From Equal Treatment to Appropriate Treatment: What lessons can Canadian Equality Law on reasonable accommodation teach the UK?

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Background

Our equality laws have become extremely complex. It is widely believed that there is a need to simplify them, particularly now that the Government is moving towards setting up a single Commission for Equality and Human Rights. The key issues for the UK concern the form that any such single consolidated equality legislation should have and what should be its content.

In this paper I shall seek to draw some conclusions for this debate from experience in Canada. In my view it provides some very interesting comparisons. Thus Canada has unified Commissions, and a unified equality law. Its equality law has been transformed since the introduction of the Canadian Charter of Rights and Freedoms in 1982, the Canadian Charter having provided much the same stimulus for reform in Canada as EU legislation is doing for the UK.

Drawing on Canadian experience, I will look in particular at two questions:

- Could the concept of *reasonable adjustment* be used for other grounds of discrimination and not limited to the field of disability? and
- Would the assessment of the impact of some impugned act or omission on a person's *dignity*, help either to determine what reasonable adjustment should be made and/or to resolve the inevitable clashes that arise between different equality rights?

Clearly there must be no reduction in the strength of the current reasonable adjustment provisions in relation to disability if the concept were widened to apply other grounds for discrimination. With this in mind, I will consider also whether *reasonable adjustment* provisions would be useful for *some,* rather than all of the current prohibited grounds. More specifically I shall consider whether *reasonable adjustment*, which certainly works particularly well in relation to disability, does so because, unlike other grounds such as gender, it is a non-symmetrical ground for discrimination.

Constraints

There are constraints on the range of options for the reform of UK equality law in this area. Obviously any change, whether through primary or delegated legislation, would require Parliamentary approval. However the most significant restraint is the need to comply with European law and in particular the terms of the various EC Directives that define what unlawful discrimination is. These Directives have to be adhered to until changed and further change is currently unlikely although the operation of the Directives are periodically reviewed by the European Commission.

The nature of this constraint is best explored by reference to the Employment Framework Directive[1] which makes specific provision for reasonable accommodation in relation to disabled people in Article 5, which says 'In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities reasonable accommodation shall be provided…'

The assertion in this Directive that reasonable accommodation is necessary 'to guarantee compliance with the principle of equal treatment' in the case of disabilities may be taken to *suggest*, at the least, that it may assist compliance with the principle of equal treatment in other cases. As I shall show, such a reading of the Employment Framework Directive would be consistent with the approach taken in Canada, where reasonable accommodation has developed into a very useful tool for securing substantive equality. The aim of securing 'full equality in practice' provides another important link with European law.

These 'full equality in practice' provisions may be found in a number of different places in European Law.[2] Thus, in Article 7 of the Employment Framework Directive it is said that

> *With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds' covered by the Directive.*

Plainly disabled persons may suffer specific disadvantages linked to their disability but so also may those of a special race or ethnic origin, or a particular age, or gender and so on. Providing *reasonable accommodation* in such a case would seem to be lawful to the extent that it was consistent with Article 7 by preventing or compensating disadvantages linked to the relevant ground. Yet this apparent licence is better seen as a qualified constraint. At present the interpretation by the European Court of Justice, of what is permissible positive action with a view to ensuring full equality in practice, is quite restricted.[3] However, while the Court of Justice has been relatively restrained, Advocate – General Poiares Maduro has provided reason to believe that this qualified constraint is to a degree pliable. He has said[4] that the provisions of Article 141(4) EC, which are very similar to those of Article 7 of the Employment Framework Directive, are capable of being read

> *49. … as meaning either that the need to compensate for past or existing social inequalities can justify favouring individuals in those groups at the expense of discriminating against members of the over-represented groups or that the adoption of measures of a compensatory type is necessary in view of the fact that the non-discriminatory application of the current societal rules is structurally biased in favour of the members of the over-represented groups.*[5] *The first reading makes individuals' rights not to be discriminated against*

[1] Directive 2000/78/EC

[2] See also Article 5 of the Race Directive, 2000/43/EC which makes similar provision in relation to race, Article 141(4) and also Article 2(8) of the Equal Treatment Directive 76/207/EEC as amended by European Parliament and Council Directive 2002/73.

[3] See Case C-319/2003 *Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation Nationale and Ministre de la Justice* judgment 3rd July 2004.

[4] *See Briheche.*

[5] This is at the core of the critiques made of formal equality which is said to reinforce discrimination existing in society.

subordinate to achieving equality between groups which is justified by the aim of compensating the members of the under-represented groups for the past discrimination to which they were subject. Such a reading is hardly compatible with the priority which the Court has given to equality of opportunities and to its traditional understanding of the general principle of equal treatment.

