The 'Range of Reasonable Responses' test: A Poor 'Substitution' for the Statutory Language

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1. INTRODUCTION

The prevailing test for establishing the 'fairness' of a dismissal, known generally as the 'band' or 'range' of reasonable responses test ('RORR'), is based on a mistake. According to the RORR, the fairness of a dismissal depends on whether the dismissal decision at issue falls within a notional range of reasonable employer responses, without any expectation that the contents of this range will be established by evidence, and with the assumption that a reasonable employer might find 'reasonable' a decision which the deciding judge or panel finds unreasonable. Ever since the Industrial Relations Act 1971 (s 24) defined the fairness of a dismissal according to whether the employer 'acted reasonably,'[1] courts and tribunals have struggled to reconcile (a) their sense that the test must be objective with (b) the apparent focus of the statute on the point of view of the employer. An understandable reticence on the part of judges, about substituting their own inexpert (in the field of business) views for those of employers, made the task even more difficult. Their attempts to resolve these tensions produced a test that distorts the meaning of 'reasonable' and tends to accuse any judge who declares a dismissal flatly unreasonable of slipping into the dreaded 'substitution mindset'.[2]

The root misconception underlying the RORR, as this article will explain more fully, is the belief that a tribunal can make sense of a dismissal *that it finds unreasonable* somehow also being reasonable according to a hypothetical 'employer reasonableness'. Because of this error, the RORR test has been a mistake from its inception, and any point in its history would represent an appropriate time to call for change.[3] However, the increasing influence of more robust tests in anti-discrimination and human rights jurisprudence makes it difficult for judges to ignore the shortcomings of the RORR. Indeed, some recent cases have seen judges embellish the test to permit more searching judicial assessments of substantive reasonableness, in some cases to make it fit in with its more sophisticated (and candid) sibling, proportionality.[4] Meanwhile, proportionality jurisprudence has begun to recognize the difference between judges forthrightly applying a standard according to their own lights (appropriate) and judges 'remaking' the original challenged decision (not appropriate).[5] In other words, while judges in human rights and administrative law cases separate the substantive standard of proportionality from concerns associated with the concept of

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[1] This is now found in the Employment Rights Act 1996, s 98 (4) (a) (although the wording now asks whether the employer acted 'reasonably or unreasonably'.

[2] The term 'substitution mindset' is one coined by the judiciary, eg, Mummery, LJ in *London Ambulance Service NHS Trust v Small* [2009] IRLR 563, CA (at paragraph 43).

[3] See, eg, Freer, Andy, 'The Range of Reasonable Responses Test - From Guidelines to Statute' (1998) 17 ILJ 335; Collins, Hugh, *Justice in Dismissal* (OUP 1992) p 8.

[4] *Connolly v Western Health and Social Care Trust* [2017] NICA 61, [2018] IRLR 239; *O'Brien v Bolton St Catherine's Academy* [2017] EWCA Civ 145; *Newbound v Thames Water Utilities Ltd* [2015] EWCA Civ 677, [2015] IRLR 734; *Turner v East Midlands Trains Ltd* [2012] EWCA Civ 1470, [2013] IRLR 107.

[5] See, eg, *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 [20]-[21].

deference, the RORR continues to distort the substantive standard (reasonableness) by mashing it up with prudential concerns. The RORR test cannot do what it claims to do, and it needs to go.

Lady Hale of the Supreme Court recently noted that the RORR, as currently understood and applied, has yet to receive the full attention of the Court, and thus remains subject to review at that level. Although the decision in *Reilly v Sandwell Metropolitan Borough Council*[6] was unanimous, Lady Hale penned a separate opinion clarifying that (1) the instant judgement in no way foreclosed a future review of the RORR and (2) there appear to be colourable arguments on either side of the question of whether the RORR correctly interprets the statute.[7] Lady Hale's opinion then pointed out three possible reasons why the RORR[8] has not been challenged at the highest court, before stating 'It follows that the law remains as it has been for the last 40 years and I express no view about whether that is correct.'[9] The weakness of the arguments Lady Hale catalogued in favour of maintaining the RORR, coupled with the gratuitousness of the separate opinion, suggests an invitation to challenge the RORR. This article represents an enthusiastic RSVP to this perceived invitation.

The challenge begins with a critical account, in the next section, of how the test emerged and what it became. Section 3 then reviews the scholarly debate on the RORR, to set up a new critique which argues that (1) because it cannot do what it claims to do, the RORR can only lead to a 'sub-reasonable' standard, (2) it is based on a fundamental cognitive flaw which divorces the doctrine from practice, and (3) recent judicial efforts to bolster the substance of the RORR will not be enough. Section 4 then (a) rejects the idea that the RORR is settled and should be left alone, (b) distinguishes between the RORR's separate functions as a standard of review and as a standard for decision, and (c) concludes that the Supreme Court should borrow from proportionality reasoning in cases like *Bank Mellat*, and recognize that judicial restraint and deference to employer expertise can occur without resort to a fictional 'employer reasonableness'.

2. THE COMING OF RORR

The story of the RORR begins, of course, with the statutory language it evolved to apply. From its earliest manifestation to the present, the right not to be unfairly dismissed has amounted, in reality, to a right not to be dismissed unreasonably. The current statutory cause of action, found in the Employment Rights Act 1996, turns ultimately on the words of section 98 (4), found under the heading 'Fairness':

> ... whether the dismissal was fair or unfair (having regard to the reason shown by the employer) (a) depends on whether in the circumstances . . . the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and (b) shall be determined in accordance with equity and the substantial merits of the case.

[6] [2018] UKSC 16.
[7] [2018] UKSC 16 at [33].
[8] The opinion [para 34] actually speaks of the test set out in *British Homes Stores Ltd v Burchell (Note)* [1978] ICR 303, but it is clear from the previous paragraph that the remarks apply to the underlying RORR.
[9] [2018] UKSC 16 at [35].

This wording has changed little since the original formulation which gave rise to the RORR, found in the Trade Union Labour Relations Act 1974 ('TULRA'), schedule 1, para 6 (8):

> … whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether the employer can satisfy the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonably in treating it as a sufficient reason for dismissing the employee.

Neither version features any reference to a range of reasonable responses, nor does either state or imply that employment judges should shrink from deciding, according to their own sense of reasonableness, whether the dismissal in question was a reasonable decision or not.[10] The statutory language does not discuss subjectivity, objectivity, or any kind of hybrid between the two, so the RORR exists as a result of judicial elaboration.[11]

A definitive early (pre-1998) history of this judicial development already exists,[12] and I cannot improve on it, so a potted version must suffice. Through the 1970s into the 1980s tribunals and courts disagreed as to whether judges should apply the plain wording of the statute or a RORR-type test. Even at the level of the Court of Appeal judges could not agree on whether the RORR meant the same thing as the statute said. *British Leyland (UK) Ltd v Swift*[13] and *Neale v Hereford County Council*[14] applied the RORR, but *Gilham v Kent County Council (No. 2)*[15] held to the view that the statute clearly provided the test in unambiguous terms: the tribunal is to decide whether the employer acted reasonably or unreasonably. Interestingly, the EAT decision in *Iceland Frozen Foods Ltd v Jones,*[16] the most detailed and oft-cited statement of the RORR, occurred after *Swift*, but before *Gilham* and *Neale*, meaning that *Gilham* ignored *Jones* and returned to the statutory language, only for *Neale* to approve *Jones* and treat *Gilham* as neither confirming nor denying *Jones*. This last approach appears to express the verdict of history, as the Jones version of the RORR received evidently eternal confirmation in *Foley v Post Office* in 2000.[17] This tidy wrapping up of the matter must not, however, obscure that fact that for over 25 years judicial opinion varied widely as to whether tribunals should apply the plain meaning of the statute or apply something that, as evidenced by all of the disagreement, was clearly *different* from that plain meaning: the RORR.

It appears that uncertainty about the propriety of an objective or subjective attitude, at least in part, moved judges to expand on the otherwise straightforward language of section 98(4). To most lawyers the concept of 'reasonableness' is obviously objective, and in earlier cases the courts took that approach, viewing the tribunal as an 'industrial jury'

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[10] It has been argued that the change from 'reasonably' to 'reasonably or unreasonably' made the test more employer-friendly, as it suggests that any decision which is not 'unreasonable' must perforce be 'reasonable' (see, eg, Collins, note 3 above, at 39). This has not, however, been an explicit basis for the RORR logic.

[11] It is possible to make something of the fact that the later wording, drafted after the RORR came into being, brings 'equity and substantial merits' out of brackets and into a status of co-equal criterion alongside of reasonableness. This received short shrift in the Court of Appeal in *Orr v Milton Keynes Council* [2011] ICR 704, [62]-[64], [91]-[98], which receives more attention below.

[12] Freer, n 3 above.

[13] [1981] IRLR 91, CA.

[14] [1986] ICR 471, CA.

[15] [1985] ICR 233, CA, 224.

[16] [1982] IRLR 439.

[17] [2000] ICR 1283, [2000] IRLR 827, CA.

authorised to review the employer's conduct and decide, in the light of standard industrial practice (hence the lay membership of the tribunals), whether in the circumstances dismissal was reasonable.[18] Some later cases, however, took the view that the test should be 'subjective' to some degree, particularly in cases where the employer's belief as to what occurred was significant.[19] Thus, in *Alidair Ltd v Taylor*,[20] where an airline pilot's summary dismissal after damaging an aircraft in a clumsy landing was held to be fair, Lord Denning MR said:

> it must be remembered that [section 98] contemplated a subjective test. The tribunal have to consider the employer's reason and the employer's state of mind.....They clearly had no further confidence in him. He could not be trusted to fly their aircraft on their behalf. That being their honest belief on reasonable grounds, they were entitled to dismiss him. They acted reasonably in treating it as a sufficient reason for dismissing him. . . . It is not necessary for the employer to prove that he is in fact incapable or incompetent.

Other cases have insisted that the standard *is* objective,[21] but describing the test as subjective in this way represents one of several conceptual (or terminological) errors which bedevil the RORR. Lord Denning, in calling the test subjective, simply meant that the *subject matter* of the assessment is not whether the employee actually deserved the dismissal, but whether the employer was reasonable to dismiss in the applicable circumstances. This is not a subjective test, which might turn on the state of mind of the employer; an employer's belief in the guilt of an employee dismissed for misconduct is only relevant because it is objectively unreasonable to dismiss someone for something one does not actually believe the person guilty of.[22] Instead, it is an objective test of the employer's action, effectively substituting 'reasonable person in the position in which this employer found herself' for 'reasonable person'. Indeed, the opinion in *Alidair* makes this objectivity clear by proceeding carefully to assess why a hypothetical reasonable employer would dismiss in the circumstances.[23] The case evidenced no hint of a range or other alloy to reasonableness, but it had the effect of planting subjectivity into future discussions.

