Discrimination Law: Victimisation

Reinterpreting *Khan*: Easy Case Makes Bad Law

St Helens Borough Council v Derbyshire [2007] UKHL 16
House of Lords

1. INTRODUCTION

Britain's anti-discrimination legislation outlaws the victimising of persons who use that legislation. The legislation, by way of a number of statutes, covers discrimination regarding race, sex, disability, sexual orientation, religion or belief, age, and (for Northern Ireland) political opinion. *Victimisation* provides a separate course of action for anyone treated less favourably by reason that they brought a discrimination claim, or did something else by reference to the legislation.

The appeal *St Helens v Derbyshire* turned on whether placing public pressure on equal pay claimants to compromise their claim amounted to victimisation. The House of Lords took this opportunity to attempt to clarify the meaning of the 'honest and reasonable' defence afforded to employers by the House in *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065 (see (2002) 31 *ILJ* 161).

2. THE LEGISLATION

Victimisation is defined in section 4, Sex Discrimination 1975:

> (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—
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> (a) brought proceedings against the discriminator or any other person under this Act or the Equal Pay Act 1970 ... or
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> (b) given evidence or information in connection with proceedings brought by any person ... under this Act or the Equal Pay Act 1970 ... or
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> (c) otherwise done anything under or by reference to this Act or the Equal Pay Act 1970 ..., 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 give rise to a claim under the Equal Pay Act 1970 ...

Paragraphs (a) to (d) are known generally as 'protected acts'. Like other discrimination or harassment, victimisation is outlawed only for certain activities, in this case employment. Section 6, SDA 1975 outlaws discrimination by employers in recruitment, access to opportunities or any other benefits, dismissal, or by causing any other detriment. (Similar definitions are provided in the parallel legislation: Race Relations Act 1975, ss 2 (victimisation) and 4 (employment); Disability Discrimination Act 1995, ss 55 and 4; Religion or Belief Regulations 2003, regs 4 and 6; Sexual Orientation Regulations 2003, regs 4 and 6, Age Regulations 2006, regs 4 and 6; Fair Employment and Treatment Order 1998 (NI) SI 1998/3162, arts 3 and 19.)

So the elements appear to be: (1) the victim does a protected act; (2) the employer treats the victim less

favourably in recruitment, or access to benefits *etc*, or by dismissal, or any other detriment; (3) it did so 'by reason that' the victim did the protected act.

3. FACTS AND DECISION

In *Derbyshire*, 510 catering staff brought an equal pay claim. Most compromised, but 39 persisted. The employer then wrote directly to all 510 members of staff (bypassing their trade union and the claimants' solicitor) stating that should the claim succeed, the resulting cost was likely to cause redundancies. The employment tribunal found that the letter was 'effectively a threat', 'intimidating,' and 'directed against people who were in no position to debate the accuracy of the ... pessimistic prognostications'. Reasonable reactions could include 'surrender induced by fear, fear of public odium or the reproaches of colleagues.' (§4(d) of the ET Reasons, cited at §38.)

Consequently, the 39 claimants brought a separate claim of victimisation. They succeeded in the employment tribunal. The EAT agreed. But the Court of Appeal reversed. The House of Lords restored the employment tribunal's decision. (In the event, the 39 persisted and won six times the compromise offer. The price of a school meal increased by a third, and job losses were approximately 10%, with no redundancies. See [2004] IRLR 851, at §16 EAT.)

4. LEGAL BACKGROUND

At first sight, this attempt to bully litigants into abandoning their equal pay claim appears to be a rather obvious example of victimisation. That the case progressed to House of Lords can be explained by its complex legal backdrop. In *Chief Constable of West Yorkshire Police v Khan* ([2001] ICR 1065), Sergeant Khan brought proceedings for racial discrimination against his employer. Whilst his claim was pending, he applied for job with the Norfolk Police. His employer, the Chief Constable, acting on legal advice, refused to provide a job reference to 'protect his position in the discrimination claim'. It seems that the Chief Constable was minded to provide a negative reference and his lawyers feared that this could be used against him in the discrimination trial. 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.' (See §§31, 44, 59, and 80.) In coming to this conclusion the House relied on the distinction, made in *Cornelius v University College of Swansea* [1987] IRLR 141, at 145-146, CA, between a reaction to the *bringing* of proceedings (unlawful) and their *existence* (lawful). Of course, the employer in *Derbyshire* relied on this analysis.

However, the employment tribunal distinguished *Khan*, noting that the employer wanted the applicants to abandon their claims. It was reacting, 'if not to the commencement of proceedings, certainly to their continuance ...' (§4(e), cited at §55.)