50. The second reading may however be more easily reconciled with the principle of equal treatment as interpreted and applied by the Court. According to this view, equality of results is not the goal. Nor do the aims of positive discrimination necessarily justify discrimination between individuals. What is believed is that measures often associated with substantive equality which compensate for the under-representation of certain groups (for example quotas, automatic preferences) are the only ones that can effectively bring about long-term equality of opportunities. Measures favouring the members of certain groups are therefore not conceived as a means to achieve equality among groups or equality of results but, instead, as an instrument to bring about effective equality of opportunities. The purpose of compensatory measures of this type becomes that of re-establishing equality of opportunities by removing the effects of discrimination and promoting long-term maximisation of equality of opportunities. [6] *Compensation refers in this case to reinstating a balance between the opportunities given by society to the members of the different groups.*

51. To base the acceptance of compensatory forms of positive discrimination on equality of opportunities and not on equality of results would still make equality among individuals prevail over equality among groups but would, in turn, impose certain limits and conditions on the forms of compensatory positive discrimination that could be acceptable ... The acceptability of such forms of positive discrimination would, for example, be closely linked to its transitional nature. Otherwise, such forms of positive discrimination may, in the long run, create entrenched rights even when the original conditions justifying them are no longer present. As a consequence, the purpose of creating long-term effective equality of opportunities would be compromised. Other conditions may be linked to the nature and extent of the burden imposed on the individuals of the over-represented group, the likelihood that increased prospects for the members of the under-represented group can lead to real equality of opportunities and the requirement to show under-representation not only in general but in the specific sector or institution subject to forms of positive discrimination.

The Advocate-General's emphasis on the transitional nature of positive action is entirely orthodox but is not really appropriate to an assessment of what reasonable adjustment must be made in a specific case, since reasonable adjustment provisions are an individually tailored response to an individuals specific needs rather than a

[6] The Advocate – General added 'Two main reasons can be given in this regard. First, positive discrimination is conceived as simply improving the prospects of victims of discrimination to the point where they would have been without any such discrimination. Second, positive discrimination is supposed to be the only effective means to generate the right incentives for the under-represented groups to invest in human capital (breaking the cycle of discrimination) and to address market failures (social monopolies and information costs) that, by reinforcing current societal discrimination, actually prevent the best persons from being chosen. It should be noted that the causality between these reasons and the effects of positive discrimination is often contested and the subject of many alternative strategies. It is not, however, for the Court to assess the merits of these policies but only whether, and to what extent, they can be regarded as compatible with the principle of equal treatment.'

group response. However the emphasis on need as opposed to wishes is apt. So it may be said that otherwise there is much in this statement of the purpose and limits to European 'full equality in practice' provisions which is transferable to the reasoning for requiring reasonable accommodation in disability cases.

So it seems that though there are constraints inherent in the Court of Justice's approach to 'full equality in practice' the positive action provisions in European discrimination law are not wholly inconsistent with a wider use of reasonable accommodation beyond disability.

Canadian Equality Law

Canada makes much use of *reasonable accommodation* in its equality jurisprudence. As a federation of provinces it has a rich seam of equality law drawing on legislation at both the federal and the provincial levels. It places its equality laws in human rights legislation; at the federal level this is in the Canadian Charter of Rights and Freedoms ('the Charter') and the Canadian Human Rights Act 1985 ('CHRA'). While the Charter operates to limit all provincial and national legislation[7], the CHRA has a limited application to federal institutions and federally *governed* institutions such as the federal government, banks, airlines and the Canadian armed forces. Beneath the federal level, each province has a Human Rights Act and/or Charter that specifically enacts equality law. There are slightly different provisions from province to province.

The most important Articles of the Charter are 1 and 15. Article 1 is as follows: -

> *The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

Article 15 (1) says:

> *(1)Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*
>
> (*2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability***.**

So Article 15, while particularising some grounds, is also open-ended. So far in total eleven grounds of discrimination have been recognised; those grounds, which are additional to the current grounds enacted into UK law, are age, marital status, family status and conviction for an offence for which a pardon has been granted, though this last ground only applies to employment cases.

[7] See *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3.

The same provisions and defences apply to each ground for discrimination; these include a duty to make *reasonable accommodation* for the person in question, to the point of *undue hardship*. *Bona fide occupational requirements* or *bona fide justifications* can be taken into account, although, in practice, their application varies depending on the discriminatory practice in question.

The Canadian Human Rights Act 1985, of course operates under the Charter, in its application to public authorities. The CHRA sets out its purpose and scope in Article 2 as follows:

> *The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.*

As in Europe, human rights legislation, Canadian jurisprudence treats these equality laws as being fundamental in nature with a consequential primacy over other legislation. This quasi-constitutional status has led the Courts to say that this legislation must be interpreted in a 'purposive' way.[8]

The concept of discrimination in Canadian Law

The Supreme Court of Canada has developed a concept of discrimination which is not exactly the same as that used in Europe. Thus, in investigating a potential breach of the discrimination case, Canadian law asks three key questions:

- Does the law impose differential treatment between the claimant and others, in purpose or effect?
- Are one or more of the enumerated[9] or analogous grounds of discrimination the basis for the differential treatment?
- Does the law in question have a purpose or effect that is discriminatory within the meaning of the equality guarantee?[10]

The last of these questions has provoked the most interest, and indeed, controversy. It has been explained as being a question as to whether the identified differential treatment, discriminates by imposing a burden upon, or withholding a benefit from, the claimant, in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting, the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian Society, equally deserving of

[8] E.g *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 – para 1 – ' a purposive and contextual approach to discrimination analysis is to be preferred, in order to permit the realisation of the strong remedial purpose of the equality guarantee, and to avoid the pitfalls of a formalistic or mechanical approach.'

[9] That is to say the grounds specifically enumerated in the Charter.

[10] *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497.

concern, respect and consideration.[11] Rather more succinctly, it is said that this depends on whether the claimant's *dignity* has been imperilled by the action in question.

It is notable from this definition, that the focus of Canadian discrimination provisions, is on those who are subjected to the stereotypical view that they are less capable or worthy of recognition because of their presumed group or personal characteristics, their 'label'. The key point to note is that, unlike UK discrimination law in respect of sex, race, sexual orientation or religion or belief, the Canadian concept of discrimination is not essentially symmetrical because the definition of discrimination focuses or assumes a history of disadvantage.