The belief that applying a purely objective test might lead judges to re-make the decision, as if they themselves were the employer, flows from yet another misconception, this time about the implications of the existence of varying views. Through the 1970s and 1980s judges translated their uncertainty about what is reasonable under any given set of circumstances into an insistence on recognizing as reasonable decisions which they do not

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[18] *Bessenden Properties Ltd v Corness* [1977] ICR 821n, [1974] IRLR 338, CA.
[19] *Ferodo Ltd v Barnes* [1976] ICR 439, [1976] IRLR 302; *Post Office v Mughal* [1977] ICR 763, [1977] IRLR 178.
[20] [1978] ICR 445, [1978] IRLR 82, CA, [19]-[20].
[21] *Watling & Co Ltd v Richardson* [1978] ICR 1049 at 1056, [1978] IRLR 255 and 257, per Phillips J, explaining *Vickers Ltd v Smith* (n 210); see also *Mitchell v Old Hall Exchange Club Ltd* [1978] IRLR 160.
[22] Some still maintain that there is a subjective element, in the sense that the tribunal must consider the question in light of the specific size and resources of the employer, and in some cases must accept the employer's determination of appropriate workplace rules and policies (D. Cabrelli, 'The Hierarchy of Differing Behavioural Standards of Review in Labour Law' (2011) 40 ILJ 146, 155-156). However, none of this makes the *test* subjective, it only emphasizes that the subject matter of the tribunal's consideration is the dismissal decision *in context*.
[23] *Alidair* [1978] IRLR 82, [19]-[20].

themselves find reasonable. For example, consider the shift between the following two cases. In *Trust House Forte Leisure Ltd v Aquilar*,[24] Phillips J said:

> when the management is confronted with a decision to dismiss an employee in particular circumstances there may well be cases where reasonable managements might take either of two decisions: to dismiss or not to dismiss. It does not necessarily mean if they decide to dismiss that they have acted unfairly because there are plenty of situations in which more than one view is possible.

This is a perfectly sensible observation to the effect that a tribunal should not find a given dismissal decision unreasonable simply because another employer might have refrained from dismissing in the same circumstances. However, it takes on a subtly new implication in *Watling & Co Ltd v Richardson,*[25] where the same judge opined two years later:

> It has to be recognised that there are circumstances where more than one course of action may be reasonable...In such cases...if an industrial tribunal equates its view of what itself would have done with what a reasonable employer would have done, it may mean that an employer will be found to have dismissed an employee unfairly although in the circumstances many perfectly good and fair employers would have done as that employer did.

Here, the tribunal's *own view* is somehow impugned by the unsubstantiated assumption that other employers might have done what the employer in question did, and that those employers were presumptively reasonable to do so. Rather than simply saying, 'some employers will be more harsh than others, so leniency by other employers does not make this employer unreasonable,' the *Watling* statement says, 'because employers might take a different view from the tribunal, the tribunal must not trust its own view.'

In conformity with this logic, the modern RORR test remains the one articulated by Browne-Wilkinson P in *Iceland Frozen Foods Ltd v Jones*[26]:

> [T]he correct approach for the Industrial Tribunal to adopt in answering the question posed by [section 98(4) of the 1996 Act] is as follows: (1) the starting point should always be the words of [section 98] themselves; (2) in applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they [the members of the Industrial Tribunal] consider the dismissal to be fair; (3) in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer; (4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another; (5) the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls

[24] [1976] IRLR 251 at 254.
[25] [1978] ICR 1049 at 1056, [1978] IRLR 255 at 258.
[26] [1982] IRLR 439 at 442.

> within the band the dismissal is fair; if the dismissal falls outside the band it is unfair.

The third stipulation, that the tribunal must not 'substitute its decision' enjoys no support from the statutory language of s 98(4), which simply requires that judges decide whether the employer acted reasonably. So it is there because some judges ostensibly[27] thought it necessary in order to ensure that other judges would not conflate 'reasonable' with 'preferable'. However genuine this concern might have been, the requirement is logically meaningless. If a judge focuses on the correct subject matter—the reasonableness of the decision under the applicable circumstances—then the judge will not declare a decision unreasonable because she would have preferred a different one: she will rule on whether the decision was reasonable. However, in practice the EAT and the Court of Appeal treat the requirement as forbidding judges to substitute their view of what is *a reasonable decision in the circumstances* in place of the view that notional 'reasonable employers' would take.[28]

So the test appears to have been stimulated by two perfectly reasonable concerns. The first, which I will call the 'subject matter' concern, was that judges must not focus on 'fairness' in the sense of whether the dismissed employee was in fact guilty or incompetent, but should focus on whether the decision made, at the time it was made and with the information reasonably known and reasonably established by the employer, was reasonable. The second, which I will call the 'uncertainty' concern, was that different reasonable employers might take different views, so judges must be careful not to enshrine the preferences of leniently-inclined judges as a general standard of reasonableness. However, the test that emerged does far more than address those concerns, which could be achieved by simply reminding judges (a) to focus on the reasonableness of the dismissal decision at the time and (b) to show some deference to the employer's decision in a context of uncertainty. Instead, the RORR enjoins them from applying their own standard of reasonableness, which in turn forces them to imagine, without evidence of actual practice, a standard which must be assumed to be more permissive of harshness than their own.

3. WHY THE RORR IS WRONG

The previous section of course includes a few observations as to what is wrong with the RORR. However, up to now the critique has focused on how the RORR represents an overreaction to and confusion about legitimate judicial concerns. Those with pragmatic inclinations might argue, "so what? If the RORR pursues sensible objectives and muddles through to the right result, why fix what ain't broke?"[29] Certainly it has been suggested that Parliament must be happy enough with the RORR to leave it free from statutory

[27] There is an argument, beyond the scope of this piece, that some judges did this because they wanted to give employers as much freedom as they could get away with under the statute. Some decisions make this a hard argument entirely to discount. However, the argument here assumes judicial good faith.

[28] See, eg, *Small v London Ambulance Service NHS Trust* [2009] All ER (D) 179; [2009] EWCA Civ 220; *Secretary of State for Justice v Lown* UKEAT/0082/15/BA, UKEAT/0130/15/BA (Transcript) 28 July 2015 unreported; *Leeds Teaching Hospital NHS Trust v Blake* UKEAT/0430/14/BA (Transcript) 15 July 2015 unreported. How the anti-substitution rule is applied in practice receives further attention in section 3 below.

[29] For some reason my imagination paints those who disagree with me as having a tendency to employ hackneyed expressions.

interference,[30] so what makes it so problematic that the judiciary should disown it? This section responds by first reviewing academic and judicial discussion of the RORR as a foundation for putting forward a new critique. It then contends that the first reason the judiciary should renounce the RORR is that it forces tribunal judges to apply a standard below their own absolute floor of reasonableness, while at the same time allowing those appellate judges with the harshest viewpoints simply to reverse tribunal decisions because they are too sympathetic to the claimant. The section next contends that at the root of the RORR lies a cognitive error that the judiciary should be embarrassed to retain in the law. There follows a third contention, that recent judicial attempts to invest the RORR with some backbone are encouraging but ineffectual, and cannot solve the underlying problem. This section argues, in short, that the RORR must go because it distorts the application of the unfair dismissal statute for flawed reasons, and the problems are too fundamental to tweak.

A. Debate on the RORR Up to Now

Commentators have criticized the RORR for decades, but it of course has its defenders. Charles Wynn-Evans summarizes the argument in support of the RORR as turning on the fact that it:

> correctly limits the role of the ET—on the basis that it is not appropriate for the ET to supplant the employer's dismissal decision save where it is clearly unjustifiable and that the margin of appreciation given to the employer by the [RORR] reflects the fact that employers take their decisions in very specific circumstances which may not admit only of one possible—and therefore fair—answer.[31]

The RORR boasts an additional justification, he adds, in that 'reasonable' in the statute must be understood as 'akin to that applied to professionals in negligence cases, ie, to give space for professional discretion and judgment.'[32] This summary properly reflects the arguments generally made in support of the RORR,[33] which this section tackles in detail below. It suffices for now to observe that these points simply restate the motives behind constructing the RORR: concern that ETs focus on the appropriate subject matter—reasonableness at the time, not preferability in hindsight—and that they show proper deference to employer expertise. These points in no way explain why the RORR, as applied in practice, represents the best or even an acceptable way to pursue those motives.

Meanwhile, the weight of commentary has been critical of the RORR. However, the chorus of criticism has never achieved sufficient intensity to produce calls for reform in a political context. This has transpired at least in part because, as is discussed more

[30] Reilly v Sandwell Metropolitan Borough Council [2018] UKSC 16 [34]; *Foley v Post Office; HSBC Bank Plc. (formerly Midland Bank Plc.) v Madden* [2000] ICR 1283, 1287-1288.
[31] Wynn-Evans, Charles, 'Harsh But Fair—The "Range of Reasonable Responses" Test and the "Substitution Mindset" Revisited: *Newbound v Thames Water Utilities Ltd*' (2015) 44 ILJ 566, 571.
[32] Ibid; S. Deakin and G. Morris, *Labour Law*, 6th edn (Oxford: Hart, 2012) 528–30.
[33] See, eg, D. Cabrelli, 'The Hierarchy of Differing Behavioural Standards of Review in Labour Law' (2011) 40 ILJ 146; A.C.L. Davies 'Judicial Self-Restraint in Labour Law' [2009] 38 ILJ 278, 291-294.

fully in section 4 below, the government has little incentive to correct a doctrinal error which produces politically desirable results. The New Labour, Coalition, and Conservative governments of the last two decades have all preferred policies which freed employers to shed unwanted employees 'flexibly.'[34] Such governments could hardly be expected to prioritize repairing a statute which appears to protect against unreasonable dismissals, but in practice permits employers to dismiss for all but the most perverse reasons. Scholarly criticism has focused on the tendency of the RORR to produce greater deference to the employer's decision than the words of the statute appear to call for, which ought to resonate with judges, but unsurprisingly has generated no political traction.

