To What Extent Should the Law Do More to Address Gendered Discrimination in Workplace Dress Codes?

Charlotte Werner

INTRODUCTION

I. “UNDERGARMENTS”: LAYING THE FOUNDATIONS OF A 21ST CENTURY DEBATE

A. Thesis

This essay will argue for mobilising law to provide effective redress for victims of gendered dress discrimination, as advanced in the current “High Heels and Workplace Dress Codes Inquiry”, overcoming a de jure “glass ceiling” symptomatic of outmoded patriarchal attitudes and restricting true equality of treatment for women in their workplaces. In engaging with this question, the weight of the analysis will fall in identifying and critiquing the law; the view advanced that minimalistic discrimination protection allows “justification” and loopholes in law, which adversely affect women. Engagement with the “law’s tools” then exposes a further layer of critique; that while law must do more, it cannot operate in a vacuum and the deeply-entrenched patriarchal views underpinning society must also change. Society’s discrepancies in gender identity and perceptions of appropriate commercial sexuality make blanket legal reform more difficult. This realisation will advance in the final part a serious democratic reconsideration of the Equality Act’s mechanism that goes further than the current Inquiry in using law to question why gender distinctions are relevant.


B. Aims

2016 has been a significant year for dress - from the French “burkini” prohibition,\textsuperscript{3} to Theresa May’s “glass cliff”\textsuperscript{4} Ministership overshadowed by her loud footwear.\textsuperscript{5} The instant case reached a particularly high profile - Nicola Thorp sent home for not wearing high heels.\textsuperscript{6}


\textsuperscript{5} Jo Tweedy, “Leopard Print Kitten Heels, Hologram Wellies and Thigh-High Boots to Meet the Queen: Inside Theresa May’s Fabulous Collection of Flamboyant Shoes” \textit{Mail Online: “Fe-Mail”} (4 March 2015); Gavin Stamp, “Who is Theresa May: A Profile of UK’s New Prime Minister” \textit{BBC News} (25 July 2016); Louise Ridley, “Theresa May Quizzed About Shoes on Good Morning Britain, Points Out People “Don’t Focus on Boris Johnson’s” \textit{Huffington Post UK} (4 October 2016); John Allen, “What Do Theresa May’s Shoes Have to Do With Her Job?” \textit{Huffington Post} (14 July 2016); Alice Cuffe, “Theresa May’s Shoes are Almost as Important to her Power as her Politics” \textit{International Business Times} (12 July 2016); Kevin Schofield, “Theresa May Urged to Ditch Her Kitten Heels to Support Women at Work” \textit{Politics Home} (14 September 2016).

\textsuperscript{6} Nadia Khomani, “Receptionist Sent Home from PwC for Not Wearing High Heels” \textit{The Guardian} (11 May 2016).
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The media attention, online petition and subsequent Parliamentary inquiry brought this issue to the forefront of numerous other legal debates – defining discrimination/equality, individuality in law, perceptions of femininity, formal and substantive equality, and the masculine bias of law creation/enforcement. With a background interest in Gender/Employment Law, this political story caught my attention, and I decided to locate the legality of “reasonable and conventional” standards of dress, before analysing its compatibility with wider societal views.

In this objective, I will be one of the first to pursue academic, extended research on gender discrimination in twenty-first-century dress codes.

This Paper attempts to raise awareness of an issue that may only offend a number of feminist and queer theorists and fall on deaf ears in our particular social, economic and political climate, still out of reach of the patriarchal system. Reflecting on these aims, the increased political interest in the issue has also led to conservative backlash forcing me to re-consider my initial aims and further justify the worth of the research. Tabloid-style rhetoric could not disguise some valid opposing arguments – freedom of contract, the dangers of paternalistic intervention in capitalist societies, that dress ranks low in a hierarchy of political

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11 Katie Hopkins, “This Time the Feminazis Need to be Brought to Heel; Bosses Should Be Able to Tell Staff to Wear Whatever Shoe Fits The Job” Daily Mail (12 May 2016).
problems facing a “Brexit” Britain. This has prompted much of the “macro” outlook adopted throughout – the law must do more to address discrimination in dress because of its symbolic and thematic relevance.