The Court of Appeal, by a majority, reversed ([2006] ICR 90). Lloyd and Parker, LJJ, applied *Khan*, and after noting the distinction between the *bringing* and the *existence* of the proceedings, held that the 'honest and reasonable' test applied equally to attempts to compromise proceedings. Thus the tribunal's distinguishing of *Khan* was an error of law (at §§49, 55, and 75).

A unanimous House of Lords restored the decision of the employment tribunal, holding that the tribunal was entitled to come to its decision. Lord Bingham held that the tribunal was entitled to distinguish *Khan* because: 'The contrast with the present case is striking and obvious, for the object of sending the letters was to put pressure on the appellants to drop their claims.' (At §9.) Lord Hope interpreted the tribunal's reasoning as a finding that the employer's conduct 'while no doubt honest, could not be said to have been reasonable.' In other words, the tribunal had applied *Khan* properly and was entitled to its finding of fact (at §§17 and 28). Baroness Hale held that the correct test was whether the employer's conduct caused the claimant a 'detriment'. As the tribunal had addressed that question (see §4(d), above), its decision could not be disturbed (at §§36 and 39). Lord Neuberger came to much the same conclusion (at §§68 and 75), but added, in line with Lord Hope's reasoning, that the tribunal had found the employer's conduct did not satisfy the 'honest and reasonable' test (at §74). Lord Carswell agreed with Lord Neuberger.

5. THE REASONING OF THE HOUSE OF LORDS

Although the House was unanimous in the decision, the reasoning varied. Four law lords gave speeches, with Lord Bingham agreeing with them all (at §9), Baroness Hale (§42) and Lord Carswell (§43) agreeing with Lord Neuberger, Lord Hope agreeing with Lord Neuberger on the Court of Appeal's decision (§16), but not on the meaning of *Khan* (or *Cornelius*). However, Lord Neuberger agreed with Lord Hope's entire opinion (§71). From this it can be deduced that Lord Neuberger's is the leading judgment.

A. The 'Honest and Reasonable' Defence and 'Any Other Detriment'

In *Khan* Lord Nicholls said:

> Employers, acting honestly and reasonably, ought to be able to take steps to preserve their position in pending discrimination proceedings without laying themselves open to a charge of victimisation. ... An employer who conducts himself in this way is not doing so because of the fact that the complainant has brought discrimination proceedings. He is doing so because, currently and temporarily, he needs to take steps to preserve his position in the outstanding proceedings. (§31.)

Lord Neuberger stated that whilst this conclusion was correct, its judicial analysis and subsequent interpretation were 'not entirely satisfactory'. (§65.) He gave three reasons. First, no such defence is provided by the legislation. Second, it placed a 'somewhat uncomfortable and unclear meaning on the words "by reason that"'. (§65.) Third, it suggested that the matter should be judged from the point of view of the employer, when it should be 'primarily from the perspective of the alleged victim'. (§66.)

From this, Lord Neuberger reasoned, when considering the employer's defence or reaction to proceedings, 'a more satisfactory conclusion' was to focus on the element 'detriment' rather than 'by reason that'. (§68.) This test is objective: 'a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment' (citing Brightman, LJ, *Ministry of Defence v Jeremiah* [1980] ICR 13 at 31). Lord Neuberger speculated:

> 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. (§68)

Thus, the employer's attempts to settle became unlawful by 'going public'. Otherwise it seems normal private responses in discrimination litigation will not amount to victimisation.

Lord Neuberger's third reason for this change of approach was EU law, which applied in this case, but not in *Khan*, which pre-dated the Race Directive (2000/43). In the victimisation case, *Coote v Granada* ((C-185/97) [1998] ALL ER (EC) 865, at §24) 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 the employer.

Lord Hope took a similar line (§§24-27), but Baroness Hale alone was more trenchant, succinctly 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.' Baroness Hale reduced her analysis to the statutory elements (§36).

Lord Neuberger attempted the seemingly impossible task of finding a just result without reversing *Khan.* The trick was switching the 'honest and reasonable' defence to the element of 'any other detriment'. His logic was that honest and reasonable conduct by the employer equates to causing the worker no detriment. That rings true around the facts of *Derbyshire*, and especially where the employer acted *un*reasonably, but this will not always be so, as the facts of *Khan*, and some variations, demonstrate.

In *Khan*, if a reference were provided it would have been negative and *reduced* Sergeant Khan's chance of being selected. So it was arguable he suffered no detriment. But as Lord Hoffman said, the employment tribunal has jurisdiction to award compensation for injury to feelings, and so the courts have given the term 'detriment' a wide

meaning. Lord Hoffman adopted the interpretation of 'detriment' given by Brightman, LJ, in *Jeremiah* (above) and 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' ([2001] ICR 1065, at §53). 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.' (§14.)