With regard to the content of the criticism, it focuses on substantive, as opposed to procedural, fairness. Nobody blames the RORR for weakening procedural protections (such as disciplinary warnings, consultation, hearings, etc); if an employee wins an unfair dismissal case it is almost always on procedural grounds.[35] Perhaps because judges feel more confident on the subject, and employers claim no special expertise, ETs have generally given robust and consistent decisions on procedure, which ACAS has gathered together in the form of the *ACAS Code of Practice on Disciplinary and Grievance Procedures*. Criticism therefore focuses on the failure of the RORR to produce a reliable objective standard for the substantive fairness of a dismissal: the sufficiency of the reason, the guilt of the employee,[36] and the harshness of the decision. Although the arguments vary among commentators, the key problems highlighted in the literature are (1) the RORR is a judicial 'gloss' and is not authorized by the statute,[37] (2) the RORR allows the standard to be that of the harshest of employers,[38] (3) the RORR simply confirms as reasonable what employers actually do, rather than applying an external standard[39] and (4) the RORR applies, without statutory authorization, a 'perversity'

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[34] See, eg, K. D. Ewing, K. D. and J. Hendy**,** 'Unfair dismissal law changes – unfair?' (2012) 41 ILJ 115; P. Smith and G. Morton**,** 'Nine Years of New Labour: Neoliberalism and Workers' Rights' (2006) 44 *British Journal of Industrial Relations* 401; P. Smith and G. Morton**,** 'New Labour's Reform of Britain's Employment Law: The Devil is not only in the Detail but in the Values and Policy Too' (2001) 39 *British Journal of Industrial Relations* 119.

[35] See, eg, J. Earnshaw, M. Marchington and J. Goodman, 'Unfair to whom? Discipline and dismissal in small establishments' (2000) 31 *Industrial Relations Journal* 62, 66-67.

[36] Because the statute focuses on the reasonableness of the employer's action, the ETs do not decide on the actual guilt of the worker, but rather on the sufficiency of the employer's investigation into it. Sufficiency of investigation technically counts as procedure, but unlike with other aspects of procedure the ACAS Code in no way 'settles' the question, so it has become as contested an area as the harshness of the dismissal itself (see, eg, *Sainsbury's Supermarkets Ltd v Hitt* [2002] EWCA Civ 1588; [2003] I.C.R. 111; [2002] 10 WLUK 539 (CA (Civ Div))).

[37] *Haddon v. Van den Bergh Foods Ltd.* [1999] I.C.R. 1150; Freer, n 3 above; H. Collins and V. Mantouvalou, 'Redfearn v UK: Political Association and Dismissal' (2013) 76 MLR 909-923, 920; H. Collins and M. Freedland, **'**Finding the Right Direction for the "Industrial Jury": *Hadden v Van den Bergh Foods Ltd /Midland Bank plc v Madden*' (2000) 29 ILJ 288, 294; T. Brodtkorb, 'Employee misconduct and UK unfair dismissal law' (2010) 52 *International Journal of Law and Management* 429, 440-444; H. Collins*, Justice in Dismissal* (Oxford: Clarendon Press, 1992) 39; S. Anderman, 'Termination of Employment: Whose Property Rights?' in C. Barnard, S. Deakin and G. S. Morris (eds), *The Future of Labour Law - LiberAmicorum Sir Bob Hepple QC* (Oxford: Hart Publishing: 2004) 101.

[38] Ibid; C. Sheffield, 'Case Comment: the reasonable response test in unfair dismissal cases' (2003) 8 *Coventry Law Journal* 67.

[39] Ibid; P. Collins, 'The Inadequate Protection of Human Rights in Unfair Dismissal Law' (2018) 47 ILJ 504, 518-520; D. Cabrelli, 'Rules and Standards in the Workplace: a Perspective from the Field of Labour Law' (2011) 31 LS 21, 29; Davies, n 33 above.

standard akin to *Wednesbury* unreasonableness.[40] I will not summarize the way these points have been argued by others, because I will argue them in my own way below, and my arguments have been influenced by all of the critiques that have gone before. However, no commentator has so far argued, as far as I am aware, that the RORR is simply *wrong*. After 40 years of the RORR most academics and many judges appear to agree that the test is a judicial invention not compelled by the statute (but not necessarily inconsistent with it), and that it defers to the employer to a degree that is undesirable or beyond what the legislation appears to contemplate. In this paper I go further to argue that in adopting the RORR the judiciary committed an error, in that the test distorts the standard away from reasonableness to something else, and does so on the basis of a mistake about the nature human reasoning.

B. The RORR is a 'Worse Than Unreasonable' Standard

Perversity

A crucial landmark in the continued vitality of the RORR occurred in the 2000 Court of Appeal decision in *Foley v Post Office*.[41] The opinion of Mummery LJ addressed a claim that had been made in the EAT case, *Haddon v. Van den Bergh Foods Ltd.*,[42] and more or less accepted by the EAT below in *Foley*, to the effect that the RORR should be ignored as an unnecessary gloss on the statutory language, in part because it amounted to a perversity test.[43] As long ago as *Vickers Ltd v Smith*[44] the EAT had said that the RORR required tribunals 'to ask themselves the question whether [the dismissal] was so wrong, that no sensible or reasonable management could have arrived at the decision'.[45] This tracks remarkably closely with the language of the *Wednesbury* perversity test: "If a decision [of a public authority] is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere".[46] *Vickers* was never rejected as bad law—indeed, it was expressly approved in *Iceland*:

> Although the statement of principle in *Vickers Ltd. v Smith* is entirely accurate in law, . . . we think industrial tribunals would do well not to direct themselves by reference to it. The statement in *Vickers Ltd v Smith* is capable of being misunderstood so as to require such a high degree of unreasonableness to be shown that nothing short of a perverse decision to dismiss can be held to be unfair within the section . . . That is not the law. The question in each case is whether the industrial tribunal considers the employer's conduct to fall within the band of reasonable responses . . .[47]

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[40] Ibid; M. K. Hattab, 'TheDoctrine of Legitimate Expectation & Proportionality: A Public Law Principle Adopted into the Private Law of Employment' (2018) 39 *Liverpool Law Review* 239, 256-257; Cabrelli, n 22 above at 156-157; L. Vickers, Case Comment: unfair dismissal and human rights' (2004) 33 ILJ 52, 53.
[41] *Foley v Post Office; HSBC Bank Plc. (formerly Midland Bank Plc.) v Madden* [2000] ICR 1283, 1287-1288.
[42] [1999] I.C.R. 1150.
[43] *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223 (HL).
[44] [1977] IRLR 11.
[45] Ibid at [4].
[46] [1948] 1 KB at 230.
[47] [1982] IRLR 439 at 442.

The Court of Appeal in *Foley* took up the same refrain, insisting that the RORR was not a perversity test, and that it would be an error of law to apply it as such.[48] *Foley* upheld the RORR as the correct test, and made the perversity argument a dead letter: it does no good to claim that the RORR essentially calls for a perversity test when Court of Appeal authority says it would be an error of law to apply the test with that effect.

Nevertheless, the RORR behaves very much like a perversity test. David Cabrelli argues that the RORR is objectively distinct from perversity, because it is expressed positively in terms of reasonableness, rather than negatively in terms of unreasonableness.[49] His point is well taken if one focuses on the abstraction of a band of reasonable employer decisions and, outside the boundary of that band, an area of unreasonable decisions. A test that requires that a decision be 'so unreasonable that no reasonable employer would make it' places the 'point of demarcation' some way into the unreasonable territory; the RORR holds that a decision is reasonable if it falls within the band, so the line of demarcation is the outer edge of the 'reasonable' territory. In theory those points of demarcation are different, but this does not work in practice. Cabrelli's claim rests on a similar mistake to the one on which the RORR rests: it does not correspond to how human beings actually think about reasonableness. If one tries to perform the RORR exercise, of imagining the universe of employer decisions and identifying which ones are unreasonable and which are reasonable, then the decisions one considers unreasonable are decisions no reasonable employer would make.[50] There is no practical difference between (1) a decision that falls barely outside the range of all decisions that one might, holding one's nose, accept as 'reasonable' (despite being harsher than the decision one might make one's self) and (2) a decision so unreasonable that no reasonable employer would make it. That is why *Vickers* was not wrong in law: it simply expressed what the RORR assessment logically produces. Any decision that does not fit within the band is one that 'no reasonable employer could have come to,' which is a standard low enough that the judiciary does not want to admit to it.

Substitution

The rule against substitution compounds this effect. Case law treats the rule against substitution as meaning that the tribunal's idea of what counts as reasonable must give way to a hypothetical employer idea of reasonableness.[51] This understanding of 'substitution', together with the 'range' construct, forces tribunals to assume, without anything that would amount to evidence in any other context, that a reasonable employer will countenance a response harsher than what the judge believes would be the harshest reasonable response. This occurs not only because there is no other way to make sense of it, but because more employer-friendly appellate judges can and do reverse findings of unfairness with which they merely disagree: they claim that the tribunal below fell into a 'substitution mindset', by showing signs that the judge or panel members used their own

[48] [2000] ICR 1283 at 1292.

[49] Cabrelli, n 22 above at 156-157.

[50] It exceeds this lawyer's expertise to substantiate this claim empirically, but I offer it as comment sense, and expect that it will correspond to the way the reader's mind works as well. Any empirical research either supporting or rejecting this claim will make a welcome addition to debate on the RORR.

[51] *GM Packaging (UK) Limited v Haslem* UKEAT/0259/13; *Orr v Milton Keynes Council* [2011] ICR 704, [78]

ideas of what would be reasonable.[52] For example, in *GM Packaging (UK) Limited v Haslem* the EAT considered it an obvious substitution for the ET to find that 'no reasonable employer would categorise sexual activity between two adults out of hours in a deserted office as gross misconduct justifying summary dismissal'.[53] The EAT's decision was based purely on the content of the ET's finding—the EAT disagreed, so the ET *must* have substituted its own judgment for that of the employer. Yet the ET clearly had not decided on the basis that the judge would have made the original decision differently, but on the ground that the judge considered the actual decision an unreasonable one that no reasonable employer would make. The 'substitution mindset' label thus empowers more harshly inclined appellate judges to set the tone for the tribunals. Some further examples will demonstrate how the RORR (a) has given rise to the idea that there is a kind of 'employer reasonableness' which is different from judicial reasonableness, and (b) has equated 'substitution' with a judge using her own standard of reasonableness instead of 'employer reasonableness'.

