
‘Grounded and Purposive’: Patrick Elias and Discrimination Law

CATHERINE BARNARD* AND SARAH FRASER BUTLIN KC**

Acceptance Date September 3, 2025.

ABSTRACT

This article argues that in his significant contribution to discrimination law, Patrick Elias’s judgments are grounded and purposive. They are *purposive* because they recognise that employment legislation must generally be interpreted as protective of employees because of the power imbalance between the parties. They are also *grounded*. They are ‘grounded in fact’ because they are practical and realistic about working life for employers and workers. They are ‘grounded in law’ because they recognise the limits of the law and that the law—even discrimination law—cannot address all injustice, real or perceived. They are also ‘grounded in the system’ because they recognise that in the current liberal (social?) market economy, employers have legitimate interests, as do employees. By grounding his judgments in the system, Elias might be seen as conservative. However, this conservatism might be considered radical in the face of much current academic discourse. Using examples from his judgments, we illustrate both the grounded and purposive approach adopted by Elias, its theoretical underpinnings, how it has been applied to labour law more widely, and how it might be used to address some thorny issues in discrimination law in the future.

1. INTRODUCTION

Patrick Elias’s contribution to discrimination law is substantial. During his time as counsel, he argued a number of important discrimination cases. In a judicial capacity, he produced judgments, written with verve, honesty and even-handedness, judgments that have fundamentally shaped discrimination law. His judicial approach is what we describe as grounded and purposive. By this we mean that not only do his judgments adopt a purposive approach,

*Trinity College, University of Cambridge, UK, email: csb24@cam.ac.uk

**Selwyn College, University of Cambridge, UK, email: skf21@cam.ac.uk. We are very grateful to Alan Bogg for his insightful comments and to the participants at the conference on ‘Sir Patrick Elias’s legacy in British labour law as judge and jurist’, held at Selwyn College, Cambridge, on 28 March 2025, for their discussion.

namely interpreting the legislation in the light of what Parliament was trying to achieve, but they are also based on an understanding of the practical and social realities of working relationships, a recognition that both workers and employers have legitimate interests which need to be reconciled, and that there is only so much that law can do. His approach has acted as a lodestar for other judges adjudicating in the employment field.

A purposive approach to the interpretation of statute is, of course, not new and has been the subject of extensive debate.¹ For Lord Sales, ‘The purpose of a law informs the understanding to be given to—that is the meaning of—the language used to express that law.’² For Burrows (now Lord Burrows), ‘The judges must look for the best interpretation now of the legal rule laid down by those words. In deciding that, they must apply the statutory words in the light of their context and purpose.’³ However, Lord Sales rejects the idea of there being a conflict between the natural meaning of a statute and its purpose. The dichotomy is ‘exaggerated and rather distorted.’ He says: ‘The use of language is a practice which is itself based on human purposes, and its meaning can only be understood in light of the purposes which the language user has, or is taken to have, in the particular context in which it is used.’ While Lord Sales might see a purposive interpretation and interpretation based on the natural meaning of the language on a continuum, in labour law, the role of purpose in statutory interpretation has a particular connotation, given both the significant imbalance of power between employer and worker and, for workers, the considerable social and financial importance of their jobs. Recent Supreme Court decisions, such as *Autoclenz*,⁴ and *Uber*,⁵ have specifically recognised this, requiring employment law legislation on, for example, working time, to be interpreted as protective because of the power imbalance between the parties.

Alongside pushing at the frontiers of a purposive approach, Elias’s judgments are strikingly *grounded*.⁶ We argue that this ‘groundedness’ has three elements. First, his judgments are practical and realistic about working

¹ See e.g. *Attorney General’s Reference (No 5 of 2002)* [2004] UKHL 40. See also Lord Bingham in *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687, [8] when he stated that the court’s task ‘is to give effect to Parliament’s purpose.’

² P. Sales, *Purpose in Law and in Interpretation*, F.A. Mann Lecture, 19 November 24.

³ A. Burrows, *Thinking about Statutes: Interpretation, Interaction, Improvement*, The Hamlyn Lectures (Cambridge: Cambridge University Press, 2018), 30.

⁴ [2011] UKSC 41.

⁵ *Uber BV and others v Aslam and others* [2021] UKSC 5.

⁶ For an analysis of his other judgments, see A. Bogg, ‘Of Judges, Jurists, and Juristic Style: The Legacy of Sir Patrick Elias in British Labour Law’ (2025) *ILJ* in this volume.

life—for employers and workers—often based on his own experiences as a worker in his early career and subsequently as counsel in a wide range of cases. We call this ‘grounded in fact’. Secondly, Elias’s grounded approach recognises the limits of the law. The law—even discrimination law—cannot address all injustice, real or perceived; there is only so far that law can go. We call this ‘grounded in law’. Thirdly, Elias’s approach to discrimination law is grounded in a recognition that in a liberal (social?) market economy,⁷ while workers need protection because of the imbalance of power, employers also have legitimate interests that should be reflected in legal interpretation. As Bogg succinctly puts it, Elias does not engage with employer interests ‘regretfully or in a constrained way. He treats them as important, because there are all sorts of goods that flow from giving some latitude to legitimate economic authority.’⁸ In much labour law discourse, this quiet recognition of the need for a balance of the interests of workers and employers is already radical. We call this ‘grounded in the system’: his judgments are grounded in the current capitalist system. They do not seek to erode it, let alone upend it.

Elias’ grounded and purposive approach in respect of discrimination law thus connects two distinct issues: on the one hand, the potentially serious nature of discrimination complaints and the need for matters to be addressed substantively where treatment is discriminatory under the Equality Act 2010; and, on the other, a recognition that employers often struggle to understand and apply the increasingly complex law, to reconcile the interests of employees, with different protected characteristics, while at the same time trying to manage a (successful) business.

