only the claimant: SDA 1975, s 65(1)(c); RRA 1976, s 56(1)(c); DDA 1995, s 17A92)(c); Religion or Belief Regulations 2003, Sexual Orientation Regulations 2003, reg 31(1)(c); Age Regulations 2006, reg 38(1)(c). Cf the Northern Ireland Fair Employment and Treatment Order, 1998, Art 39(1)(d).
[156] For the provisions, see n 155 above.
[157] See n 7 and accompanying text.
[158] See eg Gill v El Vino [1983] QB 425, where the less favourable treatment related to the parallel provisions for the supply of goods, facilities, or services under SDA 1975, s 29. These provisions outlaw discrimination by either refusing the service, or not providing it in the like quality, manner, or terms. The Court of Appeal, when allowing the plaintiff’s appeal, criticised the county court judge for confusing the simple question of whether the plaintiff was
refused a service, with an inquiry into whether she suffered a ‘detriment’ and thus held that a refusal to serve women at the bar, offering table service instead, was de minimis. The judge should have then asked a separate question as to whether the refusal was ‘less favourable’. at 431 (Everleigh LJ), 432 (Brightman LJ), 432 (Sir Roger Ormrod).


[161] [2001] ICR 1065, [53].

[162] Ibid.

[163] Ibid.

[164] Ibid, [53].

[165] [2007] ICR 841, [68].

[166] See eg Jiad v Byford [2003] IRLR 232, where the Court of Appeal and both tribunals below debated at length whether alleged workplace bullying was to the claimant’s ‘detriment’ without questioning if it were less favourable. If the claimant had alleged that bullying related to his terms of employment (see eg Reed v Stedman [1999] IRLR 299, [19]), there would have been no such debate.

[167] ‘... in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible.’ Nagarajan v LRT [2000] 1 AC 501, 513 (Lord Nicholls).

[168] See n 160 and accompanying text.


[170] Ibid, 2411.

[171] Ibid, 2414-2415. See n 150, above. It suggested a robust standard (excluding petty slights and personality conflicts normal to the workplace), but including a degree of subjectivity (with the worker’s particular circumstances taken into account), and primarily concerned with the deterrent effect (conduct that ‘dissuaded the reasonable worker’). On the facts, the Court upheld findings that a reassignment from forklift duty to standard track labourer tasks, and a 37-day suspension without pay (where the pay was restored at the end of the suspension), each amounted to less favourable treatment.


[173] [2003] IRLR 140 (EAT).

[174] Ibid [5].

[175] This should encompass work-related treatment delivered outside of work. See eg Berry v Stevenson 74 F 3d 980 (10th Cir 1996) and Rochon v Gonzales 438 F 3d 1211 (DC Cir 2006), (both digested text accompanying n 204). Employment-related victimisation, harassment and discrimination against ex-workers is covered by a free-standing provision codifying Case C-185/97 Coote v Granada ECR-I 5199 (see text to n 145): RRA 1976, s 27A; SDA 1975, s 20A; Religion or Belief Regulations 2003, reg 21; Sexual Orientation Regulations 2003, reg 21; Age Regulations 2006, reg 24; DDA 1995, s 16A. [176] Note that giving evidence in support of a claim is a protected act and so attracts protection from the victimisation provisions. See section 2B above.

[177] [2001] ICR 1065, [80]. See section 3 above.


[179] See n 61 and text to n 145. This may have been done to bolster the House’s reinterpretation of Khan, which was that the decision turned on the absence of a detriment suffered by the claimant. See text to n 140.

[180] See section 4C above.

[181] See the Board of Governors case, 957 F 2d 424, 428, n5 (7th Cir 1992), discussed text to n 43.

[182] A further policy consideration beyond the polarised debate between worker and employer comes from the prospective employer’s standpoint, who could suffer if not told of a worker’s failings. In one extreme example - the American Eagle case - an airline was not told of a pilot’s failings. He was hired and crashed their plane killing all 15 passengers. See RS Alders, E Peirce, ‘Encouraging Employers to Abandon Their ‘No Comment’ Policies Regarding Job References: A Reform Proposal.’ 53 Wash & Lee L Rev 1381 (1996). This may support a rule compelling employers to provide references for certain jobs, or more likely precluding the hiring without a reference, which would make the harm to the claimant more predictable.