A good place to start is *Saunders v Scottish National Camps*.[54] In this case the EAT found it reasonable for an employer to dismiss a worker at a children's camp simply because he was homosexual. The employer believed the claimant posed an elevated risk to the children among whom he worked. Psychiatric evidence, publically available at the time of the dismissal, made it clear that (a) Mr Saunders was no threat to children and (b) homosexuals did not represent a greater risk to children than heterosexuals. The EAT found the dismissal fair because 'a considerable proportion of employers would take the view that the employment of a homosexual should be restricted, particularly when required to work in proximity and contact with children'.[55] This ruling clearly, by its own terms, stands for the proposition that if a considerable proportion of employers would in fact decide in a certain way, that fact provides better guidance as to the content of 'reasonableness' than do the views of judges and psychiatrists. The principle assumes that these other employers are reasonable, and tribunals are neither expected nor even permitted to require evidence to support a belief as to what a considerable proportion of employers would decide. In short, if appellate judges believe, without evidence,[56] that a considerable proportion of employers would decide a certain way, it is irrelevant whether those employers would be reasonable to do so and impermissible for a tribunal to assess whether deciding in that way is reasonable: it is reasonable if 'a considerable proportion of employers' would do it.

The emphasis on a 'considerable proportion' of employers has led some to suggest that the RORR acts like the *Bolam*[57] test in medical negligence: the RORR is not a perversity test (the thinking goes) because rather than approving a dismissal unless 'no reasonable employer would have dismissed,' it approves it if a 'reasonable body' of employers would

[52] *Wilko Retail Limited v Mr W Gaskell & Mr. R Willis* UKEAT/0191/18/BA (Transcript) 22 November 2018, [29], [48], [52]; *Leeds Teaching Hospital NHS Trust v Blake* UKEAT/0430/14/BA, (Transcript) 15 July 2015, [60]-[71]; *London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220, [35]-[43].

[53] UKEAT/0259/13 at [30].

[54] [1980] IRLR 174 (Lord McDonald Presiding).

[55] Ibid at [8].

[56] It is tempting to suggest that the RORR might have more substance where the tribunal includes lay wing members. However, lay members cannot rescue the RORR test when their involvement is increasingly curtailed and spotty, and their views cannot in any event amount to evidence of what reasonable employers would do.

[57] *Bolam v Freirn Hospital Management Committee* [1957] AER 118.

dismiss.[58] The suggestion that the RORR draws upon the *Bolam* test ignores the fact that the *Bolam* test requires evidence of what a 'reasonable body of medical practitioners' would do, while the RORR simply leaves judges to imagine what reasonable employers would do. Perhaps more importantly, it pretends that the dismissal tendencies of unspecified groups of employers (even if they could be established by evidence) could represent an objective standard in a way comparable to the opinions of a group of similarly-trained professionals, about how to conduct some aspect of that profession. 'Employers,' as a class, can include any level of experience, education, and training from a shift manager at McDonalds to the Vice Chancellor of a university. Almost none of this breathtakingly diverse assortment of tradespeople, businesspeople, artisans, managers, professionals, consultants, and robber barons can claim the slightest expertise in the area of 'reasonable dismissals'. They pursue their livelihood doing something other than dismissing people; in most situations the need to dismiss someone represents a breakdown in and interruption to a completely different primary activity. The very idea that a 'considerable' subset of such a melange could produce an objective standard of reasonableness defies belief.[59] The RORR not only honours this idea, but requires that judges imagine, without evidence, what that subset might do and elevate it over any of their own ideas of what reasonableness might require.

The substitution requirement should simply mean that judges must not decide whether the dismissal was what the judge would have done, but whether what was done, taking account of all relevant circumstances *applying at the time*, was reasonable. If the RORR required no more than this the rule against substitution would be rational, if somewhat superfluous. Unfortunately, in 2011 in *Orr*[60] the Court of Appeal summed it up in this way, 'the ET must [decide], by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views'. This essentially instructs tribunals as follows: you may not base a finding of 'unreasonableness,' under unfair dismissal law, on your view that something is unreasonable; you must lower your idea of what counts as reasonable to match an imagined employer view of reasonableness.

Readers can confirm the accuracy of this claim by looking at most of the cases cited in this article,[61] but the following examples illustrate the phenomenon. In *London Sovereign Ltd v Gallon*[62] the ET found unfair the dismissal of a bus driver for alleged use of a mobile phone while driving. A manager of the respondent employer had been waiting for a traffic light at the same intersection as the bus driven by the claimant. She testified that 'he appeared to be distracted by something to the right of his seating position near the cab window'. As he passed closer to her, on leaving the junction, she saw him reach down and touch a mobile phone. The employer concluded on this basis that the claimant was guilty of texting while driving and dismissed him. The employer rejected his assertion that he was simply reaching down to stop it from sliding off, and ignored and refused to investigate

[58] *Beedell v West Ferry Printers Ltd* [2000] UKEAT/135/00, [77]-[84]. See also S. Deakin and G. Morris, *Labour Law*, 6th edn (Oxford: Hart, 2012) 528–30; Brodtkorb, n 37 above at 444-446; Davies, n 33 above at 292.
[59] See Davies, n 33 above at 290-291, 293-294.
[60] *Orr v Milton Keynes Council* [2011] ICR 704 at [78].
[61] Eg, in *London Ambulance*, Lord Justice Mummery breezily dismisses almost every material finding of the ET on the ground that the ET arrived at different conclusions than the employer's disciplinary panel, despite the fact that throughout its decision the ET had invoked the RORR, and insisted that the employer's procedures and findings had been outside the range of what reasonable employers would do or find. For Mummery, LJ, it was substitution not to defer to the employer's findings of fact. *London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220 at [14]-[23], [37]-[43].
[62] UKEAT/0333/15/LA, (Transcript) 13 May 2016.

further his claims that (a) he could not text without putting on reading glasses and (b) his phone records would confirm that he neither sent nor received any texts on that phone at that time.[63] At the root of the ET's finding of unreasonableness was the conclusion that, in a case where the sole evidence of guilt was an inconclusive observation from inside a stationary car to the inside of a moving bus, no reasonable employer would fail to consider evidence which could so conclusively exculpate the claimant:

> Applying [the RORR], it does not seem to me that it is within the band of reasonable responses for an employer in these circumstances to rely as heavily as it did on what [the witness] saw in a very brief period of time. . . . The limited investigation that was carried out, the failure to wait until the claimant had produced his [phone] records and the fact that the respondent did not fully investigate other matters that the claimant himself and his union rep raised, makes this investigation fall outside the range of reasonable responses.[64]

It is hard to imagine how an ET could more clearly express that no reasonable employer would have been satisfied with such an investigation.

The EAT, however (Judge David Richardson sitting alone), found that the ET had fallen into the 'substitution mindset'. The EAT had several criticisms for the structure of the ET's Reasons, but primarily based this decision on a lack of deference for the employer's reasoning: 'crucially in reaching my conclusion, is the absence of any real process of reviewing the Respondent's actual reasoning for dismissal.'[65] According to the EAT the ET's mistake was not rehearsing, in its Reasons, the logic put forward by the employer in support of its decisions, and then pointing to where it was wrong.[66] There is no legal principle that requires such an approach, so the EAT's decision comes down to a basic disagreement about what is reasonable. The ET did set out the facts and the claims of both parties; on the basis of those facts and claims, the ET concluded that no reasonable employer could have acted as the respondent did on the basis of such an investigation. The EAT simply thought differently: the employer's reasoning was perfectly persuasive, in the view of the EAT, and the ET should have more effectively refuted this reasoning. In short, the ET must have substituted its judgement for that of the employer because the employer's thinking seemed sound to the EAT, and the ET had not adequately debunked it. The EAT did not *say* this, but given that there is no legal rule to support what it *did* say, the upshot is that appellate judges with harsher views can and will overturn findings of unreasonableness on 'substitution' grounds no matter how much the ET insists it is applying an objective standard of the reasonable employer.

London Sovereign is not a rogue decision. In *Leeds Teaching Hospital NHS Trust v Blake*[67] the EAT found a substitution mindset simply because the ET applied a standard for

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[63] It is a relevant consideration that at the ET the records were produced and did in fact show that both claims (reading glasses and phone records) were correct. The ET's finding of unreasonableness was not based on the fact of innocence, but on the fact that the employer did not consider such probative evidence in the face of the relatively weak basis for the accusation. The ET was required to make a finding of guilt/innocence for the purpose of the corresponding wrongful dismissal claim, and the EAT claimed that this tainted the ET's conclusions.

[64] *London Sovereign Ltd v Gallon* UKEAT/0333/15/LA, (Transcript) 13 May 2016 at [12].

[65] Ibid at [34].

[66] Ibid at [35].

[67] UKEAT/0430/14/BA, (Transcript) 15 July 2015, [68]-[71].

investigation that was 'extremely high' which, in the view of the EAT, suggested the ET had not 'recognized' that there was a range of reasonable responses (this despite the fact that the ET had repeatedly invoked the RORR). It defies explanation how an ET can be said to have failed to recognize that there can be a range of reasonable responses, when it introduced its application of the law to the facts by noting that a tribunal 'must not fall into the error of asking themselves the question "would we dismiss?" because you sometimes have a situation in which one reasonable employer would and one would not.'[68] In *Secretary of State for Justice v Lown* the EAT opined that saying 'a reasonable employer would not do this' will not save what is, deep down, a substitution:

> The band of reasonable responses is not limited to that which a reasonable employer might have done. The question was whether what this employer did fell within the range of reasonable responses. In this case I consider the ET has seen itself not simply as the assessor of the band of reasonable responses (its role) but as laying down the only permissible standard of the reasonable employer.[69]

In essence, if an ET declares that 'a reasonable employer' would not do a particular thing (a statement which clearly denotes that the act in question falls outside the band of reasonable responses) the RORR appears to respond, 'yes, but *some* reasonable employer might'.[70] These and many other cases[71] demonstrate that the rule against substitution (a) leaves any finding of unreasonableness at the mercy of appellate judges with more permissive ideas about what reasonableness requires and (b) forces judges to simply assume that any employer decision is arguably reasonable or, at a minimum, to apply an artificially low standard of what counts as reasonable.