The article is structured as follows. Section 2 analyses key judgments across Elias’ career to illustrate his grounded perspective and his purposive approach. Section 3 explores the theoretical underpinnings for that approach, with a consideration of the academic writings of Bob Hepple, Paul O’Higgins and Otto Kahn-Freund, who were influential in Elias’ early work. Section 4 then examines how the purposive approach to interpretation has developed more generally in labour law in recent times and Elias’ potential influence on that development. Section 5 reflects on why a grounded and purposive approach may be of particular assistance in the future and why it matters. Section 6 concludes.

⁷ P. Hall and D. Soskice, ‘An Introduction to Varieties of Capitalism’ in P. Hall and D. Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2001).

⁸ Bogg ‘Of Judges, Jurists, and Juristic Style’ (n.6).

2. AN ANALYSIS OF ELIAS LJ'S CONTRIBUTION TO DISCRIMINATION LAW

A. Being Grounded

(I) Introduction

Patrick Elias grew up in Cardiff and went on to study at the University of Exeter. He was a judge in the EAT from 2006 to 2009 and the Court of Appeal from 2009 to 2017, after a stellar career as an academic, a barrister and a judge.⁹ However, his earlier years were formative. As he explains:

I did work every summer from when I was 16. The first job was digging trenches and making tea for other labourers on a building site in Cardiff. I earned the apprentice rate of 2 shillings 10 pence per hour. ... I saw more (low level) pornography than I have ever seen since! [I] [g]ardened in a [psychiatric hospital]; and had four months as a bus conductor between school and University (which I loved). I objected to joining the TGWU but it was a closed shop. I also objected to paying the political levy—it didn't do me much good they said that they couldn't find the opt-out forms! A good lesson about how laws and practice diverge.

As Grossman points out, 'Those who attempt to explain judicial behavior in terms of the backgrounds of the judges share with historians the problem of never knowing precisely how the past has influenced the present.'¹⁰ However, in the case of Patrick Elias, it is perhaps not going too far to say there are 'very subtle ways in which personal values derived from background experiences are articulated in the judicial context.'¹¹ Lady Hale is more direct. She said that 'everybody comes to the task [of judging] with a set of values and perspectives that may lead you to pick different bits of the materials to reason towards an outcome.'¹² She continued: '[T]he impact of background and perspective on judicial decision making is particularly relevant in close cases where the legal principles themselves permit more than one acceptable answer.' For her, this was precisely the type of case that reaches the Supreme

⁹ Ibid.

¹⁰ J. B Grossman, 'Social Backgrounds and Judicial Decision-Making' (1966) 79 *Harvard Law Review* 1551, 1562

¹¹ Ibid., 1564.

¹² Lady Hale, oral evidence before the Constitution Committee Autumn 2011, reported in A. Paterson and C. Paterson, 'Guarding the Guardians: Towards an Independent, Accountable and Diverse Senior Judiciary' (2012) <<http://www.centreforum.org/assets/pubs/guarding-the-guardians.pdf>>. This is cited by R. J. Cahill-O'Callaghan, 'The Influence of Personal Values on Legal Judgments' (2013) 40 *Journal of Law and Society* 596, 597. As a former academic herself, she referenced the particular anomaly created by the decision in *Johnson v UNISYS* [2001] UKHL 13 to academic contracts: *Edwards v Chesterfield Royal Hospital* [2001] UKSC 58, para 113.

Court. We would argue that this also applies in cases that go to the EAT, most of which do not get appealed any further.

Patrick Elias' experiences as a labourer, as a gardener or as a bus conductor meant that he saw something of the reality of working life—from the worker's perspective—before reaching the hallowed halls of Cambridge and the Inner Temple. As a practitioner appearing for respondents and claimants, he saw that his clients and their lives were messy and complex. Mistakes were made both by employees and employers. One is dependent on the other for work, and thus there is a vulnerability that needs to be protected. Yet, Elias also recognised that without employers, there is no work. This means no vulnerability, but also no jobs. Employers, when doing their best, should not be unjustly condemned by their courts. Law should not be bent so far to address all injustice.

We want to give four examples of how this grounding shaped Elias's judgments. First, he rooted his judgments in observations of human experience and its messiness; where there was obvious vulnerability, he would intervene where the law warranted it, but not where it did not (subsection (ii)). Secondly, he recognised the difficulties (good) employers face in managing the diversity of discrimination cases and is prepared to acknowledge that (subsection (iii)). Thirdly, and relatedly, he respected the limits of discrimination law as laid down in the statute (subsection (iv)). Fourthly, he rejected simple procedural failings in the workplace as a basis for a successful discrimination claim: the law had to be able to work on the ground (subsection (v)).

(II) Human Frailties and Human Dilemmas

Employment judges frequently observe the frailties of the human condition in the cases before them. Elias recognises this. For example, in *Bahl v Law Society*,¹³ he said:

The reason for [having to establish less favourable treatment] is easy to understand. Employers often act unreasonably, as the volume of unfair dismissal cases demonstrates. Indeed, it is the human condition that we all at times act foolishly, inconsiderately, unsympathetically and selfishly and in other ways which we regret with hindsight.

This leads him to observe that 'It is however a wholly unacceptable leap to conclude that whenever the victim of such conduct is black or a woman

¹³ [2003] IRLR 640, affirmed by the Court of Appeal: [2004] EWCA Civ 1070.

then it is legitimate to infer that our unreasonable treatment was because the person was black or a woman.’ He concludes:

All unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory, and it is not shown to be so merely because the victim is either a woman or of a minority race or colour.