Reasonable accommodation

This approach provides a fertile territory for the development of the concept of reasonable accommodation. Canadian equality law uses *accommodation* to determine how a discriminatory situation should be resolved. *Accommodation* encompasses the adjustment of a rule, practice, condition or requirement, so as to take into account the specific needs of an individual or group. Canadian law acknowledges that the rights and freedoms of the complainant are inseparable from the rights and freedoms of others and the common well being. Consequently a consideration of the relationship between those different persons' rights and freedoms is required.

In *Ontario Human Rights Commission (O'Malley) v Simpson Sears* the Supreme Court explained this point very succinctly as follows:

> *In any society the rights of one will inevitably come into conflict with the rights of others. It is obvious then that all rights must be limited in the interest of preserving a social structure in which each right may receive protection without undue interference with others*[12].

This limit to the interference that the exercise of fundamental rights might otherwise impose has led to the development of the principle that individuals have the right to have their needs *accommodated* to the point of *undue hardship* to other persons. Thus in section 15(2) CHRA there is an express requirement that in order to establish the defences of *bona fide occupational requirement* and *bona fide justification* it must first be established that further accommodation of the needs of the individual (or class of individuals) affected would impose *undue hardship* on the person who would have to accommodate those needs.

Undue hardship is the only check on the duty to accommodate imposed on the employer or service provider. However by merely describing the limits of the duty to accommodate in this way, the actual boundary at which undue hardship occurs is not illuminated much. Guidance from the courts has developed this concept extensively, providing European readers with a much better 'feel' for the reach of this new concept.

[11] Ibid.
[12] [1985] 2 SCR 536, p 554-555.

The parameters were first set out in 1990 in *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*[13] a case concerning a dairy worker who wished to take off Easter Monday as a religious holiday. The Court concluded that a reasonable accommodation should be made for the complainant. In forming its judgement the Court set out a non-exhaustive list of criteria to be considered, which included financial cost, disruption to a collective agreement, problems of morale for other employees and the interchangeability of workforce and facilities.

In an interesting passage the Court noted:

> *the size of the employers operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations. This list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case*[14].

Since 1990 the test has been narrowed somewhat; now employers and service providers must demonstrate that they have made every effort to accommodate an employee and that it would be impossible to modify or eliminate a particular requirement without incurring undue hardship.

The utility of expressing the limit to the non-discrimination obligation in this way was exemplified in *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union* (known as the *Meiorin* case).[15] This case concerned a woman, who having worked as a fire fighter for three years, was subjected to a new aerobic assessment.

In the assessment she was required to demonstrate that she could run 2.5 kilometres in 11 minutes. However she missed the mark by 49.4 seconds. Unsurprisingly, these new aerobic requirements for fire fighters were shown to be sex discriminatory. Quite simply as a generality, it was clear that women could not physically achieve the same aerobic rating as men. The question then was whether the new rules on aerobic capacity could be shown to be a genuine occupational requirement, if not they had to be altered to accommodate this difference.

In its judgment the court set out the test for establishing whether a particular requirement is a bona fide occupational requirement. It held that the employer must show that

- The requirement in question, was adopted for a purpose rationally connected to the performance of the job,
- This standard was adopted in an honest and good faith belief that it was necessary for the fulfilment of a legitimate work related purpose, and
- The standard was reasonably necessary to the achievement of a legitimate work-related purpose.

[13] [1990] 2 SCR 489
[14] Ibid para 6.
[15] [1999] 3 SCR 3.

The last point was key. Thus the court held that to show that a requirement was necessary, an employer had to show that the accommodation of the individual in question was impossible without imposing undue hardship on the employer.

This test seems to have become stricter more recently. Thus employers now have to show that

- They have made every possible effort to accommodate the employee and
- It would be impossible to modify or eliminate the requirement in question without incurring undue hardship.[16]

This approach is also taken in cases concerning the provision of goods, facilities and services: *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights) (also known as Grismer)*[17].

Grismer concerned an application for a driving licence by a man having only limited peripheral vision. The adjustment required was that he should be tested to see whether this affected his ability to drive safely, rather than automatically refusing him a driving licence. The court said

> *'Accommodation' refers to what is required in the circumstances to avoid discrimination. Standards must be as inclusive as possible. There is more than one way to establish that the necessary level of accommodation has not been provided. In Meiorin, the government failed to demonstrate that its standard was sufficiently accommodating, because it failed to adduce evidence linking the standard (a certain aerobic capacity) to the purpose (safety and efficiency in fire fighting). In Mr. Grismer's case, a general connection has been established between the standard (a certain field of peripheral vision) and the purpose or goal of reasonable highway safety. However, the appellant argues that some drivers with less than the stipulated field of peripheral vision can drive safely and that the standard is discriminatory because it does not provide for individualized assessment. Failure to accommodate may be established by evidence of arbitrariness in setting the standard, by an unreasonable refusal to provide individual assessment, or perhaps in some other way. The ultimate issue is whether the employer or service provider has shown that it provides accommodation to the point of undue hardship...This case deals with no more than the right to be accommodated. It does not decide that Mr. Grismer had the right to a driver's licence. It merely establishes that he had a <u>right to be assessed</u>. That was all the Member found and all that we assert. The discrimination here lies not in the refusal to give Mr. Grismer a driver's licence, but in the refusal to even permit him to attempt to demonstrate that his situation could be accommodated without jeopardizing the Superintendent's goal of reasonable road safety. This decision stands for the proposition that those who provide services subject to the Human Rights Code must adopt standards that accommodate people with disabilities where this can be done without sacrificing their legitimate objectives and without incurring undue*

[16] *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights) (also known as Grismer) [1993] 3 SCR 868*
[17] *[1993] 3 SCR 868.*

hardship. It does not suggest that agencies like the Motor Vehicle Branch must lower their safety standards or engage in accommodation efforts that amount to undue hardship[18].