C. Accepting that views differ cannot make the unreasonable reasonable

The RORR rests on the idea that a given situation will generally give rise to more than one reasonable response. This idea means that a workplace issue might justify dismissal as well as responses short of dismissal. Anyone can agree with this idea—how can one dispute it?—but it does not imply what the RORR treats it as implying. The RORR version of this idea forgets, or never really notices, that dismissal is the harshest response available; and that if one considers dismissal unreasonable in a particular set of circumstances, one cannot also consider it reasonable.

The question of the reasonableness of a dismissal generally seeks to place the challenged decision somewhere on a continuum of harshness. If one looks at a set of facts and places all of the possible responses to those facts on a continuum from least harsh to

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[68] Ibid at [17].

[69] UKEAT/0082/15/BA, UKEAT/0130/15/BA, (Transcript) 28 July 2015, [54].

[70] This is almost precisely what Lord Denning, MR, opined in *British Leyland (UK) Ltd v Swift* [1981] IRLR 91, 93: quoting the ET's finding that 'a reasonable employer would in our opinion, have considered that a lesser penalty was appropriate' (ie, a person who would do otherwise would not be a reasonable employer), Lord Denning immediately commented, 'I do not think that that is the right test. The correct test is: Was it reasonable for the employers to dismiss him?'

[71] Eg, *Wilko Retail Limited v Mr W Gaskell & Mr. R Willis* UKEAT/0191/18/BA (Transcript) 22 November 2018, [29], [48], [52]; *P&O Ferrymasters Ltd v Thorogood* UKEAT/0124/14/DM (Transcript) 10 September 2015; *Orr v Milton Keynes Council* [2011] ICR 704; *London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220, [35]-[43].

most harsh, and then identifies the lowest point on that continuum (ie, in the direction of 'most harsh') where one would consider the response reasonable, then everything below that point is unreasonable: it is unreasonably harsh. Most people would be comfortable with any outcome at that point or above (less harsh); it is hard to imagine any person or judge finding that an employer was unreasonable in being insufficiently harsh.[72] In this setting, multiple different-but-reasonable responses can only coexist in the area above that harshness baseline; the area below that baseline contains only unreasonable responses. No person can make any sense of the idea that there could be reasonable decisions that exist below that baseline. Once one has decided that boundary in light of all relevant circumstances, if someone were to say, 'here is a reasonable employer who thinks it is OK to do something so harsh it falls below that baseline,' one would find that decision unreasonable. Different people might draw this baseline in different places, but those people will see each other's baselines as wrong. We all accept that people have different views and that we must nevertheless rub along; but if I think it is wrong to fail to clean your dog's poo from the footpath, I cannot also consider it not-wrong simply because I acknowledge that there are other people who seem to think it is acceptable.

Of course not all decisions reviewed by judges fit this continuum paradigm. Imagine a typical judicial review case where a judge must consider whether an official made a reasonable regulatory or policy choice. If there are five available options, it is not necessary to think about a continuum. The judge might think that four of those options are reasonable and one is not. If the one the official chose is among the four, the judge must find that choice to be reasonable. In this situation it might indeed help to remind the judge he or she is not to look for the option he or she prefers, but only to look at whether the option that was chosen was among the reasonable ones. This is what the RORR claims to be doing, and viewed in that light it would make perfect sense. However, if the option the official chose is the fifth one, the unreasonable one, how can it help to remind the judge that there can be more than one reasonable response, and that the judge must not substitute his or her judgment for that of the official? The fifth option is, in the judge's view, unreasonable. It is not among the different-but-reasonable responses. At this point, the RORR seems to say, 'yes, clearly *you* think it is unreasonable, but you must accept that there are many different reasonable responses, and that just because this is not the response you would choose, does not mean it is not what a reasonable official would choose.' The poor judge replies, 'yes, I understand that, but I have considered what was known to the official, what should have been known, and what should have been taken into account, and I find it to be unreasonable, so it doesn't matter who makes the choice, it is an unreasonable choice.' Unfortunately, the RORR seems unwilling to accept this kind of response, insisting that judges develop a new understanding of what is reasonable, one which rejects a judge's own judgement of what is reasonable, and posits a version of reasonableness that would somehow make sense of the idea that the fifth, unreasonable option might be reasonable to somebody.

Unfair dismissal cases do not typically deal with choices among reasonable options, where different people might choose different options, but most of the options are reasonable. A dismissal has occurred, and it is either reasonable or unreasonable. A judge who finds a dismissal reasonable will of course agree that any of several options short of dismissal would also be reasonable, even if the judge would have dismissed. However, if a

[72] There are obvious exceptions, such as failing to dismiss an employee who sexually assaults a colleague, but that finding would only relate to a claim by the victim, not the assaulter.

judge believes that a dismissal was unreasonable, what meaning can he or she give to the idea that one or a thousand employers would consider it reasonable? I suggest that no human mind can think anything other than that those employers would be wrong to think so. If I believe it is unreasonable to dismiss a camp counsellor because of an unsubstantiated belief that homosexuals are more likely to engage in paedophilia, no legal fiction can turn such a dismissal decision into a reasonable one. If the law requires that I apply a legal test which rejects my own view of reasonableness as a standard, and insists that I must apply an unspecified standard which is different from my own and allows for things I find unreasonable to count as reasonable, then I can do nothing in this context but push the standard down artificially. Because dismissal decisions involve a continuum of harshness, and I cannot employ my own judgement as to when a dismissal is too harsh, I can only adopt, on behalf of 'reasonable employers,' a standard that is defined as 'more harsh than what I would consider too harsh'. This is, I contend, the standard the RORR demands in practice.

What makes a dismissal decision reasonable or unreasonable encompasses, of course, aspects of the decision other than its harshness, such as the sufficiency of investigation or of other procedures. The analysis does not change, however. If I find it unreasonable not to consider phone records when deciding whether an employee was guilty of using a mobile phone while driving a bus, it does not help to remind me that a lot of different employers might handle the situation differently, and that those different approaches might be reasonable. Yes, some employers might not have considered phone records, but at the same time would have required conclusive eyewitness testimony when deciding the question of guilt. That is a different approach and it might, in the round, be reasonable. But once I have looked at the facts of this case, and found it unreasonable to (a) ignore phone records when (b) the only damning testimony cannot actually establish phone use, there is no meaning to the idea that a reasonable employer might nevertheless have done just that. Whichever employer makes that specific decision, in those circumstances, has acted unreasonably in my view. If, again, the law demands that I ignore my own judgment and imagine a standard capable of finding such decisions reasonable, I can only make up a standard like, 'it is unreasonable to apply procedures that are significantly less fair than what I would consider to be the bare minimum of fairness'.

When a judge appears to use his or her own judgement to pinpoint the unreasonableness threshold, the decision can be rejected as suffering from a 'substitution mindset'. If an appellate judge sees a boundary drawn higher than the boundary he or she would draw, nothing could be easier (or more tempting) than to cast the higher boundary as a substitution. Did the tribunal opine in passing that the claimant was innocent of the dismissal offence? It must be a substitution, because actual guilt or innocence distracted the judge from a proper focus on employer reasonableness.[73] Did the tribunal express strong negative views about the conduct of a disciplinary investigation? It must be substitution, as the tribunal's judgment that the employer acted unreasonably must have inhibited its ability to judge whether those actions fell within the RORR.[74] Ultimately the RORR's underlying fiction confronts tribunal judges with the absurd injunction to come up with a different standard which makes sense of the idea that what they find unreasonable could nevertheless be reasonable if done by an employer. This is impossible to process,

[73] *London Sovereign Ltd v Gallon* UKEAT/0333/15/LA, (Transcript) 13 May 2016 at [32]-[33].
[74] *P&O Ferrymasters Ltd v Thorogood* UKEAT/0124/14/DM (Transcript) 10 September 2015 at [32]-[33].

and can only result in artificial depression of the standard of reasonableness. This might be avoided if judges could turn to an objective standard of the 'reasonable employer' but this fiction has no more basis in reality than the 'range'. Because the law has made no provision for proving or deriving content for that standard, judges can only push past their own understanding of 'reasonable' and accept as reasonable the employer decision under review. Thus judges with the highest tolerance for harsh discipline set the harshness standard for the rest of the tribunal judiciary, who must lower their own threshold or wear the scarlet 'S'.

D There Are No Work-Arounds

This paper up to now has focused only on problems with the RORR, and cases demonstrating the mistakes which either led to or result from that misconceived test. The ETs and EAT have reached countless sound decisions despite the RORR, and some cases have even sought to push back against its worst excesses. An earlier section briefly mentioned *Haddon v. Van den Bergh Foods Ltd.*,[75] where the EAT prefigured some of the arguments in this paper, on the way to rejecting the RORR as an illegitimate gloss on the statute. The focus of the argument there was that the RORR acted as a perversity standard, but the underlying problem was the same: the RORR makes the standard artificially permissive of harsh employer behaviour. The EAT was reacting to the same kind of absurd result we still see today.[76] In *Haddon* the employer dismissed a long-serving worker with an unblemished record because the worker had failed to return for the last fraction of his shift after the employer threw him a drinks party to celebrate his long service. This was clearly unreasonable, and there is no room for debate about this. Yet the ET, following the dictates of the RORR, felt that it must find this fair because there might be a reasonable employer who would do this. The EAT attacked the RORR because it saw what we should see today: the problem with the ET's decision was the RORR and until it goes tribunals will continue to sanction unreasonable dismissals.

Although *Haddon*'s rebellion was swiftly quelled, counsel and tribunals have found the pluck, of late, to raise the colours once again. In recent cases attention has been drawn to the statutory language calling for 'fairness' to be determined 'in accordance with equity and the substantial merits of the case' (98(4)(b)).[77] Some decisions have suggested that this language authorises tribunals to apply some external standard of equity superimposed on whatever the standard of the 'reasonable employer' might permit. This argument was batted down in *Orr*,[78] but the Court of Appeal in *Newbound v Thames Water Utilities Ltd* saw something in it, and allowed that tribunals may use their own understanding of equity and merits to some degree: 'an employment tribunal is entitled to find that dismissal was outside the band of reasonable responses without being accused of

[75] [1999] I.C.R. 1150.