Later in the judgment, he explained that unreasonable treatment was not ‘of no relevance whatsoever’ because ‘If what [the employer] does is reasonable, then the reason is likely to be non-discriminatory.’¹⁴ Encapsulated in this pithy statement is a recognition of one of the more difficult issues of discrimination law: causation.¹⁵ Elias’ touch is light and uncomplicated. He also pushes back against seeing discrimination at every turn:

In order to establish unlawful discrimination, it is necessary to show that the particular employer’s reason for acting was one of the proscribed grounds. Simply to say that the conduct was unreasonable tells us nothing about the grounds for acting in that way. The fact that the victim is black or a woman does no more than raise the possibility that the employer could have been influenced by unlawful discriminatory considerations. Absent some independent evidence supporting the conclusion that this was indeed the reason, no finding of discrimination can possibly be made.¹⁶

Similarly, when dismissing an age discrimination appeal concerning a pay grading structure that required a person to have a degree to attain the highest pay grade, Elias J explained in *Chief Constable of West Yorkshire Police v Homer* that ‘... the financial disadvantage—if it can properly be so described—resulting from the operation of this criterion is the inevitable consequence of age; it is not a consequence of age discrimination. The disadvantage follows from the simple fact that it is necessary to be employed to earn pay; the shorter the remaining working life the less will be earned by way of future earnings.’ He concluded:

It seems to us that the claimant’s case would require more favourable treatment for older workers to mitigate the fact that as they get older so their working life span decreases and the future value of benefits conferred by the employer is reduced. That, however, is the human condition, and not even Parliament can change it.¹⁷

¹⁴ At [99].

¹⁵ See further S. Auerbach, ‘Sir Patrick Elias on Causation’ (2025) ILJ in this volume.

¹⁶ At [94].

¹⁷ [2009] ICR 223 at [39].

Bahl and *Homer* provide good examples of Elias' grounded approach: he does not see discrimination at every turn, he recognises that the law cannot address every vicissitude of life, including ageing and its consequences ('grounded in law'), and he also recognises that employers have the right to take decisions in the interests of their business but which may have negative effects on individual employees ('grounded in the system').

For some, the sorts of statements made in *Bahl* and *Homer* make Elias seem pro-employer and thus insensitive to the needs of individual claimants. But there is also evidence of the opposite: Elias is certainly capable of recognising the dilemmas faced by claimants in their work. For example, in *Eweida v British Airways Plc*, he noted that the requirement on the claimant that she not visibly wear a cross at work 'operated as a barrier which she could only surmount if she were prepared to comply with it'.¹⁸ He said that there was some merit in the argument that the change in wording in indirect discrimination claims from establishing an inability to comply to establishing a 'particular disadvantage' permits a court to find a particular disadvantage even with respect to those who can and do comply with the provision. He gave as an example 'a woman who wishes for child care reasons to work part-time but feels compelled to work full-time, which is a job requirement, because her employer will not consider the possibility of part-time work and she cannot afford to lose her job'.¹⁹ This is a good example of Elias' approach being 'grounded in fact' and specifically the realities of working life facing employees.

(III) The Difficulties (Good) Employers Face

Discrimination law is a challenge to good employers. The law is increasingly complex, and nine protected characteristics inevitably mean most employees could potentially raise a point. Patrick Elias is sympathetic to this and ensures that the law is not stretched too far to be used against employers. Take the case of *Ladele v Islington London Borough Council*,²⁰ in which he held:

Nor is it a breach of the law for management to lack sympathy for the beliefs of certain employees. Christian managers may be wholly unsympathetic to the atheist views of their staff, and vice versa. That does not involve a breach of [the Equality Act 2010]. Provided they do not discriminate against them because of those beliefs, that is enough. They must tolerate the beliefs and not subject the staff to any

¹⁸ [2009] ICR 303 at [35].

¹⁹ At [45].

²⁰ [2009] ICR 387. Affirmed by the Court of Appeal: [2009] EWCA Civ 1357.

disadvantage because of them; but they do not have to agree with them, or even consider them to have any merit.²¹

In *JP Morgan Europe Ltd v Chweidan*,²² Elias LJ is also practical when considering the issues facing employers with an employee with a protected characteristic. He doubted whether ‘a frank recognition by employers that they are concerned about the legal implications of having a disabled employee and that this creates a new HR challenge’ was sufficient to shift the burden of proof. This was (realistically) because ‘if anything one might expect that it would cause the employer to be particularly cautious before dismissing that employee.’²³

Similarly, when considering the relevant legitimate aims for an employer justified retirement age in *Seldon v Clarkson Wright and Jakes*, Elias LJ held that an objective to run a firm in a collegiate way whereby partners would generally not be subjected to disciplinary procedures for under performance was legitimate because ‘It is inevitably destructive of a congenial environment if one partner or group of partners can criticise the performance of another in circumstances which may lead to that partner’s removal.’²⁴ It was also relevant that the scheme had been agreed ‘by parties with equal bargaining power.’²⁵ And when considering the lawfulness of a contractual redundancy scheme, in *Loxley v BAE Systems Land Systems (Munitions & Ordnance) Ltd*,²⁶ one of the early judgments on age discrimination, Elias J was heavily influenced by the practical reality of such a scheme:

We reject the claimant’s submission that preventing a windfall cannot be a legitimate feature of the scheme. One of the purposes of a redundancy scheme of this nature is to cushion workers from the effects of losing their income. This is not required, or at least not to the same extent, where pensions are paid. Indeed, if the position still were that retirement automatically took place at the age of 60 then an employer would in our view manifestly be justified in having a rule which prevented the employee being better off as a consequence of receiving redundancy pay than he would have been if working until retirement age. ...²⁷

The Court allowed the appeal on the basis that the Tribunal had failed to analyse whether, in this case, the benefit from the pension scheme was such

²¹ At [68].

²² [2012] ICR 268.

²³ At [34].

²⁴ [2010] EWCA Civ 899 at [69]. *Seldon* was affirmed by the Supreme Court: [2012] UKSC 16.

²⁵ At [52].