The assessment of *reasonable accommodation* and *undue hardship* has been very important in Canada; it applies to all the prohibited grounds of discrimination. Although such cases are most frequently found in the fields of disability and religious discrimination there are also a few cases where it has been used in a gender or race context.

In my view the Discrimination Law Review could usefully consider how far these concepts could be utilised in a new single Equality Act to ensure that the appropriate adjustments are made for all grounds of discrimination.

It is worth noting that the current provisions in the UK protecting pregnant women actually amount to a statutory reasonable adjustment. It may be commented that provisions in relation to genuine occupational requirements are already in place for all grounds, except disability where because of its asymmetric structure it is not necessary. By imposing this limitation on the way in which genuine occupational requirements are to operate it could provide a reasonably simple common standard which was readily understood by all. Of course there would still be arguments about what was undue hardship but the context for such a dispute would come much closer to the common understanding of all that give and take is necessary in every society.

Dignity and undue hardship

As I have pointed out the 'feel' of this test requires some examples before it is clear. However one way that it can also be rationalised is by reference to dignity. Thus in Canada the impact on a person's dignity has been used to determine how far the right to be accommodated can be pressed. I shall consider some cases to show how this works.

Examples of the accommodation rule in practice

Disability

Perhaps, the most well known case is *Eldridge v British Columbia (Attorney General)*[19] which concerned the need for provision of sign language interpreters for deaf patients as part of the publicly funded health care scheme. The appellants were Robin Eldridge and John and Linda Warren, all of who were born deaf and whose preferred language of communication was sign language. The problem was that none of their doctors knew sign language. When they were able to, the appellants hired sign language interpreters to go to the doctor with them. The facts were somewhat different between the two cases:

- Ms Eldridge was financially unable to hire a sign language interpreter for every medical visit, and as a result, she found visits to a doctor without a sign language interpreter stressful and confusing. Her doctor testified that he was

[18] Ibid, paras 22 and 44.
[19] [1997] 3 SCR 624,

satisfied with the communication when a sign language interpreter was present but in the absence of an interpreter he was unsure about the accuracy of the information he was receiving.

- John and Linda Murray were both born deaf. Their case concerned Linda's premature labour with twins. Her doctor testified that communication by notes was time-consuming, impractical and has the potential to cause harm. She pointed out that adequate communication was particularly critical in childbirth.

The court said

> *In Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, at p. 169, McIntyre J. stated that the 'accommodation of differences . . . is the essence of true equality'. This emphasizes that the purpose of s. 15(1) of the Charter is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons...in the present case the adverse effects suffered by deaf persons stem not from the imposition of a burden not faced by the mainstream population, but rather from a failure to ensure that they benefit equally from a service offered to everyone...Where it is necessary for effective communication, sign language interpretation should not therefore be viewed as an 'ancillary' service. On the contrary, it is the means by which deaf persons may receive the same quality of medical care as the hearing population*[20].

It is perhaps cynical to note that the Court was clearly influenced by the risks of medical negligence where a doctor is unable to receive adequate instructions and information from the patient. The court added

> *The centrality of communication to the delivery of medical services is particularly evident in the context of negligence law. The duty of disclosure commands physicians to inform patients fully of the risks involved in treatment and answer their questions regarding such risks; see Reibl v. Hughes, [1980] 2 S.C.R. 880, at p. 884, and Hopp v. Lepp, [1980] 2 S.C.R. 192, at p. 210. Physicians cannot discharge this obligation without being able to communicate effectively with their patients. In the absence of sign language interpretation, there may well be cases where it will be impossible for doctors to treat deaf persons without breaching their professional responsibilities*[21].

Hence the Court then concluded that:

> *the failure to fund sign language interpretation is not a 'minimal impairment' of the s. 15(1) rights of deaf persons to equal benefit of the law without discrimination on the basis of their physical disability. The evidence clearly demonstrates that, as a class, deaf persons receive medical services that are inferior to those received by the hearing population. Given the central place of good health in the quality of life of all persons in our society, the provision of substandard medical services to the deaf necessarily diminishes the overall*

[20] Ibid paras 65,66 & 71.
[21] Ibid para 70.

quality of their lives. The government has simply not demonstrated that this unpropitious state of affairs must be tolerated in order to achieve the objective of limiting health care expenditures. Stated differently, the government has not made a 'reasonable accommodation' of the appellants' disability. In the language of this Courts' human rights jurisprudence, it has not accommodated the appellants' needs to the point of 'undue hardship'[22].

Other cases have concerned:

- The provision of access for wheelchair users to the premises of a private art gallery[23];
- Staffing the entrance of a cinema so that persons using wheelchairs do not have to gain access through a separate, locked entrance which required them to use an intercom system from outside the building, and waiting for an employee to come downstairs to let them[24];
- Modifying procedures for determining who was eligible for licences to drive taxis and buses[25];
- The provision of transportation subsidies to persons receiving social assistance who have disabilities which prevent them from using public transport that is equivalent to the transportation subsidy provided to those who can use public transport[26].