[76] See, eg, *London Sovereign Ltd v Gallon* UKEAT/0333/15/LA, (Transcript) 13 May 2016 (dismissal of driver for texting while driving fair even though employer refused to consider clearly exculpatory evidence in favour of admittedly inconclusive witness testimony); *Orr v Milton Keynes Council* [2011] EWCA Civ 62 (dismissal found fair even though it was instigated by a manager who himself committed the dismissal offence and then framed the claimant. The majority (Sedley, LJ dissenting) held that the involvement of the manager did not render the decision of 'the employer' unreasonable).

[77] This argument was mentioned briefly at footnote 11 above.

[78] [2011] ICR 704, [62]-[64], [91]-[98].

placing itself in the position of the employer.'[79] However, this does not amount to a real challenge to the RORR, but merely recognition of the obvious: even with an artificially low standard tribunals must be entitled to draw the line somewhere. One finds the best part of *Newbound* not in any adjustment to the test—none occurs—but in the forthright way in which the Court of Appeal picks apart the employer's decision and declares it unreasonable.[80]

A more recent decision of the Northern Ireland Court of Appeal (NICA) appears to take the matter slightly further. In *Connolly v Western Health and Social Care Trust*[81] the majority found unfair the dismissal of a hospital nurse who, having an asthma attack and realising her inhaler medication was locked in her car far away, used one from the hospital supplies and did not mention it until she next came to work. The ET had found the dismissal fair, in significant part because it thought it was not allowed to consider whether a lighter penalty would have been appropriate. The NICA addressed the issue this way:

> At para 59 [of the ET decision] one finds this.
>
> > 'It is not for a tribunal in then determining whether or not dismissal was a fair sanction to ask whether a lesser sanction would have been reasonable, the question being whether or not dismissal was fair.'
>
> I express a degree of caution with that statement. The decision is whether or not a reasonable employer in the circumstances could dismiss bearing in mind 'equity and the substantial merits of the case'. I do not see how one can properly consider the equity and fairness of the decision without considering whether a lesser sanction would have been the one that right thinking employers would have applied to a particular act of misconduct. How does one test the reasonableness or otherwise of the employer's decision to dismiss without comparing that decision with the alternative decisions? In the context of dismissal the alternative is non dismissal ie some lesser sanction such as a final written warning.[82]

This seems to go beyond merely confidently drawing a threshold of reasonableness, as in *Newbound*. It pushes on to suggest that judges can assert what 'right thinking' employers would do. This is precisely the kind of thing that EATs have for years identified as a smoking gun for the substitution mindset. Unfortunately, although it offers authority for a successful claimant to defend an ET ruling on appeal, by arguing that a tribunal does not commit the sin of substitution simply by finding that a reasonable employer would have been less harsh than the respondent, it stops short of adjusting any of the RORR formulae. This is a court working within the flawed RORR framework struggling to make more sensible rulings possible, rather than trying to fix the problem.

The *Connolly* decision mentioned proportionality, noting that the tribunal claimed to recognise its importance, but failed properly to observe it.[83] It is not unusual to apply a generic sense of proportionality to the review of a disciplinary dismissal, but here the court referred to the formal principle: 'Proportionality has come to the fore in legal

[79] [2015] EWCA Civ 677, [2015] IRLR 734, at [61].
[80] Ibid at [71]-[77]. In this case the employee was dismissed for following the outdated safety instructions provided by the employer, rather than following the correct health and safety rules.
[81] [2017] NICA 61, [2018] IRLR 239.
[82] Ibid at [22].
[83] Ibid at [42].

thinking since 1996, it might be said.'[84] Proportionality, which has indeed come to the fore in legal thinking in recent years, is a completely different kettle of fish from the RORR.[85] Proportionality asks objective questions (eg, was dismissal the least intrusive option available; does the importance of the employer's objective outweigh the harm resulting from the dismissal) completely incompatible with the 'standard of the reasonable employer' and the RORR. However, as proportionality plays an increasing role in human rights and discrimination adjudication, employment judges will inevitably compare it with the RORR. The Court of Appeal confronted just this issue in *O'Brien v Bolton St Catherine's Academy*,[86] where Underhill, LJ opined for the majority that the two tests should not produce different outcomes in practice. He emphasised that the RORR is an objective test, and that therefore it was not wrong for the tribunal to find that if a dismissal was disproportionate under the Equality Act, it was also unreasonable under section 98(4).[87] As much as I like this outcome, it flies in the face of all other teaching on the RORR. It might be true that in many cases the outcomes of the two tests will coincide, but it cannot be said that anything found disproportionate would logically fail the nebulous RORR standard we have come to know in this article. In fact, were an ET to find a dismissal unfair because it violated the principle of necessity (the third step of structured proportionality, requiring that the decision made was the least intrusive one available), in a context where no statute called for that principle to apply, the EAT would find that it had substituted its judgment for that of the employer, and not asked the proper question of whether the response was among those that might be adopted by at least one hypothetical reasonable employer. *O'Brien*, therefore, represents another example of a court straining to supply the RORR with a substance it lacks, without doing anything to repair the doctrine. In the end, unfair dismissal law cannot be made more rational by massaging the RORR: the solution requires a proper rethink.

4. WHAT CAN BE DONE ABOUT THE RORR?

This article began with what I interpreted as Lady Hale's 'invitation' for a proper challenge to *British Home Stores*,[88] and by implication the RORR.[89] In that case she set out three reasons why, she imagined, no such challenge had made it to the Supreme Court so far:

> First, it has been applied by Employment Tribunals, in the thousands of cases which come before them, for 40 years now. It remains binding upon them and on the Employment Appeal Tribunal and Court of Appeal. Destabilising the position without a very good reason would be irresponsible. Second, Parliament has had the

[84] Ibid.

[85] See, eg, A. Baker, 'Proportionality' in *Supperstone, Goudie & Walker: Judicial Review (6th ed)*. (Fenwick, Helen (ed) London: LexisNexis 2017); A. Baker,'Proportionality and Employment Discrimination in the UK' (2008) 37 ILJ 305.

[86] [2017] EWCA Civ 145, [53]-[55]. Cf *Turner v East Midlands Trains Ltd* [2012] EWCA Civ 1470, [2013] IRLR 107.

[87] The case involved a claim that the dismissal violated s15 of the Equality Act, as discrimination 'arising from' a disability. The ET had ruled that dismissal, in the face of evidence that the claimant could return to work, was not a proportionate means to a legitimate aim, as required by s15, and that therefore no reasonable employer would dismiss for that reason. This view was later treated as limited to its facts in *York City Council v Grosset* [2018] ICR 1492, [54]-[55].

[88] *British Homes Stores Ltd v Burchell (Note)* [1978] ICR 303.

[89] *Reilly v Sandwell Metropolitan Borough Council* [2018] UKSC 16, [33].

> opportunity to clarify the approach which is intended, should it consider that *Burchell* is wrong, and it has not done so. Third, those who are experienced in the field, whether acting for employees or employers, may consider that the approach is correct and does not lead to injustice in practice.[90]

Other than the fact that Lady Hale wrote the (unnecessary) separate opinion at all, I find the clearest evidence of an invitation in the very weakness of these reasons. Not one of these reasons defends the correctness of the RORR. Each reason represents a different kind of inertia, which alone could prop up a test so flawed as the one under examination. This concluding section (a) explains why none of these reasons justifies maintaining the status quo, (b) distinguishes between the RORR's separate functions as a standard of review and as a standard for decision, and (c) points the direction for a solution which would learn from Supreme Court jurisprudence on judicial review.

A. The Supreme Court Should Fix What Is Broke

Upsetting law that has been settled for a long time sounds like a bad idea, and it is difficult to argue with the statement that '[d]estabilising the position without a very good reason would be irresponsible.' However, as we have seen, the RORR has hardly been settled despite its 40-year subsistence. It took a decade to decide the objective/subjective debate and arrive at the RORR; two decades after that we had the *Haddon*/*Foley* crisis, and in the last five years rumblings of discontent again disturb the fragile peace. It could be argued that the lack of a robust challenge since *Foley* owes less to complacency and more to the Svengali-hold on the legal imagination of the 'Parliament-would-have-fixed-it-if-it-wanted-to' trope (about which more anon). Settled or not, two 'very good' reasons spring to mind for destabilising the position: (1) extremely bad doctrine should be fixed and (2) sometimes the Supreme Court needs to do this to force Parliament to account for its laws. This whole article has advanced the proposition that the RORR is fundamentally flawed and bad for judicial credibility—if you are not persuaded by this point that the position needs destabilising, then nothing more will help. But it deserves attention that the House of Lords (as was) gutted 'disability-related discrimination' in *Lewisham v Malcolm*,[91] overturning nearly a decade of settled employment law followed since *Clark v Novacold*[92] in 1999. The cries of those of us accustomed to the purposive construction placed on DDA 1995 section 5 in the latter case fell on deaf ears, because the statute said what it said: if what it said was not what Parliament intended, Parliament should do a better job of writing what it intended. Within two years it had done precisely that, producing in section 15 of the Equality Act 2010 language which achieved *Novacold*, but through words with a plainer meaning.

This leads to the second of Lady Hale's reasons: that Parliament has not seen fit to fix the RORR, so it must be happy. Parliament might well be happy that employers are seldom called to account for unreasonable dismissal decisions. This article does not focus on demanding statutory change in part because it seems unlikely that correcting a judge-made doctrine, which ultimately leads to deregulatory effects likely to be favoured by the current government, would make it far up the legislative agenda. However, for Parliament to

[90] Ibid at [34].
[91] 2008 UKHL 43, [10]-[16].
[92] [1999] ICR 951.

achieve what it wants, without having to face the political consequences of writing it down clearly, arguably undermines the rule of law.[93] If applying section 98(4) the way it reads—without the unwarranted gloss of the RORR—would result in more successful unfair dismissal claims than the Parliament of the day prefers, then it must write a statute which more explicitly lowers the standard from one of reasonableness to something less than reasonable. So if Parliament actually knows how the RORR works and prefers to allow judicial legerdemain to achieve its policy aims without it having to own up to them, the silence of Parliament has no normative force. It is much more likely, however, that Parliament's attention never really rests on the doctrinal mess that has congealed around what counts as a fair dismissal, so the RORR is out of sight and out of mind. Either way, Parliamentary inaction provides no argument for resisting the correction of misguided and distorting interpretations of an otherwise uncontroversial statute.