²⁶ [2008] ICR 1348.

²⁷ At [37].

as to justify the exclusion of the claimant from the contractual redundancy scheme. However, again the emphasis was practical and pragmatic, considering that: ‘It may be that his pension entitlement, even if taken earlier than he would otherwise have wished, is far more valuable than any redundancy entitlement.’²⁸

Other judgments recognised the need to make those decisions within the relevant operational constraints, namely the realities of running a business or providing a public service. For example, in *Chief Constable of Lincolnshire v Weaver*,²⁹ Elias J noted the importance of looking at the overall context when considering whether an adjustment was reasonable:

...the Tribunal assessed the reasonableness of allowing the Claimant onto the [police retention] scheme merely by focusing on his own position. They were obliged to engage with the wider operational objectives of the force, and in particular the desire to liberate posts for restricted officers. If he were to retire, that would liberate a further post for those in the force who were on restricted duties and would in turn enable a non-disabled officer to be recruited who could undertake the wide range of obligations which the Police usually require. ...

Elias continued that ‘The obligation to have regard to all the circumstances, including the benefits to the force and the consequences for other officers, as well as the precedent it sets for other cases, is in our view self evident.’³⁰ This holistic approach seems infused with notions of good faith. Providing employers act in good faith, the chances of them being found liable are significantly reduced, and in this way Elias ensures that businesses can operate successfully: his judgments are grounded in the system.

Finally, and perhaps most famously, in *Moyhing v Barts*³¹ Elias J indicated the need for some rationalisation of the Equality Act in cases where the application of the law delivered perverse outcomes. The case concerned the requirement that male, but not female, nurses needed a chaperone when doing intimate procedures on women patients, which the male nurse argued was directly discriminatory: ‘We have much sympathy for the dilemma in which this decision places the respondent and other hospital trusts who have adopted similar policies for good and objective reasons.’ He continued that assuming that the risk of female assaults on male patients or false allegations by male

²⁸ At [41].

²⁹ UKEAT/0622/07/DM.

³⁰ UKEAT/0622/07/DM.

at [49]–[51].

³¹ [2006] IRLR 860 at [26].

patients really is virtually non-existent, ‘it seems a waste of potentially scarce resources in the health service to require a chaperone system to be extended to [female nurses] (if that is the option chosen) merely to establish a formal equality’. But, he concluded, ‘that is the choice Parliament has made, and unless and until a specific legislative exception is made for this situation or the concept of justification is extended so that exceptionally it could apply to direct discrimination, we see no legal basis for treating male and female student nurses differently.’

(IV) The Limits of Discrimination Law and Its Interpretation

Moyhing is a good example of Elias recognising the limits of the law and thus the powers of the judiciary (‘grounded in law’). As a judge, he could not do surgery to clearly draft legislation in order to achieve what he considered a ‘fair’ outcome.

He was also keen to prevent tribunals from embellishing legislation. For example, in *Chief Constable of West Midlands Police v Harrod*, he said:

There is another fundamental problem with the tribunal’s analysis [of s.19 Equality Act 2010]. The assumption underlying this argument is that the employer should be obliged to minimise dismissals and should take any reasonable steps to avoid them... It is not the job of tribunals to question management decisions in that way, and they are not equipped to do so. Tribunals do of course have extensive jurisdiction relating to dismissals. ... But that is a far cry from reviewing the decision of management as to the number of staff required to run their business.

He concluded ‘That will often involve difficult decisions about how resources should be prioritised. In my judgment, discrimination law does not, and was not intended to, open up questions of this kind to scrutiny by tribunals.’³² Likewise, in *Seldon*, Elias J said that ‘The equality laws are not designed to determine for companies what might be appropriate objectives. A business which places considerable weight on environmental or charitable objectives, even if they do not believe that they have [any] direct business benefit, can pray these in aid as legitimate aims.’³³

Thus, by grounding his judgments in the law, Elias also ensures employers are able to run their business, a matter which he regarded as wholly legitimate. His judgments are thus grounded in the system.

³² [2017] EWCA Civ 191 at [48].

³³ See n 25 at [67].

(V) Rejection of Procedural Failures in the Workplace as a Foundation for a Discrimination Finding

Related to his broad sympathy towards generally good employers facing discrimination law issues, Elias rejects procedural failures as a basis for a finding of discrimination. For example, in *Seldon*, he said that:

It is important that tribunals do not see a finding of discrimination as a form of punishment because they consider that the employer's procedures are unsatisfactory, or that the commitment to equality is poor. In a different but related context, the EAT (Underhill J presiding) observed in *D'Silva v NATFHE* [2008] IRLR 412 (para 38) that the mere fact that an employer does not have an equal opportunities' policy or fails adequately to respond to a questionnaire is not of itself a basis for establishing sex discrimination in any particular case, although it may in an appropriate case provide evidence supporting an inference of discrimination.³⁴

This pragmatism came to the fore particularly in relation to disability discrimination when Elias J rejected arguments that the duty to make reasonable adjustments included a duty to consult the disabled employee about adjustments that should be made. Consequently, in *Tarbuck v Sainsbury's Supermarkets Ltd*, he held:

There can be no doubt that any employer would be wise to consult with a disabled employee in order to be better informed and fully acquainted of all the factors which may be relevant to a determination of what adjustment should reasonably be made in the circumstances. If the employer fails to do that, then he is placing himself seriously at risk of not taking appropriate steps because of his own ignorance. The issue for the tribunal will then be whether it was reasonable to take that step or not. ... If he does what is required of him, then the fact that he failed to consult about it or did not know that the obligation existed is irrelevant. It may be an entirely fortuitous and unconsidered compliance: but that is enough. Conversely, if he fails to do what is reasonably required, it avails him nothing that he has consulted the employee.³⁵

This was followed by *Scottish and Southern Energy Plc v Mackay*, when Elias J rejected an argument that an employer had failed to make reasonable adjustments by not exploring the possibility of a different job with a disabled employee.³⁶ Similarly, in *Spence v Intype Libra Ltd*, it was argued that there had been a failure to make reasonable adjustments because the employer had not obtained up-to-date medical information. Elias J held that an

³⁴ At [47].