These cases are similar to those that have been observed in the UK under the reasonable adjustment provisions of the Disability Discrimination Act 1995.

Gender

Examples in the field of gender include:

- Modifying aerobic requirements for women fire fighters[27],
- Altering a federal government 30 week limit 'no-stacking rule' to permit women to receive both maternity benefits and sickness benefits[28],
- Altering a rotating shift pattern so that a female employee with a small child might work straight day shifts[29];
- Enabling a pregnant female spray painter to move temporarily to a position in the packing area away from paint fumes[30];

The first three examples would be dealt with in the UK as cases of possibly justified indirect discrimination. The fourth example would be dealt with by the UK health and safety provisions for pregnant employees.

[22] Ibid para 94.
[23] *Ripplinger* v. *Ryan* (1996), 24 C.H.R.R. D/435 (Sask. C.A.)
[24] *Miele v. Famous Players Inc.* (2000), 37 C.H.R.R. D/1 (B.C.H.R.T.).
[25] *Hussey* v. *British Columbia (Ministry of Transportation and Highways)* (1999), 36 C.H.R.R. D/429 (B.C.H.R.T.)
[26] *Chipperfield v. British Columbia (Ministry of Social Services) (No. 3)* (1998), 33 C.H.R.R. D/340 (B.C.H.R.T.)
[27] *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (known as the Meiorin case) [1999] 3 SCR 3.*
[28] *McAllister-Windsor v. Canada (Human Resources Development)* (2001), 40 C.H.R.R. D/48 (C.H.R.T.)
[29] *Brown v. M.N.R., Customs and Excise (1993), 19 C.H.R.R. D/39 (C.H.R.T.).*
[30] *Emrick Plastics* v. *Ontario (Human Rights Comm.)* (1992), 16 C.H.R.R. D/300 (Ont. Ct. (Gen.Div.))

The United Kingdom does have a number of provisions that could be seen as statutory reasonable accommodation provisions; thus the Management of Health and Safety at Work Regulations 1999 set out particular duties in respect of pregnant or breast-feeding women. These require the alteration of working conditions or hours of work where it is necessary to avoid health and safety risks to the pregnant or breast feeding woman. The Employment Rights Act 1996 makes provision for pregnant employees to receive reasonable paid time off for ante natal care as well as a right to alternative work or paid time off on health and safety grounds.

Race

Examples of cases include:

- Provision of documentation to verify family status for immigration purposes[31],
- Hard hats for Sikhs - this could be religious discrimination – see below,
- The Crown's duty to consult and accommodate Aboriginal peoples prior to making decisions that may adversely affect their as yet unproven Aboriginal rights and title claims[32].

There seem to be very few cases where the reasonable accommodation provisions have been used in relation to race discrimination. This makes it hard to reach any conclusions on the basis of Canadian experience of the use, or potential misuse, of these provisions.

Research into the incidence of race discrimination shows that racism is still widely experienced by many ethnic minority people in the UK. In the field of employment repeated studies show that although, generally speaking, people from ethnic minorities are finding it easier (but still not as easy as for white people) to get jobs, studies of promotion records show a widening gap. People from ethnic minorities experience significant differences in their progression within job hierarchies. Thus, in considering the roots of racism in the UK, Bhavnani, Mirza and Meetoo observe:

> *Promotion procedures are also arguably becoming more objective in assessing those with management potential. However, research continues to show slower progress of minorities in organisations and a greater tendency for minorities to receive lower evaluations of competence than their white peers. Organisational cultures continue to disadvantage minorities.*[33]

This suggests that provisions for reasonable accommodation might be useful in advancing the progress of ethnic minorities within hierarchies.

The inclusion of a reasonable accommodation principle within UK race discrimination law could also affect the outcome of race discrimination complaints by putting an emphasis on requiring the discriminator to put in place provisions to accommodate the affected person. *Noone v N W Thames Regional Health Authority (no*

[31] *Canada v Menghani* [1994] 21 CHRR 427
[32] *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511.
[33] *Tackling the Roots of Racism: Lessons for Success,* R Bhavnani, H S Mirza & V Meetoo, 2005, the Policy Press, p93.

2)[34]provides an example of the possibilities. In this case Dr Noone was repeatedly subjected to discrimination in her application to become a Consultant. The Court of Appeal ruled that the Employment Tribunal could not recommend that the hospital authority seek the authority of the Secretary of State to dispense with its statutory obligations governing the appointment of consultants by not advertising its next vacancy for a consultant's post similar to that for which Dr Noone had unsuccessfully applied and offering it to Dr Noone instead. If the law had permitted reasonable accommodation then this course of action would have been allowed.

Religion

There are numerous Canadian examples of reasonable accommodation being made for religious belief (they do not appear to extend to 'belief' alone):

- Modification of shift hours to accommodate religious observance [35],
- Accommodation of religious holidays[36],
- Accommodation of dress codes[37],
- Provision of an alternative to union contributions for employees – where religion forbade membership of unions – employers permitted an alternative of payment of the equivalent amount to a charity[38],
- Altering leasehold requirements, subject to no risk to health and safety, so as to permit the building of temporary dwellings on flat balconies by Orthodox Jews, desiring a 'succot' – a temporary dwelling – on their balcony in order to celebrate a Jewish religious festival [39],
- Altering a no weapons school rule, to permit Sikhs to carry kirpans[40], and a similar rule in relation to hospital admissions[41],
- Altering a school board's shift schedule to permit an employee whose religious requirements conflict with being assigned to a Friday evening shift[42];
- Requiring a superintendent of motor vehicles to test Sikh applicants for motorcycle driving licences notwithstanding a failure to wear a helmet because of the religious requirement to wear a turban[43];

Sexual orientation

I have not found any examples of reasonable accommodation being used in the context of sexual orientation. Sexual orientation as a ground for discrimination is a relatively recent addition to the list of prohibited grounds[44], this may account for the absence of any case law on reasonable accommodation.