[183] See text to n 108.


[185] Ibid, 1330.


[187] The court further observed that Huber’s policy did not adversely affect all Title VII plaintiffs, only those who
had been dismissed, alleged discrimination, and claimed reinstatement. The policy did not affect, for instance, anyone alleging discrimination in promotion or pay, or any dismissed worker seeking only damages. Explained in a rehearing 942 F 2d 930, 933-934 (5th Cir 1991).

[188] But see Lord Bridge in James v Eastleigh BC [1990] AC 751 (HL), 764, who held that as reference to ‘pensionable age’ was ‘convenient shorthand’ for sex discrimination. Similarly, the US Supreme Court has noted that the ‘absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect.’ International Union, UAW, v. Johnson Controls, 11 S Ct 1196, 1203-04 (Sup Ct 1991).

[189] Alternatively, this could be (1) reporting wrongdoing of (2) unlawful discrimination; or (1) giving evidence in support of a colleague (2) in that colleague’s discrimination claim; and so on.

[190] A phrase used by Cudahy J to describe the similar problem with disability discrimination law: McWright v Alexander 982 F 2d 222, 228 (7th Cir 1992).


[193] Affecting a worker respectively, with an artificial leg, or dyslexia. Examples provided by Lindsay J in Heinz v Kendrick. [2000] ICR 491 (EAT) [25].

[194] In Huber the manifestation was the claim for reinstatement.

[195] DDA 1995, s 3A(1).


[198] [2001] ICR 805 (CA)

[199] Pill LJ stated that where an employer made a ‘properly conducted risk assessment’ and then acted upon it, the question is whether that act fell within the ‘range of responses open to a reasonable decision-maker’ (ibid, [25]-[26]). Arden LJ stated that ‘material’ meant that there had to be a ‘reasonably strong connection’ between the reason (the worker’s disability) and the ‘circumstances of the particular case’ (presumably here, safe driving). No medical evidence was necessary to decide this point. ‘Substantial’ meant, she continued, that the reason ‘must carry real weight and thus be of substance.’ However, employers were not ‘obliged to search for the Holy Grail.’ And echoing Pill LJ, the employer must act within the band of responses open to the reasonable employer (ibid [37]-[38]). Kay LJ agreed with Pill LJ. See further, J Davies, ‘A Cuckoo in the Nest? A “Range of Reasonable Responses”, Justification and the Disability Discrimination Act 1995’ (2003) 32 Industrial Law Journal 164; Karin Monaghan, Equality Law (OUP, Oxford 2007) [6.157]-[6.158]; Michael Connolly, Discrimination Law (Thomson: Sweet & Maxwell, London 2006) 322-325.

[200] ‘Discrimination Law Review’ (n 3) §§1.46-1.53.


[203] It would also provide evidence of a discriminatory intent, suggesting a case of ‘direct’ victimisation, or even direct discrimination.

[204] 74 F 3d 980, 986 (10th Cir. 1996).


[206] See text to n 184.

[207] See text to n 43.

[208] Case C-185/97, [1999] ICR 100, [24], see text to n 145.

[209] See text to n 175.

[210] Explanatory Notes to the pre-consultation draft Regulations (now Disability Discrimination Act (Amendment) Regulations 2003 SI 2003/1673), § 32. For instance: ‘an employer, on learning that a job applicant has diabetes, summarily rejects the application without giving any consideration of the applicant’s circumstances or whether the person concerned would be competent to do the job (with or without a reasonable adjustment)’.

[211] This narrow definition of disability discrimination is under challenge as not complying with EU law: Coleman v

[212] Of course, a claimant will need to do this to claim damages.

[213] [2000] IRLR 804, [29]-[31].

[214] Recommended by Browne-Wilkinson J (as he then was): Bodha v Hampshire AHA [1982] ICR 200 (EAT), 205F–G.