³⁵ [2006] IRLR 664 at [69] and [71]–[72].

³⁶ UKEATS/0075/06/MT.

appropriate assessment of the employee's condition may involve obtaining information from the employee, consulting with him, and obtaining medical reports. These are all 'part of the procedures which an employer will sensibly adopt when determining what adjustments, if any, are reasonable'. However, he continued 'if a failure to consult cannot constitute a breach of the duty, then neither can a failure to obtain a medical report. The issue ... is whether the necessary reasonable adjustment has been made; whether it is by luck or judgment is immaterial'.³⁷

This conclusion was specifically linked to the purpose of the legislation: 'The nature of the reasonable steps envisaged in s4(A) is that they will mitigate or prevent the disadvantages which a disabled person would otherwise suffer as a consequence of the application of some provision, criterion or practice.' He continued, 'the duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise'. Therefore, the 'carrying out of an assessment or the obtaining of a medical report does not of itself mitigate or prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing'.³⁸

This brings us to consider the purposive approach more generally.

B. Being Purposive

So far, we have focused on Elias' 'grounded' approach to legal interpretation, an approach based on a recognition of day-to-day practicalities of working life, the vulnerability of claimants, but also the needs of (good) employers to run their businesses without excessive judicial second-guessing, while always respecting the limits of the law. We turn now to the purposive approach to statutory interpretation. By this, we mean that the courts interpret the legislation in the light of the objectives of what Parliament was trying to achieve. This purposive approach can often be seen in Elias' judgments. Take, for example, his approach to disability discrimination and the duty to make reasonable adjustments. In *Khan v Royal Mail Group Plc*, Elias J held 'The purpose of making reasonable adjustments is to facilitate the return to work of a disabled employee; it is not to provide a handout over and above the sick pay that would be paid to others if they were absent from work'.³⁹ Similarly, in *O'Hanlon*, he emphasised that:

³⁷ UKEAT/0617/06/JOJ at [38] and [40].

³⁸ At [43].

³⁹ UKEAT/0480/06/DA at [31].

...the purpose of this legislation is to assist the disabled to obtain employment and to integrate them into the workforce. All the examples given in section 18B(3) are of this nature. True, they are stated to be examples of reasonable adjustments only and are not to be taken as exhaustive of what might be reasonable in any particular case, but none of them suggests that it will ever be necessary simply to put more money into the wage packet of the disabled. The Act is designed to recognise the dignity of the disabled and to require modifications which will enable them to play a full part in the world of work, important and laudable aims. It is not to treat them as objects of charity which, as the Tribunal pointed out, may in fact sometimes and for some people tend to act as a positive disincentive to return to work.⁴⁰

He made the same point in *Secretary of State for Work and Pensions v R (MM and DM)*, concerning welfare benefits rather than employment matters, specifically the requirement to undergo certain processes to obtain employment and support allowance:

The laws regulating disability discrimination are designed to enable the disabled to enter as fully as possible into everyday life. This requires not merely outlawing discrimination against the disabled; it also needs those who make decisions affecting the disabled to take positive steps to remove or ameliorate, so far as is reasonable, the difficulties which place them at a disadvantage compared with the able bodied.⁴¹

Another area in which the purpose of the legislation appears to have been at the forefront of Elias' decision-making is in the sphere of equal pay. As counsel for the UK Government in *Enderby*, he had argued that a purely statistical difference in relation to a pay disparity in work of equal value was not enough to convert it into a question of equal pay. The basis for his argument in the Court of Appeal was recorded as follows:

Both the provisions of [Union] law and the provisions of the Acts of 1970 and 1975 are designed to prevent discrimination against women. In the context of equal pay this means, inter alia, the removal of all barriers and requirements which may indirectly discriminate against women because a smaller proportion of women than men can surmount the barriers or fulfil the requirements.

It is important to recognise that the legislation is designed to eliminate discrimination on grounds of sex; it is not designed to introduce a general principle of equal pay for equal work as between persons of the same sex. Nor does it seek the removal of wage differences.⁴²

⁴⁰ At [69].

⁴¹ [2013] EWCA Civ 1565 at [35].

⁴² [1994] ICR 112 at [122H]-[123B].

Although he lost in the Court of Justice on this point,⁴³ the issue of how to interpret the equal pay provisions in light of their concern being one of sex discrimination, not fair wages, is evident in his judgment in *Villalba v Merrill Lynch & Co Inc.*⁴⁴ Elias J rejected an argument that an employer was required to objectively justify a difference in pay merely because the claimant was a woman doing equal work to a man. This was not ‘a technical matter about identifying when and how the burden of proof can be rebutted, ... It is a fundamental undermining of the very concept of article [157 TFEU] being rooted in discrimination on grounds of sex.’⁴⁵ He held:

What is striking about this whole jurisprudence is that, ... no one has ever thought that the mere fact that a woman is paid less than a man for work of equal value is enough to trigger the obligation objectively to justify the difference in pay. If it were enough then the legislation would be concerned with fairness rather than with sex discrimination. All the case law is premised on the basis that, whilst that basic comparison is enough to raise a prima facie case of direct sex discrimination which the employer will have to rebut, if the claim is one of indirect discrimination then the claimant will have to establish a prima facie case. ... In short, European law has not taken the view that, even in the absence of any evidence, actual or assumed, of a causal link between the pay arrangement and the sex of the claimant, there is still an obligation objectively to justify the difference in pay.⁴⁶

Furthermore, he emphasised that ‘only in the language of Lewis Carroll ... such a pay differential not tainted in any way by sex could be rendered unlawful under provisions which *outlaw sex discrimination*. It could of course be rendered unlawful under a wider principle of fair wages which entitled the tribunals to become wage setting bodies, but that is not the law’ (emphasis in original text).⁴⁷

⁴³ The ECJ (Case C-127/92) held that ‘where significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men, article 119 of the Treaty requires the employer to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex’ (at [19]: [1994] ICR 112).