Lady Hale's final reason reads like a challenge. It seems implausible that 'those who are experienced in the field' consider the RORR correct and unlikely to lead to injustice. *Harvey on Industrial Relations and Employment Law*, which is pretty popular with practitioners and the judiciary, speaks of the attempt in *Connolly* to build some substance on the foundation of section 98(4)(b) (equity and substantial merits) as follows:

> The range of reasonable responses test for the fairness or otherwise of a dismissal has often been criticised as being too pro-employer, but it is so well established now that the received wisdom is that it could only realistically be abrogated by legislation. Even so, every now and then a case comes along which at first sight seems to at least mitigate its effect. These are, however, invariably false dawns . . .[94]

The *New Law Journal* catalogues a whole constituency of critics, from practitioners to academics to judges.[95] Perhaps the ranks of employers and their lawyers boast some 'experienced in the field' who support the current arrangements, but the overall picture suggests no reason to suppose that satisfaction reigns.

The Supreme Court, then, needs to grasp this nettle. It needs to erase the folly of a belief that there can be a range of harshness below 'unreasonably harsh'. It needs to reveal the imperial nakedness of a 'standard of the hypothetical reasonable employer' (or provide for such a standard to move from the hypothetical to the evidenced). It needs to bring the determination of unfair dismissal cases back to the words of the statute and let judges use their own reason while at the same time ensuring appropriate deference and distance. So how?

B. Standard of Decision v Standard of Review

This section introduces a distinction which suggests a way forward. The object is to de-couple two functions which British lawyers at times seem determined to treat as the same function. The two functions appear any time a judge is in a position of reviewing a decision previously made by another decision-maker, where the judge must assume some

[93] *R v Secretary of State for the Home Department Ex Parte Simms* [1999] UKHL 33 (per Lord Hoffmann) 'The constraints upon [Parliamentary sovereignty] are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost.'
[94] Harvey Bulletin 476 March 2018, DI [961], DI [975].
[95] S. Levinson, 'Burchell & judicial jostling' *New Law Journal* 13 April 2018, 10.

expertise and legitimate discretion on the part of the decision-maker. This includes judicial review, cases applying the Human Rights Act 1998, and dismissal cases. *Wednesbury* unreasonableness, proportionality, and the RORR all perform two functions, those of a standard of review and a standard for decision.

Unreasonableness, for example, serves both functions. We expect decision makers to make reasonable decisions, so in that sense the standard for decision is reasonableness. However, *Wednesbury* unreasonableness is primarily a standard of review, requiring that the court keep a certain distance from the decision, and reject only decisions that no reasonable decision-maker could make.[96] These different functions are emphasised in judicial review of matters requiring 'anxious scrutiny.' The standard for decision in such a case is raised above day-to-day reasonableness: the decision-maker must conclude that there is a competing interest sufficiently strong to warrant an interference with a fundamental right.[97] The standard of review, however, does not change: the court should not disturb the decision under review unless no reasonable decision-maker could reach that conclusion. The standard of review constrains the reviewing court, limiting how intensely it can scrutinise the decision. The standard for decision defines the requirements placed on the original decision-maker.[98]

This distinction comes into its own with proportionality. Where proportionality features because of a rights challenge under the HRA or a challenge to an EU measure, it begins by serving the function of a standard for decision. The EU has adopted proportionality as the standard for when certain measures are improper limitations on, for example, the free movement of goods. This is not a rule for how far courts may explore the issue, it is a rule for what counts as improper: it is a standard for decision. Similarly, the ECtHR has used proportionality as the test for whether restrictions on the so-called qualified rights—represented by arts 8 through 11 of the European Convention on Human Rights—are 'necessary in a democratic society.' If the restriction is not proportionate, the right has been violated; proportionality does not here seek to answer the question of how intensely a reviewing court will scrutinise the decision that resulted in the restriction.

However, domestic courts have often treated proportionality as a standard of review.[99] Because proportionality can take different forms, and be applied with varying degrees of intensity, courts have used the way they apply the test as their standard of review. This is not inevitable. Courts can, for instance, straightforwardly apply structured proportionality as a standard of decision, but constrain the intensity of their review by deferring to the expertise of the decision-maker on some specific factual matter, or identifying an 'area of discretionary judgment' allowed to the decision-maker, such that specific policy questions can only be disturbed where 'manifestly inappropriate'.[100] However, until recently it has been just as common for courts to soften the standard for

[96] Of course there are other aspects to *Wednesbury* reasonableness, but this is merely an illustration.
[97] *R (Brind) v Secretary of State for the Home Department* [1991] 1 AC 696 at pp 749–751, 757–758, 765 (applied by Popplewell J in *R (Cox) v Secretary of State for the Home Department* [1992] COD 72).
[98] See, eg, *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 3 All ER 1015 [95]-[96], [115]-[116]; *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60; [2015] 2 All ER 453 [22]-[34]; *Caroopen v Secretary of State for the Home Department* [2016] EWCA Civ 1307 [81]-[83].
[99] *R (Sosancy) v GMC* [2009]EWHC 2814 (Admin); *R (Assn of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397. *R (CCSU) v Minister of Civil Services (GCHQ Case)* [1985] AC 374; *R (Hargreaves) v Secretary of State for the Home Department* [1997] 1 All ER 397.
[100] *R (P & Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151; *R (Samaroo) v Secretary of State for the Home Department* [2001] UKHRR 1622; *Huang v Home Secretary* [2007] UKHL 11.

decision, according to their sense of how much distance they should maintain from the decision, by leaving out some of its more hard-edged aspects like 'necessity',[101] or by suggesting that, in the circumstances, proportionality requires no more than reasonableness.[102]

It should be obvious, by now, how this applies to the RORR. The standard for decision is set out in section 98(4): the employer must have acted reasonably (according to equity and the substantial merits). As is the case with *Wednesbury* and proportionality, there is no reason to change that standard. The statute requires that employers make reasonable dismissal decisions, and the tribunal—the reviewing court—must check to see that this standard has been met. It makes sense that a tribunal should also employ a standard of review, in the form of some constraints which recognize the expertise of the employer and the employer's legitimate scope of discretion as to what is reasonable. In short, the tribunal should not 're-make' the decision of the employer or, according to the expression common in US labour law, act as a 'super-personnel department'. All of these considerations have echoes in the RORR, but the RORR was not developed with two functions in mind, and it has never been subjected (by courts) to a clear-eyed analysis of whether its strictures conform to standard-of-review concerns.[103]

The substitution prohibition, for example, is either nothing in standard of review terms, or it is too much. It either merely reminds judges to focus on the correct subject matter—reasonableness of the employer decision rather than the outcome the tribunal would have preferred—or it tells them they may not employ reasonableness (as they understand it) at all. The effect of the latter application is not deference to expertise or respect for legitimate discretion. Instead, it tells the judge that 'reasonableness'—the standard for decision—cannot mean the same thing as what the judge thinks is reasonable; it distorts the standard for *decision* rather than defining any aspect of the standard of *review*. The 'band' has the same effect. It tells them that reasonableness means 'what many employers (who we will assume to be reasonable) would do in the same situation.'[104] So by jumbling up the two functions the RORR manages to warp the standard for decision away from the simple words 'acted reasonably,' while at the same time failing to provide any targeted guidance as to the standard of review, or to relevant considerations like deference to expertise and discretion.

The RORR does have the effect of causing a deference-like restraint. Judges hesitate to disturb the view of the employer regarding, for example, the degree of seriousness required to justify a misconduct dismissal,[105] but they hesitate much less with regard to whether the employer afforded a proper hearing.[106] This form of humility- and uncertainty-driven restraint clearly has a place in unfair dismissal law: if a manager with decades of experience in a given industry says that a certain practice is unacceptable in the industry, great mischief could ensue if a tribunal judge ignored this expertise and went

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[101] *R (Boroumand) v Secretary of State for the Home Department* [2010] EWHC 225 (Admin); *SM (JM) v Advocate General* [2010] CSOH 15.

[102] *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37; *SM (JM) v Advocate General* [2010] CSOH 15.

[103] See ACL Davies, 'Judicial Self-Restraint in Labour Law' (2009) 38 ILJ 278 for a thorough discussion of the (limited) judicial restraint virtues of the RORR.

[104] *Beedell v West Ferry Printers Ltd* [2000] UKEAT/135/00.

[105] *Distillers Co (Bottling Services) Ltd v Gardner* [1982] IRLR 47; *Macari v Celtic Football & Athletic Co Ltd* [1999] IRLR 787, Ct of Sess.

[106] *McLaren v National Coal Board* [1988] ICR 370, [1988] IRLR 215.

with a gut feeling. Tribunal resources cannot stretch to medical malpractice-style evidence about the 'professional standard' of employers, so judges must acknowledge their uncertainty and respect their own lack of knowledge. On the other hand, one can easily exaggerate employer expertise. Employers are not in the business of employing: the employment is ancillary to the business. To suggest that most employers or managers have 'expertise' about workplace discipline is either to imagine a business world populated entirely by HR professionals, or to fancy that dismissal happens a lot more frequently than it really does. In short, although tribunal judges need to show deference, the situation calls for clear guidance on just how far this deference should go. The RORR provides no such guidance, and indeed only achieves deference through crude and distorting rules about the standard for decision. The two functions need to be separated, so that the standard for decision remains true to the statute (and to good sense), and so that the doctrine addresses the standard of review head-on.

C. A Forthright Test with Targeted Guidance on Deference

The solution begins with the Supreme Court's recent case law on deference in the application of proportionality.[107] As the previous section noted, proportionality differs significantly from the RORR, and from the underlying statutory question of whether an employer acted 'reasonably or unreasonably'. It serves a similar function, in that it governs the review by a court of a decision by an official or employer, and often acts as both a standard for decision and a standard of review. However, it typically applies to state officers, and it consists of a structured, four-part analysis[108] designed as a standard for decision. Proportionality differs most from the section 98(4) question in that it expressly *does not* concern itself with the quality of the decision at the time it was made. As Lord Steyn in *R (Daly) v Secretary of State for the Home Department* put it, 'the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions.'[109] Case law admonishes judges to decide proportionality objectively, with all the information currently available, not from the viewpoint of the original decision-maker.[110]

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[107] There is of course a rich literature on proportionality, to which I have added on occasion. It is not possible within the constraints of this article to review all of that literature, but here are some sources that do that fairly well: A. Baker, 'Proportionality' in *Supperstone, Goudie & Walker: Judicial Review (6th ed)*. (H. Fenwick (ed) London: LexisNexis 2017); A. Kavanagh, 'Reasoning about proportionality under the Human Rights Act 1998: outcomes, substance and process' (2014) 130 LQR 235; J. Gerards, 'How to improve the necessity test of the European Court of Human Rights' (2013) 11 ICON 466; A. Tompkins, 'What's Left of the Political Constitution?' (2013) 14 *German Law Journal* 2275; J. King, 'Proportionality: a Halfway House' [2010] *New Zealand Law Review* 327; D. Réaume, 'Limitations on Constitutional Rights: The Logic of Proportionality', *University of Oxford Legal Research Paper Series*, Paper No. 26/2009, August 2009 (http://ssrn.com/abstract=1463853); A. Baker, 'Proportionality and Employment Discrimination in the UK' (2008) 37 ILJ 305; M. Taggart 'Proportionality, Deference, *Wednesbury*' [2008] *New Zealand Law Review* 423; J. King, 'Institutional Approaches to Judicial Restraint' (2008) 28 OJLS 409; E. Ellis, *The Principle of Proportionality in the Laws of Europe* (Oxford: OUP 1999); G. De Búrca, 'The Principle of Proportionality and its Application in EC Law', [1993] Yearbook of European Law 105.