Age

[34] [1988] IRLR 530
[35] *Central Okanagan School District no 23 v Renaud [1992] 2 SCR 970 and Gohm v Domtar (no 4) (1990) 12 CHRR D/161.*
[36] *Commission Scolaire regionale de Chambly v Bergavin (1994) 22 CHRR D/1 (SCC).*
[37] For example, *Grant v Canada [1995] 1 FC 158.*
[38] *Kurvits v Canada* (1991) 91 CLLC 17024 (CHRT).
[39] *Syndicat Northcrest v Amselem* [2004] 2 SCR 551.
[40] *Pandori v Peel Board of Education* (1990) 12 CHRR D/425 (SCC) – this has been recently revisited by the Canadian Supreme Court, as far as I know no judgement has yet been given.
[41] *Singh v Workmans Compensation Board Hospital* (1981) 2 CHRR D/459.
[42] *Central Okanagan School Dist. No. 23 v. Renaud* (1992), 16 C.H.R.R. D/425 (S.C.C.)
[43] *Dhillon v. British Columbia (Ministry of Transportation and Highways)* (1999), 35 C.H.R.R. D/293 (B.C.H.R.T.).
[44] It was first recognised in *Vriend v Alberta* [1997] 31 CHRR

The only example I have found so far in relation to age concerns housing relating to age or the presence of children[45]. Other cases show a refusal to accommodate, some of which have been widely criticised. In the *Law* case referred to above Nancy Law was widowed at the age of 30. The Canada Pension Plan makes payments to a surviving spouse if they are either over the age of 45 at the time of the contributor's death, disabled or maintaining dependant children of the deceased. Graduated payments were made for those between the ages of 35 and 45. Ms Law did not fall into any of these categories so she was not eligible for a survivors pension, she argued that the provisions were discriminatory on grounds of age, that she had been left in financial difficulties when her spouse died and the legislation was based on the stereotype that younger survivors would not face as great financial problems upon the death of a spouse as would an older survivor. The Court rejected her claim saying that the purpose of section 15 of the Charter was to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping or political or social prejudice. The provisions that she was challenging did not perpetuate the view that adults under the age of 45 were less capable or less worthy of recognition or value as human beings, they had not been consistently or routinely subjected to discrimination compared to some of Canada's other minorities[46].

In addition, there are a number of cases concerning retirement age. However, in most of these cases a fixed retirement age has been found to be a justifiable bona fide requirement. For example, in *Large v Stratford (City)*[47] a policeman challenged his mandatory retirement age of 60. He claimed that the mandatory retirement age was not a bona fide occupational requirement; the Board defended the requirement citing scientific evidence of the risk of cardiovascular disease and lack of aerobic capacity for people over the age of 60. Mr Large claimed that he should have been allowed an individual accommodation so that he could be individually tested for these risks. The Supreme Court concluded that there was sufficient scientific evidence to justify the mandatory retirement provisions as reasonable in the light of the duties performed by police officers and hence no accommodation had to be made for Mr Large[48].

Although these cases do not show the requirement to make accommodation in cases of age discrimination have been well utilised in Canada I can see that they could be useful in the UK. Such provisions could facilitate those at the beginning and end of their working life being able to reduce their hours, work flexi-time or work in part from home.

Dignity as a moderator of reasonable adjustment

It is obvious that to a degree the impairment of 'dignity' is at the heart of these decisions; the question is to what extent could it be useful on this side of the Atlantic? In my view it does offer real utility. The first point is that dignity is not an alien concept. Dignity is already used in the Race and Framework Directives to define harassment as a form of discrimination, so the question is not posed in a barren

[45] *Desroches v Commission des Droits de la Personne du Quebec* [1997] RJQ 1540
[46] See also *Gosselin v Quebec(Attorney General)* [2002] 4 SCR 429.
[47] [1995] 3 SCR 733.
[48] See also *Mckinney v. University of Guelph*, [1990] 3 S.C.R. 229 on the issue of retirement ages for university staff.

context[49]. It reflects a common theme in human rights law from the Universal Declaration of Human Rights onwards.

It is important to note that dignity is not here used in a comparative sense. Unlike the ordinary (non-harassment) definitions of direct and indirect discrimination in the Directives, which do require some comparative assessment of the treatment of others, harassment is not a comparison-based concept[50]. Whilst having a subjective element, the core of the concept of harassment in the Directives is a reference to an objective assessment of the degree of effect on the dignity of the individual in the specific context. It is concerned therefore with society's view (as interpreted judicially) as to when someone is treated sufficiently badly on one of the protected grounds, to require protection. Thus it is an objective/ subjective test.