⁴⁴ [2007] ICR 469.

⁴⁵ At [187].

⁴⁶ At [124]–[125].

⁴⁷ At [187]. Elias J subsequently rowed back from his judgment in *Villalba*, holding that where the arrangements have a sufficiently strong disparate impact, there is always an irrebuttable presumption of prima facie indirect sex discrimination: *Surtees* at [46].

3. THE THEORETICAL UNDERPINNINGS OF A GROUNDED AND PURPOSIVE APPROACH TO LABOUR LAW

Having illustrated not only the purposive approach to the interpretation of labour law adopted by Patrick Elias but also its grounding in the practical realities of working life for both employers and employees, this raises the question as to the intellectual origins of, and justification for, this approach. As Bogg shows in this contribution to this special issue, Patrick Elias was very much a product of the ‘Cambridge school’ (Hepple, Napier, O’Higgins, Wedderburn).⁴⁸ Like all labour lawyers of his generation, he was much influenced by the work of Kahn-Freund who, according to Freedland, aimed to play ‘a significant role in the practical development of labour law ... according to his social ideals.’⁴⁹ Dukes describes the methodology of Kahn-Freund and Sinzheimer as ‘primarily sociological or socio-legal’ because ‘their normative arguments were closely informed by the work of sociologists and political economists, including Marx, who sought to identify and explain the injustices inherent in bourgeois society and “bourgeois” private law’. Sociological analysis was the primary method chosen to make the case for labour law: to explain why the application of private law rules to working relationships was unjust, and to identify the kinds of laws which might deliver just and equitable outcomes. The sociology of law, wrote Kahn-Freund, established ‘the social effect of the norm, ... the way in which it appears in society and ... its social function.’⁵⁰ This emphasis on the social function of law is important to explain the subsequent development of a purposive approach to labour law because it recognises the particular context in which labour law operates, where in most instances one party is subordinate to another, thus requiring a different approach from private law in other settings.

While Kahn-Freund wrote in letters of gold his belief that ‘the law is a secondary force in human affairs, and especially in labour relations’, something which has changed significantly in Patrick Elias’ time as a judge, Kahn-Freund’s teaching ‘made his students realise the immense impact of social,

⁴⁸ Bogg ‘Of Judges, Jurists, and Juristic Style’ (n 6).

⁴⁹ M. Freedland, ‘Otto Kahn-Freund’ in J. Beatson and R. Zimmerman (eds), *Jurists Uprooted: German Speaking Émigré Lawyers in Twentieth Century Britain* (Oxford: Oxford University Press, 2004) 304.

⁵⁰ R. Dukes, ‘Identifying the Purposes of Labor Law: Discussion of Guy Davidov’s *A Purposive Approach to Labour Law*’ (2017) 16 *Jerusalem Review of Legal Studies* 52, 61.

political and economic developments on the law...⁵¹ Hepple also emphasised the social realities of the law. In one essay, he considered the similarities of comparative dismissal laws, noting that:

It is, however, obvious that similarities of this kind may mask the different functions that these laws serve, depending upon the social system in which they are enacted and the power relations which exist, inside and outside the plant. We may say, with Otto Kahn-Freund, that the laws themselves are blanks without intrinsic significance until they are adapted to any number of social objectives.⁵²

Hepple and O'Higgins, in their core text on employment law, likewise recognised the need to interpret legislation according to the practical realities of the workplace and connected that to the structure within which labour law is enforced. In 1981, they wrote, 'It was plainly the intention of Parliament in setting up specialised tribunals in which legally qualified chairmen are assisted by those with knowledge and experience in industrial matters, that the employment statutes dealt with by those tribunals should be interpreted in light of practical experience.'⁵³

It therefore comes as no surprise that Elias should be at the forefront of combining a purposive approach with realism. However, as shown in section 2, his appreciation of the power relationship has been increasingly tempered by a realism about the needs of (good) employers to have an environment that enables them to run their business effectively. He therefore stands somewhat apart from those in academia and elsewhere who might want to use labour law to 'unpick the forms of capitalist enterprise, or those of the market state'.⁵⁴ He recognises the legitimate needs of capitalist enterprises ('grounded in the system'). For Elias, law can be used to control the excesses of capitalism but not to reshape it. His judgments are therefore not radical in the sense of undermining the foundations of the state. Quite the opposite: his judgments uphold the law and enable it to operate in a liberal (social) market economy.

⁵¹ B. Hepple, F. Gamillscheg, J. De Givry and J-M. Verdier (eds), *In Memoriam: Sir Otto Kahn-Freund* (Munich: Beck, 1980) XV.

⁵² *Ibid.*, 477.

⁵³ B. Hepple and P. O'Higgins, *Employment Law* (4th edn, London: Sweet and Maxwell, 1981) 53.

⁵⁴ S. Deakin, 'Labor Law: The Pragmatist's Guide—Comments on A Purposive Approach to Labour Law', (2017) 16 *Jerusalem Review of Legal Studies* 28, 31.