Lord Neuberger said that applying his 'detriment' test to the facts of *Khan* would produce an 'identical' result (§68). But this overlooks the holding in *Khan* that the claimant *had* suffered a detriment (also at §§ 37 & 38). Not only is Lord Neuberger's opinion effectively overruling *Khan* on this point, it is ignoring the two reasons underpinning that decision, that the legislation envisages liability purely for injury to feelings, and the dictum of Brightman, LJ in *Jeremiah.*

It also overlooks the fact that the Chief Constable did more than merely abstain from providing a reference. He wrote to the Norfolk Police explaining why: that Khan had brought industrial tribunal proceedings. That is enough to dissuade many employers from selecting a candidate, and even if that did not happen in Khan's case, a reasonable worker would be entitled to fear so. This alone would cause a detriment. (See the US case *Rutherford v American Bank of Commerce*, 565 F 2d 1162, at 1164 (10th Cir 1977).)

Further, in many cases, withholding a negative reference will cause the claimant a detriment simply because he will present an incomplete application, excluding him from any selection process.

Finally, Lord Neuberger's opinion confines its logic to the unusual situation where a reference would be negative. Where a reference would be positive (or neutral), its withholding is even more likely to cause a detriment. Of course, the employer may be withholding the reference for the same ('honest and reasonable') motive as Khan's employer: a positive reference could be used against the employer in the principal proceedings (see the US case, *Sparrow v Piedmont* 593 F Supp 1107, at 1112 (MDNC 1984)).

In these scenarios, an honest and reasonable response is likely to cause a detriment. They demonstrate, contrary to Lord Neuberger's opinion, that 'honest and reasonable' conduct cannot be equated with causing no detriment.

Moreover, there are reasons why an 'honest and reasonable' defence should be purged from *any* element of victimisation. First and most obvious, the reasons given by Lord Neuberger for ruling out an 'honest and reasonable' defence for the causative element (it does not appear in the legislation, and the matter should be viewed from the worker's perspective) apply as cogently to the element of detriment.

Second, many employer responses could be characterised, not as 'any other detriment', but as discrimination in relation to 'access to benefits' under say, SDA 1975, s 6(2)(a). This would include the suspension of a grievance procedure, transfer rights, or indeed, the withholding of a reference (as Lord Mackay found in *Khan*, at §38). In these cases, the honest and reasonable defence, logically tied as Lord Neuberger would have it, to the element of detriment, becomes redundant.

Third, such a defence has been ruled out of the similarly formulated definition of direct discrimination (for 'protected act' read the protected ground, such as race, sex, age *etc*). A benign motive defence for direct discrimination would do catastrophic damage to the aims of the legislation. It would be a good defence for an employer to show that he discriminated not because he intended to do so but (for example) because of customer preference, or to save money, or avoid controversy (see *R v Birmingham City Council, ex parte Equal Opportunities Commission* [1989] 1 AC 1156, at 1194; *R. v Commission for Racial Equality Ex p. Westminster City Council* [1985] ICR 827, CA). In *Nagarajan v LRT* [2001] AC 502, HL, Lord Steyn asserted that 'victimisation was as serious a mischief as direct discrimination' and 'common sense' suggested the same approach (§79).

Fourth, another, albeit lesser, danger associated such a defence in victimisation is that a tribunal may inadvertently broaden the defence by inverting the question and demanding that for liability the employer must have acted dishonestly *and* unreasonably (see *Chief Constable of Norfolk v Arthurton* (2006) UKEAT/0436/06/DM, at §25. See Employmentappeals.gov.uk.) Here, the employer need only show that its response was say, not dishonest even though it was unreasonable, (and less likely, vice versa). For instance, an employer may threaten to expose a claimant's extra-marital affair should she persist with her claim; or report the worker's suspected fraudulent conduct it to the police only after the worker instigated discrimination proceedings (see the US case *Berry v Stevenson Chevrolet* 74 F 3d 980, at 989 (10th Cir 1986)). Such responses may be characterised as unreasonable, but not necessarily dishonest.