Canadian courts been much concerned with the use of dignity as a jurisprudential concept, so there is a body of case law much larger than anything we have. Indeed they have placed it centre stage rather than as in the Directives as an add-on, in the analysis of the presence or absence of discrimination. Thus the Supreme Court ruled in the key case of *Law v Canada (Minister of Employment and Immigration|)*[51] has described how an equality rights analysis should be conducted as follows:

> *the overarching purpose of s. 15(1) as being 'to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of merit, capacity, or circumstance'…. differential treatment will not likely constitute discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a person or group in this way, and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society…. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law? … The equality guarantee in s. 15(1) of the Charter must be understood and applied in light of the above understanding of its purpose. The overriding concern with protecting and promoting human dignity in the sense just described infuses all elements of the discrimination analysis.*

[49] See for example, Race Directive article 2(3) and the Employment Framework Directive article 2(3).
[50] Compare Pearce v Governing Body of Mayfield Secondary School [2003] IRLR 512 with Race Directive article 2(3) and the Employment Framework Directive article 2(3).
[51] [1999] 1 SCR 497, quotation from paras 48 - 54.

The merit of a test for discrimination based on the effect of impugned treatment on a person's dignity is precisely that it does not require a strict comparison to be made. Properly applied it therefore has a much greater capacity to entrench social solidarity. The outcome of the case depends not on whether someone has been *comparatively* badly treated on a protected ground but on whether they have been badly treated on such a ground in such a way that affects their dignity in a way that the law must notice.

It can be seen that a well-worded and wise judicial declaration of what is an unacceptable imposition on the dignity of members of a protected class will both establish and re-enforce social mores as to the acceptability of treatment of that class. So, provided that it can be accepted that judges may be trusted to treat *dignity* properly, this approach could be a powerful tool to eradicate discrimination. By contrast, a misplaced and uncorrected assessment of the extent to which the dignity of a person was affected, would be very damaging. But that surely is the cost of any judicial system called on to arbitrate in a socially sensitive context. The fault in such a case lies not with the test but with the qualities of the adjudicator, and the remedy lies in better selection and training of the judiciary. The current drive to create a more diverse judiciary provides some cause for hope here[52].

Conflict of Rights

A dignity assessment also helps to resolve conflicts of rights. The impact on dignity is a useful touchstone for determining how far one person should be entitled to advance their rights in relation to another in such a way that impacts on the protected rights of that other.

Its benefits have been described by the Chief Justice of Ontario as permitting distinctions that are based on merit to escape the equality provisions and as binding together the different grounds for discrimination[53].

However, it is clear from the Canadian experience that the use of dignity in this way is not without pitfalls. An objective assessment of what dignity means in the subjective experience of a particular individual has been the approach taken by the Canadian courts[54]. It is widely argued in Canada that the Canadian Federal jurisprudence has at times taken a wrong turn by placing too much emphasis on a subjective assessment of what is dignified in a particular situation. Accordingly those who seem to have abandoned elements of their own personal dignity (for good reason or bad) have been afforded less protection.

Canadian courts have addressed clashes between equality rights where a balance between them needs to be reached, and one must provide accommodation to the other. For example, one recent case considered the situation when a print shop owned by an evangelical Christian refused to print letterheads and business cards for the local lesbian and gay centre on the grounds that the printer believed that he should not assist in the dissemination of information that conflicted with his religious beliefs. The Court ordered that the print shop should provide these services,

[52] Constitutional Reform Act 2005 s 64.
[53] Personal discussions between the author and Chief Justice McMurtry, Spring 2005.
[54] See Ibid paras 59-61

however, there was a limit, which was to be set by reference implicitly to the affect that was acceptable. The print shop could not be asked to print *'material of a nature which could reasonably be considered to be in direct conflict with the core elements of* [the owner's] *religious belief...'*[55]

The Canadian courts have had to deal with cases where a Muslim owned restaurant refused admission to a guide dog on the grounds that dogs are not permitted. This parallels the experience of the DRC in GB, which negotiated an accommodation for guide dogs through guidance from Muslim faith leaders. I was informed that a dignity impact analysis helped to resolve the dispute in the Canadian courts. The owner's upset in being required in limited circumstances to set aside religious scruples and to permit dogs in the restaurant was weighed as less than the blind person's upset at not being permitted supported access to the restaurant.

An example that has surfaced in the UK recently concerned a paraplegic woman who wanted to have certain intimate services delivered to her only by a woman; the service provider considered this would entail sex discrimination by them in employment since women would have to work to a different rota to men. This conflict is neatly resolved by testing the impact on the dignity of female care staff in being required to a more onerous rota and the dignity of the paraplegic woman in being denied intimate care from female staff.

There are many more potential clashes that will have to be addressed in the coming years both in Canada and the UK where the need for a balance between conflicting human rights will be required. Measuring and assessing the effect on each person's dignity seems to be a good way to address this and to find the right balance.

Cross – strand or Intersectional approaches to discrimination law

As the Canadians have worked with common provisions for each ground of discrimination for some time there is an increasing awareness of the need for an intersectional approach to discrimination in order to address multiple grounds for discrimination. It is highly likely that a similar trend will emerge once the new Commission for Equality and Human Rights is up and running.

The Ontario Human Rights Commission estimated that between April 1997 and December 2000 48% of the complaints that they received included more than one ground. They argue that in cases of discrimination on multiple grounds the discrimination experienced is different from that experienced on any of the individual grounds. So that, for example, the experience of discrimination suffered by a black woman is intrinsically different from that suffered by a black man, or a white woman. This has been described as ' *intersectional oppression [that] arises out of the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone*…'[56].