4. THE SUBSEQUENT RECOGNITION OF A GROUNDED AND PURPOSEFUL APPROACH MORE GENERALLY IN LABOUR LAW

Discussions of a purposive approach to labour law have developed significantly in recent years in the context of how a court is to determine whether a person is a worker under section 230(3)(b) Employment Rights Act 1996 and cognate legislation. The question of status has been particularly vexed in relation to ‘gig economy’ workers—plumbers,⁵⁵ Deliveroo riders,⁵⁶ Uber drivers⁵⁷ and many others—who are said to be independent contractors but whose freedom in how they work is constrained and whose contractual terms represent the reality of their work to a greater or lesser extent. Lord Clarke in *Autoclenz Ltd v Belcher*⁵⁸ described the approach to be taken as follows:

So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem.⁵⁹

This led to the Court in *Autoclenz* finding that terms in the written contracts could be disregarded when determining their status where those terms did not reflect the ‘true agreement’ between the parties.⁶⁰ Bogg suggested that the judgment in *Autoclenz* could be understood on the basis that it represented a ‘strong purposive approach’ which would ‘seem to suggest’ ‘that any interpretative doubts will be resolved in the putative worker’s favour, so as to further the protective reach of the specific statutory right being claimed. It is conceivable that Lord Clarke is invoking this very idea in *Autoclenz* as a general interpretive principle for employees and workers.’⁶¹

In *Uber BV and others v Aslam and others*,⁶² the Supreme Court stressed that the ‘modern approach to statutory interpretation is to have regard to the purpose of a particular provision’, and to analyse the relevant facts in light of the statutory provision being considered. Lord Leggatt noted that:

⁵⁵ *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29.

⁵⁶ *IWGB v CAC and Rooffoods Ltd* [2023] UKSC 43.

⁵⁷ *Uber BV and others v Aslam and others* [2021] UKSC 5.

⁵⁸ [2011] UKSC 41.

⁵⁹ [2011] UKSC 41 at [35].

⁶⁰ Arguably Elias J’s judgment in *Consistent Group v Kalwak* [2007] IRLR 560 was foundational to this approach but there is insufficient space to develop this point in this article.

⁶¹ A. Bogg, ‘Sham Self-Employment in the Supreme Court’ (2012) 41 *ILJ* 328, 343.

⁶² [2021] UKSC 5.

The general purpose of the employment legislation invoked by the claimants in the *Autoclenz* case, and by the claimants in the present case, is not in doubt. It is to protect vulnerable workers from being paid too little for the work they do, required to work excessive hours or subjected to other forms of unfair treatment (such as being victimised for whistleblowing).⁶³

The Court emphasised the ‘two synergetic aspects’ of an employment relationship of control exercised by an employer and dependency on the part of a worker, which meant that ‘such relations cannot safely be left to contractual regulation and are considered to require statutory regulation.’⁶⁴ Thus, Uber drivers working in London were workers despite not having a direct contractual relationship with Uber London.

Atkinson and Dhorajiwala have argued that the Court’s purposive approach ‘represents a dramatic shift away from the narrow contract-based analysis of the parties’ relationship towards a broad enquiry into the reality of the relationship, and requires the legal category of ‘employment’, meaning employee and worker status, be constructed in a manner that protects individuals performing work in positions of ‘subordination and dependency.’⁶⁵ Bogg and Ford, when commenting on the Court of Appeal judgment in *Uber*, distinguished between a ‘contractual’ reading of the purposive approach requiring a focus on the ‘true agreement’ and a ‘statutory’ reading, that is, where ‘the ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.’⁶⁶ They strongly advocated for—and this has now been established by the Supreme Court in *Uber*—the statutory reading of the purposive approach. Bogg and Ford also argued, following, the Supreme Court decision, that after the judgment in *Uber*, the purposive approach requires a tribunal, when considering a status case, ‘to view the *whole* relationship ‘purposively’ and ‘realistically’ in light of the facts on the ground to see if the statutory provisions were intended to apply to it’ even where ‘it is not the employer’s ‘object’ to exclude statutory employment rights ...’⁶⁷

This requires a careful analysis of the realities of the relationship and the real-world operation of the work being done (i.e. ‘grounded in fact’). It is not

⁶³ [2021] UKSC 5 at [71].

⁶⁴ At [75].

⁶⁵ At 789.

⁶⁶ J. Ribeiro, *Collector of Stamp Revenue v Arrowtown* [2003] HKFCA 46 at [35], cited by Lord Nicholls in *Barclays Mercantile Business Finance Limited v Mawson* at [36].

⁶⁷ A. Bogg and M. Ford, ‘The Death of Contract in Employment Status’ (2021) 137 *Law Quarterly Review* 392.

simply a matter of analysing the purpose of the legislation; it goes beyond the question of the aim of the legislation and steps into the real-world murkiness of how that relationship operates in practice. As we showed in Section 2, this is what Elias has excelled at, day in day out, in his balanced judgments. In the field of establishing employment status, he is perhaps best known for his observation in *Kalwak*⁶⁸:

The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship.

We cannot show that Elias' judgments led to this remarkable shift in approach by the Supreme Court in the *Autoclenz*, *Uber* line of authority but his role front and centre of the employment law world, his respected, carefully reasoned judgments, his willing engagement with the wider employment law community, especially through the Industrial Law Society, helped shift the dial in attitudes to labour law which allowed the change to occur. We would argue that a grounded (i.e. grounded in fact) and purposive approach is now the distinctive quality of labour law, and it should be identified as such. This will then help the courts and tribunals handle difficult cases, in particular in discrimination law.

5. A GROUNDED AND PURPOSIVE APPROACH TO DISCRIMINATION LAW

Atkinson and Dhorijawala have argued that 'the "contextual" nature of employment law makes it highly likely that the discipline is underpinned by a plurality of values, and that there will be instances of conflict between these various goals. It is not obvious to us, for example, that the purpose of national minimum wage legislation maps perfectly onto the purposes of statutory trade union rights or protections from discrimination.'⁶⁹ We would argue that the challenges of a purposive approach in discrimination law go beyond the question of whether there is a plurality of values, and must also acknowledge the reality of the constraints that are in play. These constraints arise—as recognised by Elias throughout his judgments—from the messy realities of the

⁶⁸ *Consistent Group v Kalwak* [2007] IRLR 560, [57].