There is no doubt that the House of Lords is driven by a certain sympathy for the employer's dilemma, even though, as it acknowledged, it is the worker's perspective that counts. After all, a worker may risk a frozen career for bringing proceedings, for several years if it goes to appeal. In the United States the courts have avoided any 'benign motive' defence for much the same reasoning given above (see *EEOC v Board of Governors* 957 F 2d 424 (7th Cir

1996)). The stateside approach to this difficulty is to take a more robust view of what constitutes less favourable treatment. In *Burlington Railway v White* 126 S Ct 2405 (2006), the Supreme Court stated that the victimisation provision 'protects an individual not from all retaliation, but from retaliation that produces an injury or harm.' And this meant that '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.' The Court emphasised that context matters: 'A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children.' However: 'An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience.' The Court noted that 'personality conflicts at work that generate antipathy' and 'snubbing' by supervisors and co-workers' are not actionable. (At 2414-2415.) 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.

B. The Distinction Between the Bringing and the Existence of Proceedings

The decision in *Khan* relied on this distinction, first aired in *Cornelius v University College of Swansea*. The speeches in *Derbyshire* did not question this distinction, with Lords Bingham (who presided in *Cornelius*) and Hope citing it with approval (see §§9, 21 and 23). In *Cornelius*, the claimant brought sex discrimination proceedings against her employer. Pending the outcome the employer refused her a transfer request and access to the grievance procedure. Consequently she brought a separate claim for victimisation. The Court of Appeal rejected her claim *inter alia* because:

> 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. (At 145-146.)

The futility of this distinction is realised by adding a second protected act to the claim: under SDA 1975, s 4(1)*(c)* (see above), the claimant had 'otherwise done anything under or by reference to this Act'. As well as having *brought* proceedings, she was 'otherwise' *maintaining* them in existence. The fragility of the distinction was exposed when the employment tribunal in *Derbyshire* made a *third* distinction: that the employer reacted not to the commencement or existence of proceedings, but to their 'continuance'. (See §4(e), above.)

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 (at 71): '... in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible.'

This distinction was devised with the employer's perspective in mind. Now that the perspective has shifted to the worker, the distinction serves no useful purpose and should be disregarded.

6. DETERRING OTHER WORKERS

A broader issue was left untouched in this judgment. For policy reasons, it is arguable that the victimisation provisions should cover the deterrent effect of the employer's reaction on other workers. (A 'general deterrent' policy has been adopted expressly by some Circuits in the United States: *eg Hashimoto v Dalton 118 F 3d 671 (9th Cir 1997).)* As noted above, the House of Lords in *Derbyshire* took recourse to EU law, in particular *Coote v Granada*, to switch the focus to the perspective of the worker. It is arguable that *Granada* goes further than that.

The ECJ's focus in *Granada* was on the 'deterrent' effect of the employer's reaction, suggesting that an employer could be liable for deterring workers generally, even if the reaction caused no detriment to the claimant. Take *Khan* again. Even if it could be said (as the House in *Derbyshire* asserted) that Sergeant Khan himself suffered no detriment, the act of withholding the reference still sent a signal to other workers (most of whom presumably would receive positive references) making them think twice before complaining of discrimination. That would, in the words of the ECJ, 'jeopardise implementation of the aim pursued by the Directive'. (§24.) The decision in

Granada supports this interpretation. Mrs Coote sued her employer following her dismissal for being pregnant. After those proceedings were dead, the employer refused to give her a reference and Mrs Coote sued again, this time for victimisation. The question referred to the ECJ was whether victimisation provisions should protect *former* employees. Predictably, the ECJ ruled that they should. However, although the refusal of a reference may have caused her a detriment, it could not be said to have *deterred* her, because at the time her pregnancy discrimination claim was complete. So the ECJ's concern must have been for the broader deterrent effect of the employer's act. As the House chose to revisit the facts of *Khan*, a comment on this issue would have been welcome.

7. CONTEMPT OF COURT

As Bingham, LJ (as he then was) observed in *Cornelius*, the victimisation provisions had an 'obvious although partial analogy to the law of contempt'. (At p 145.) In addition to victimisation, it is arguable that this case was so serious that the employer was in contempt of court by placing public pressure on the claimants to abandon their claim.

The relevant contempt here is conduct interfering with the administration of justice, which can be unlawful at common law, or under the Contempt of Court Act 1981, which applies strict liability, but only to publications. The letters sent by the employer were 'publications' for this purpose.

The High Court or Court of Appeal is empowered to punish for contempt where the contempt is in connection with employment tribunal proceedings (Civil Procedure Rules 1998 SI 1998/3132, Sch 1, rule 52.1(2)(a)(iii); *Peach Grey v Sommers* [1995] ICR 549, at 557-559; *Harris v Lewisham & Guy's NHS Trust* [2000] ICR 707, at §§ 17 & 32, CA; or CCA 1981, s 19).