[108] The classic expression of proportionality has these elements: (1) legitimate aim (in the human rights context, it must be an aim sufficiently important to burden a right), (2) suitability, (3) necessity, and (4) proportionality in the strict sense (balance). *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 [74].

[109] [2001] UKHL 26 [27].

[110] *R (Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, [29].

This might appear to make proportionality a poor comparator for the present purposes, but in fact it enhances the value of the analogy.

British judges have always been uncomfortable with proportionality precisely because of these characteristics, and have consistently demonstrated a concern that proportionality encourages judges to decide the original decision anew on the merits.[111] This has over the years given rise to an impulsive and incoherent doctrine of 'deference', resembling the RORR in its development. [112] Just as the RORR evolved from concerns about *uncertainty* and *subject matter*, so too deference arose from the worry that (a) judges might not know any better than the officials they were reviewing (uncertainty) and (b) no matter how objective proportionality must be, judges should not be in the position to re-decide the original decision on the merits (subject matter). This resulted in some judges dropping whole elements of the proportionality test,[113] while others went so far as to find entire topics non-justiciable via proportionality, and subject only to a rationality review.[114] For fear that judges would perform 'merits' review willy nilly, and fail to recognize the limits of their own certainty (both 'standard of review' considerations), they distorted the 'standard for decision,' proportionality, by constricting it, lopping bits off, or disapplying it altogether.

The Supreme Court began to tackle this problem with *Bank Mellat*[115] in 2013, and applied the finishing touches with *Lord Carlile*[116] in 2014. Both decisions conveyed the same basic message: respect for the expertise of the original decision-maker, and a desire to resist 're-making' the original decision, do not justify or permit distorting the standard for decision. Where proportionality is the standard for decision, instincts for deference and restraint must be given effect in a more focused way, without changing the applicable test. *Lord Carlile* in particular is instructive. There, the Court of Appeal had justified weakening proportionality in a way familiar from RORR cases: 'In the context of national security and foreign policy, [deference] is achieved . . . by a review of the Secretary of State's decisions for rationality, legality and procedural irregularity, not by the substitution by the court of its own judgment on the merits.'[117] The Supreme Court firmly rebuffed this approach, declaring that proportionality was the ultimate standard for decision and deference could not and should not change that.[118] Most importantly, and echoing *Bank Mellat*, the Court distinguished between a forthright application by the court of a standard for decision, on one hand, and 're-making' the original decision, often referenced by terms like 'merits review' or 'substituting judgment,' on the other. A judge can avoid 're-making' the original

[111] See, eg, Baker, n 107 above (both).
[112] 'Proportionality' note 107 above at [9.18.1-4].
[113] *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2013] EWCA Civ 199. See also, *R (Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15; *Barry v Midland Bank plc* [1999] ICR 859, 870–872; *Main v Scottish Ministers* [2015] CSIH 41, [43]-[49].
[114] *R (Smith) v Secretary of State for Defence* [2004] EWCA Civ 1664 [11]. See also, *Humphreys v Revenue and Customs Comrs* [2012] UKSC 18; *R (RJM (FC)) v Secretary of State for Work and Pensions* [2008] UKHL 63; *R (Marper) v Chief Constable of South Yorkshire* [2004] 1 WLR 2196, 2212–13; *R (Gillan) v Metropolitan Police Comr* [2006] UKHL 12, [29]–[30], [63]–[64]; *R (Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 606.
[115] *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 [20]-[21].
[116] *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60; [2015] 2 All ER 453 [22]-[34].
[117] *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2013] EWCA Civ 199, [7(iii)], [64]-[73].
[118] *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60; [2015] 2 All ER 453 [34].

decision simply by focusing on what the standard asks (was it proportionate?) rather than what the original decision asked (what is the best decision?). Meanwhile, according to the Court, a judge should manage concerns about uncertainty and differences in expertise by employing targeted deference considerations, rather than distortions of the test.[119] Although the public law setting of *Lord Carlile* makes the specific targeted considerations generally inapplicable to unfair dismissal, they include a reflection that judgements about the future impact of decisions are not susceptible to a single 'right' answer and that a 'range' of acceptable answers might apply. This shows that one can address uncertainty and deference issues in a much more restrained and nuanced way than through distortion of the very idea of reasonableness itself.

These recent proportionality decisions[120] demonstrate that sophisticated jurisprudence (1) differentiates between the standard for decision and the standard of review, (2) maintains the standard for decision as an objective test and protects it from any inroads justified by standard of review concerns, and (3) deals with standard of review concerns through targeted considerations (eg, 'what is the proper subject matter of the court's assessment?'; 'on what specific matters should the court give more weight to the conclusions of the original decision-maker?'; 'what matters are not susceptible to objective assessment?'). In the context of section 98(4) Parliament has set out the standard for decision: whether the employer acted reasonably or unreasonably. If, despite this unambiguity, the judiciary believes this must refer to a special kind of 'employer reasonableness' rather than just 'reasonableness,' it must supply some content that can make this an objective test.[121] In other words, there must either be some provision for evidencing or establishing this special kind of reasonableness, or judges must simply use the standard of reasonableness. If they employ their own reason to assert that a particular employer acted 'unreasonably' this can be argued in the cases, precedents established and distinctions made (this is what happens with proportionality). What the RORR asks them to apply currently, 'the standard of the hypothetical reasonable employer,' is not a thing. It is simply the negative of judicial reason ('not-the-judge's-view'), and cannot be argued, established, or distinguished.

Meanwhile, the legitimate subject matter and uncertainty concerns which generated the RORR in the first place must find expression through simple, specific instructions. For example (these are mine, for illustration only):

> -The subject matter of an unfair dismissal claim is not whether dismissal was the right or best decision, or whether the outcome was unfair; it is whether the employer acted reasonably or unreasonably, given the information known at the time.
> -Employers know more than judges about what matters to their customers or clients; they know more about what counts as a serious problem in their industry; and they know more about what impact particular conduct or incapacity will have on

[119] Ibid at [32].
[120] See also *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 3 All ER 1015 [95]-[96], [115]-[116]; *Caroopen v Secretary of State for the Home Department* [2016] EWCA Civ 1307 [81]-[83].
[121] It is worth noting that there are objective sources for such content, such as the ACAS Code of Practice on Discipline and Grievance (2015) found at http://www.acas.org.uk/index.aspx?articleid=2174 (last checked 26 November 2019).

their business—tribunals should give special weight to employer findings on these matters.

-Employers know better than judges how much economic impact a particular investigatory step will have on their enterprises, so judges should give special weight to their findings on these matters; but they do not know any more about the relative importance of these costs as compared to the consequences for the worker of an inadequate investigation, so the tribunal should decide for itself whether the employer acted reasonably in skipping a given step.

These resemble the instructions given in *Lord Carlile* in connection with proportionality and, like those, they would represent a mere starting point in what should become a long judicial conversation. The content of these instructions must of course depend on whether the Court opts to give substance to a special kind of 'employer reasonableness': if tribunals could rely on guidance documents or expert advice (like in medical malpractice), fewer instructions about deference to industry priorities would be required. But the solution must involve one or the other: an objective independent standard with content, or judges freed to apply their reason to the statutory standard for decision coupled with explicit deference advice.

5. CONCLUSION

The 'range of reasonable responses' test (RORR) for assessing the fairness of a dismissal under section 98(4) ERA 1996, set out in its clearest form in *Iceland Frozen Foods Ltd v Jones,*[122] started life as a mistake and never recovered. Where the statute tells judges a dismissal is unfair if an employer acted 'unreasonably,' the RORR tells them this refers to a special kind of 'employer reasonableness'. In a setting where the only question is whether a dismissal is too harsh or not, or whether procedural steps are sufficient or not, it is senseless to ask anyone, including a judge, to behave as if a dismissal they consider too harsh is nevertheless not too harsh, or that a procedure they consider insufficient is somehow sufficient. Yet this is what the RORR has always asked Employment Tribunal judges to do, with predictable results. Because they are told that they may not use their own idea of what counts as reasonable, they have no choice but to assume that 'employer reasonableness' tolerates more harshness than 'reasonableness'. This is not just erroneous, it lowers the standard of a fair dismissal below what the words of the stature appear to contemplate.

Lady Hale, perhaps viewing the matter in the same light, appears to have invited a Supreme Court challenge to the RORR in *Reilly v Sandwell Metropolitan Borough Council.*[123] This article has argued that the Supreme Court must do away with the RORR because it artificially makes it harder to succeed in an unfair dismissal claim, it is doctrinally confused, and incremental efforts by the lower courts to resolve these problems within the RORR framework inevitably fail. The answer, should the Court have an opportunity to provide one, must involve distinguishing between a standard for decision and a standard of review. The RORR tried to perform both functions by distorting the standard for decision to address standard of review concerns. Recent Supreme Court case law on proportionality, however, has made it clear this is the wrong approach. What the Court should install, in place of the

[122] [1982] IRLR 439 at 442.
[123] [2018] UKSC 16 [33]-[35].

RORR, is (a) a clear standard for decision, not subject to modification over standard of review concerns, and (b) targeted guidance about how tribunals should focus their inquiry and where to give deference to employers. Parliament has already provided the standard for decision in the statute—whether the employer acted reasonably or unreasonably—so it's time for advocates to get working on the guidance.