⁶⁹ J. Atkinson and H. Dhorajiwala, 'The Future of Employment: Purposive Interpretation and the Role of Contract after *Uber*' [2021] 85 *Modern Law Review* 787, 794.

human relationships within which the employment relationship operates and the complexities of the employment relationship being concerned with economic commodification. That requires a nuanced, grounded and purposive approach to discrimination legislation that recognises the fundamental values that are in play, including dignity,⁷⁰ freedom and autonomy,⁷¹ while also acknowledging the serious and stigmatic nature of a discrimination complaint, especially complaints for direct discrimination and harassment, for an individual or a business. This viewpoint flows into the emphasis we have identified in a number of Elias' judgments on identifying discriminatory conduct, not simple unfairness. Moreover, that leads to an acknowledgment—that is particularly apparent in the cases concerning the duty to make reasonable adjustments—that mechanistic responses focusing on process and form are not enough; what is required are substantive and practical steps to address the real issues on the ground. It is an approach that requires deep humanity as well as realism about the demands of, and on, businesses operating within the labour market, which goes beyond simply asking what the purpose of a particular provision of the Equality Act is and requires the analysis of purpose to be grounded not only in practical realities but also in the (capitalist) system.

There are a number of particularly challenging areas in discrimination law where a grounded and purposive approach might assist in providing some answers. First, the equal pay law. The case of *Hartlepool BC v Llewellyn*⁷² appears to suggest that once female claimants bring a claim for equal pay, comparing themselves to male comparators, then male claimants who are rated as equivalent to those women on a job evaluation scheme can piggy-back on to their claims, whether or not the male claimants are working in male- or female-dominated jobs. This is a significant issue in many of the mass equal pay claims that are being litigated. The strict interpretation of the equal pay provisions would appear to support such a reading of the position, because if the women succeed in their claims in relation to male comparators, then the equality clause operates retrospectively. The women are then in the same beneficial position as men who were recipients of a particularly beneficial pay practice, and they can be used as comparators for men in other male-dominated roles who were not recipients of that practice. Consequently, there is a

⁷⁰ D. Reaume, 'Dignity, Equality and Comparison' in D. Hellman and S. Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford: Oxford University Press, 2013).

⁷¹ T. Khaitan, *A Theory of Discrimination Law* (Oxford: Oxford University Press, 2015).

⁷² UKEAT/0006/08/CEA.

ratcheting up of pay across both male- and female-dominated roles. A grounded and purposive approach, we suggest, would raise significant questions about such an interpretation. Is this really about equal pay, or has it become a question of fair pay, something that Patrick Elias has long pushed back against?

Secondly, questions arise in relation to the current approach to indirect sex discrimination and flexible working requests. If a woman's flexible working request is refused, she may have an indirect sex discrimination claim; the particular disadvantage women suffer is identified as the 'childcare disparity' (i.e. the fact that more women than men tend to have childcare responsibilities) of which judicial notice can be taken. However, taking a grounded and purposive approach, is that right? Post-coronavirus disease-2019 (COVID-19) and post the extension of shared parental leave, has the social context of responsibility for childcare arrangements changed such that this is no longer the position, and that men may be equally affected?

The third example is the highly contentious issue of the manifestation of religion or belief, and questions of the single sex exemption. We would argue that a grounded and purposive approach is precisely what the courts need to use. It will be crucial to enable the courts to pay particular attention to the practical, real-world challenges in workplaces in navigating these issues, to ensure that fundamental rights are substantively protected within the context of enabling the effective operation of the business. As cases such as *Higgs*⁷³ show, employers are struggling to navigate a complex terrain where they are having to balance the freedom of employees to manifest their religious/philosophical beliefs, which might cause offence to others, including vociferous parents demanding action, while at the same time trying to manage the day-to-day operation of a business. A grounded, purposive approach helps to ensure tribunals apply the standards of 'men and not angels',⁷⁴ weighing the practical issues on the ground.

6. CONCLUSION

What is clear from the 'old' and the 'new' discussions of a purposive approach to labour law is that the social context within which labour law operates requires a distinctive approach to interpreting the legislation, recognising

⁷³ [2025] EWCA Civ 109.

⁷⁴ *Jupiter General Insurance v Shroff* [1937] 3 All ER 67.

both the importance of values such as dignity and the reality of the employment relationship being a fundamentally economic one. Too often, cases on discrimination law have got stuck in the weeds of technical arguments and lost sight of both the purpose of this fundamental right and the need for it to apply practically in the workplace, particularly in the case of businesses trying to stay afloat. We would argue that this is the unifying theme of many of Elias' judgments: a grounded and purposive approach. It is an approach that he has developed particularly in the context of discrimination law, but one that has now been extended by the Supreme Court in relation to worker status. It is focused on the social context of the employment relationship, twinned with the business realities involved. We have argued that Patrick Elias has been influential in shaping this evolution by showing, not telling. In this article, we have aimed to 'tell', giving a label—'grounded and purposive'—to what is already happening, and commending its use to help address some particularly difficult issues in the field of discrimination law.

So why does the emphasis on the grounded and purposive nature of this approach matter? We would argue that it increasingly marks labour law out as an area of law with its own internal frame of reference where purpose takes account of not just the power imbalance inherent in the employment relationship but also the complexities of recognising both labour as an economic commodity and the human relationships involved. By giving the interpretative approach a name, 'grounded and purposive', it provides a concrete recognition of what we witness in Elias' judgments and what underpins the recent Supreme Court decisions. It is an approach that has the potential to feed back into discrimination law and may be an important way-marker in future decisions, especially as discrimination law comes under challenge from the left and the right.