Such an approach permits the particular experience to be both acknowledged and remedied. They have pin-pointed difficulties suffered by older people with

[55] *Scott Brockie and Imaging Excellence Inc v Ray Brillinger & ors (no 2)* (2002) 43 CHRR D/90 (Ontario Supreme Court).
[56] M Eaton 'Patently confused, complex inequality and *Canada v Mossop'* (1994) 1 Rev. Cons. Stud.203 at 229.

disabilities, people with disabilities from ethnic minority groups, ethnic minority people who have a particular religion for example. They argue that taking an intersectional approach leads to a greater focus on society's response to the individual and a lesser focus on what category the person may fit into. Again a dignity analysis has its merits here, permitting a more person specific analysis of the effect of impugned treatment and in the case of a conflict of the relative strength of the impact of a specific course of conduct.

I suspect that this approach would be very attractive to those working with people with disabilities who seek to move away from an over medicalised definition of disability. The Ontario Human Rights Commission has said

> *within the Commission, there is a growing recognition that we can improve our understanding of the impact when grounds of discrimination intersect and that tools for applying an intersectional analysis will be very helpful in the handling of complaints, from inquiries through to litigation, and in our policy work*[57].

In fact, all too often a pragmatic decision has been made to proceed on one or the other ground, sometimes based on the availability of evidence, sometimes on the strength of the law in that particular area. An example is a case brought by Professor Carasco who wished to take a discrimination case. She has said:

> *Providing systemic discrimination based on gender in my case was made possible by the availability of research and statistics relating to women in Canadian universities. Proving systemic discrimination based on the combination of race and gender would have been a lot more difficult simply because of the paucity of women of colour in Canadian universities and the corresponding lack of salary data…As a woman of colour, I could not help wondering if it was indeed necessary to prove that other women of colour had been treated in a similar fashion before my own treatment, as a woman of colour, could be acknowledged."*[58]

An example of the second was provided in the case of *Canada (AG) v Mossop*[59] when a gay man failed in his claim for bereavement leave in order to attend his partner's father's funeral. At the time that the case was heard sexual orientation was not a prohibited ground for a discrimination claim so it could not be used, however 'family status' was a recognised ground. The case was therefore argued on this ground but lost because the evidence of discrimination on grounds of 'family status' was insufficiently strong. However, Madame Justice L'Heureux Dubé giving a powerful minority judgement said:

> *...categories of discrimination may overlap, and...individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap, or some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex. Categorizing such discrimination as primarily racially oriented, or primarily*

[57] See: An Intersectional Approach to Discrimination: Discussion paper, Ontario Human Rights Commission, 2001.
[58] E Carasco 'A case of double jeopardy: Race and Gender' (1993) 6 CJWL 142 at p 152.
[59] [1993] 1 SCR 554.

gender-oriented, misconceives the reality of discrimination as it is experienced by individuals[60].

This has rightly been seen subsequently as a highly influential judgement. It is this emphasis on the experience of the individual that is surely so important. Society must respect these experiences where they deserve and need respect by affording legal consequence to them. Reasonable accommodation and dignity are key concepts in that process as the Canadian jurisprudence shows.

Conclusions

There are a number of lessons that can be learnt from the Canadian experience. The reasonable accommodation provisions have enabled the legislation to adopt a certain flexibility to take account of the needs of individuals with the objective of creating a barrier free society. Recognising that in some cases employers and service providers will not accept the rights of others the Canadian jurisprudence has sought to determine at what point is that permissible. In that sense it may be said that the test of *reasonable accommodation* to the point of *undue hardship* provides clarity to the fundamental basis for non-discrimination. It underpins dignity requiring treating the employer as a host from whom a generous welcome is expected rather than a cold indifference extended to all. And in so doing it implies a need to be ready to adapt to the diverse situations of people from different backgrounds.

In this respect the Canadian process of reasoning certainly provides a useful methodology for testing the extent to which an occupational or service requirement is appropriate and necessary. In some cases where demands are made of large institutions or organisations to accommodate the particular situation of members of protected groups, the test of *undue hardship* may seem somewhat personalised. On the other hand the utility of this analytical framework is well established in Canada and from the examples I have cited above it appears to produce demonstrably acceptable, workable and progressive solutions. So I consider that such provisions could provide for a common structure applicable to several or all of the grounds for discrimination without the need for complex statutory exceptions.

Overall my opinion is that there are clear benefits for the use of this analysis for age discrimination, religion or belief discrimination. In the field of disability there is already a well-established use of reasonable adjustment and its utility is therefore obvious. I think that the benefits are slightly less clear for gender and sexual orientation. I am currently undecided that it is an advance in its application to race discrimination, particularly in view of the scarcity of examples available from Canada. I consider that this needs more debate. In order for it to work effectively the access to reasonable accommodation needs to be linked to a past history of disadvantage or discrimination as can be seen in Canada.

I must end with a small note of caution. Currently the equivalent UK concept of reasonable adjustment for disabled people has worked well in removing the many barriers that people with disabilities experience and the tribunals have made good

[60] *Canada (A.G.) v Mossop*, [1993] 1 SCR 554 at p 645.

use of this provision. It would be most undesirable if any extension of this provision to other grounds had the effect of limiting its use in the field of disability.

However, looking at the Canadian cases concerning disabled people there is no evidence that the use of reasonable accommodation provisions for other grounds has operated to limit the extensive use that has been made of these provisions for the benefit of people with disabilities. It should also be noted that the principles of reasonable adjustment for people with disabilities are now sufficiently well established that it is unlikely they would be at risk of dilution.