The Contempt of Court Act 1981, section 7, limits the persons who may bring proceedings to the Attorney-General, or anyone with his consent, or by the court with jurisdiction over the contempt. At common law, there are examples of individuals with sufficient interest instigating contempt proceedings with punishment as the goal (see *Connolly v Dale* [1996] QB 120, at 125; *Raymond v Honey* [1983] 1 AC 1, HL; *In Re the William Thomas Shipping Company* [1930] 2 Ch 36.) Precedent suggests that even if the Attorney-General or a court failed to act, someone in the position of Ms Derbyshire could instigate common law contempt proceedings against her employer.

A modern and flagrant example of contempt occurred in *Attorney-General v Hislop* [1991] 1 QB 514. Here the satirical magazine *Private Eye* published defamatory articles about Sonia Sutcliffe (wife of the 'Yorkshire Ripper') suggesting that she knew her husband was a murderer and gave the police false alibis. Ms Sutcliffe sued *Private Eye* for libel. Before the trial, *Private Eye* repeated the allegations pointing out that Ms Sutcliffe would be cross-examined on them. The Court of Appeal held that the articles were designed to pressurise Ms Sutcliffe to abandon her claim and as such they amounted to contempt at common law and under the 1981 Act. McCowan, LJ stated that there is:

> [A]ll the difference in the world between a private discussion between lawyers aimed at bringing to Mrs Sutcliffe's attention that she might be cross-examined about certain matters and holding her up to public obloquy in terms neither fair nor temperate but of abuse, which is what I conclude without hesitation occurred in this case. (At 535.)

And Nicholls, LJ, observed: 'There is an enormous difference between bringing home to an opponent the strength of one's own position and the weakness of his, and vilifying him in public.' (At 530.)

In many ways *Derbyshire* and *Hislop* are alike. There was private pressure to abandon the proceedings. There was public pressure (*a fortiori* on daily basis, in person from work colleagues). Third, there was public 'odium' or 'obloquy'. The difference is that the letters were not misrepresentations (in the ordinary legal sense of misstatements of existing fact), even though the forebodings never materialised. It should be noted though, the editor's belief at the time that the allegations were true was considered irrelevant to liability (526-527 & 531). More importantly, the emphasis in *Hislop* was not on the untruthfulness of the articles, but on their *effect* upon the claimant (526), suggesting that untruthfulness is not a necessary ingredient for contempt. In *Hutchison v AEU* (1932) *The Times* 25th August, p 4, the *Daily Worker* attacked a litigant who was seeking an injunction to prevent his removal as union president, stating that union members 'will no doubt have no mercy upon those who seek to upset working-class decisions in the capitalist courts.' Goddard, J found the newspaper guilty of contempt for the pressure it placed on the litigant as well as possible witnesses. The attack contained no misrepresentations.

Finally, for the Contempt of Court Act 1981 only, section 5 contains a 'defence' where a publication is in the public interest and made in good faith. In *Hislop*, the Court of Appeal held that as the articles were intended to dissuade Ms Sutcliffe from pursuing her claim, they could not have been made in good faith. The same logic applies

here. The sole reason for the sending out the letters was to pressurise the claimants into abandoning their equal pay claim.

Any conduct coming close to one of the most flagrant and notorious contempts of modern times must risk being in contempt of court. The employer's conduct in *Derbyshire* did that. The employer should consider itself fortunate that this went unnoticed by the courts and the Attorney-General.

8. CONCLUSION

This was an easy case to decide, but in reconciling the decision with an 'honest and reasonable' defence, the House of Lords perpetuated a bad law and fell short of offering clarity and guidance on the meaning of victimisation. This obvious and flagrant case of victimisation (conceivably amounting to contempt) took several years and a House of Lords decision to decide because of the 'honest and reasonable' defence postulated in *Khan*, which encouraged the employer to think it could bully the claimants with impunity. The House did little to lay the defence to rest, as Baroness Hale alone advised. Instead, it transferred it to another element, whilst at the same time articulating reasons why it has no place in the law of victimisation. The only useful guidance suggests that normal private negotiations to compromise should be lawful. Any broader guidance, that honest and reasonable conduct by the employer will not cause a detriment, is off little use, because 'honest and reasonable' conduct will not necessarily equate with causing no detriment.

The better view is to follow Baroness Hale's approach, and do no more than apply the plain words of the legislative formula, bearing in mind ECJ policy. As the House itself implied, an 'honest and reasonable' defence - based as it is on the employer's perspective - would not survive a challenge in the ECJ, and so eventually it should perish. As domestic employment discrimination legislation falls within EU jurisdiction, tribunals should feel free to follow Baroness Hale's advice and disregard employer's attempts to introduce this defence into the victimisation provisions.

MICHAEL CONNOLLY
University of Westminster