Contrastingly, extensive subsequent publication on dress codes has overcome my initial concerns of irrelevance. After months drawing together often antiquated and unreported jurisprudence to apply to Chapter Two “PwC v Thorp”, in December the Advisory, Conciliation and Arbitration Service (ACAS) website was updated to summarise it in one sentence - high heels would “probably be direct discrimination” in courts. Nonetheless, I hope that this succinct reform consideration can prove useful in contextualising the media debates with the academic legal position. 

During preparation, the conscious decision to focus on women’s discrimination was made; acknowledging that racial, disability and age discrimination, their intersectionalities and the marginalisation of the transgender and non-binary individual, probe linked and relevant questions but fall beyond the scope of the thesis set out here. It is hoped that others will ask whether legal reform is needed to overcome these problems.

C. Methodology

This essay combines a black-letter analysis of English and Welsh law, with socio-legal understandings and feminist theory to form a relevant, modern analysis rooted heavily in 2016 context.

However, the frequented legal position forms only the “undergarments” of the suggested importance of this Paper – aiming to directly apply the fast-moving discourse surrounding the High Heels Petition to the abstract law, and suggesting reform. In order to give due credit to the main influential sources surrounding the petition, non-traditional sources have been necessary; Thorp’s own website, the Twitter hashtag #highheelsinquiry, evidential podcasts, commentary feeds, online voting through the Parliamentary petition and the wealth of

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13 References to European and American regimes are used to locate our Western approach to conventionality and discrimination, but this will not be a comparative dissertation.
14 <http://whoareyouwearing.co.uk> accessed 29 December 2016.
18 ibid.
critical engagement through news reports and blogs from employment lawyers in practice. These have included material from high profile individuals that fall outside the constraints of (e.g. quarterly) publication, allowing a visible, current debate. They also extend to inflammatory materials and informal responses which engage with the depth of feeling for the opposing view and lack of homogeneity of public perceptions on equality. Whilst used cautiously, acknowledging the reliability pitfalls, and often favouring traditional literature review approaches in the main body, the autonomy to engage with non-legal sources for largely the first time in academic work has allowed me a greater depth of understanding of why the law is as it is.

**D. Law**

The Equality Act (EA) protects against four types of discrimination; direct, indirect, harassment, and victimisation. The nature of binary gendered dress codes is often alarmingly simple, “men wear X, women wear Y” and Chapter Two will explain why ACAS says that Thorp’s case would likely be direct discrimination, therefore forming the main body of legal analysis.

The peculiar situation is that many unsuccessful direct discrimination cases are squeezed into indirect discrimination, which provides for gender-neutral rules with the effect of differential treatment through a “policy, criterion or practice” (PCP). Albeit incorrect, use of indirect discrimination is more favourable to employers, as it rebuts prima facie illegality by allowing justification – business conventionality and perhaps even brand image akin to aesthetic labour (Chapter Three) become engaged. A genuine indirect gender claim could be the PCP of a blanket prohibition of earrings, which adversely impact women as they tend to have pierced ears more often. Ultimately, however the majority of dress codes bypass this discussion as they have nothing to hide – the law allows gendered distinctions, so common practice is to have two dress codes. They are not caught out because they fall short of the “bolted on” tests for favourability of treatment.

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19 Katie Hopkins, “This Time the Feminazis Need to be Brought to Heel; Bosses Should Be Able to Tell Staff to Wear Whatever Shoe Fits The Job” Daily Mail (12 May 2016).

20 Equality Act 2010

21 ibid s.13.

22 ibid s.19.

23 ibid s.26.

24 ibid s.27.


26 Inter alia Kara v United Kingdom (1999) 27 EHRR CD272 [5].

27 Equality Act 2010 s.19(1).

28 ibid.

29 ACAS, Dress Codes and Appearance Norms at Work: Body Supplements, Body Modifications and Aesthetic Labour (Research Paper 07/16, August 2016).

that legal direct discrimination has developed to protect current practice. The utility of indirect discrimination lies beyond the scope of this paper in the religious parallel - in not allowing head coverings\(^{31}\) or jewellery,\(^{32}\) which adversely affect demonstration of faith (skewed towards women), perhaps reflecting unaddressed cultural insensitivities in the UK, or worse, using the shield of derogable obligations to discriminate.

Victimisation and harassment also have some limited utility,\(^{33}\) such as where skimpy clothing encourages unwanted attention,\(^{34}\) and are prevalent for their value in pre- and post- employment claims. However, the frequency of all four being claimed simultaneously stands out when reviewing the literature. This applies despite direct discrimination often being obvious in gender dress code cases. It is posited here that running multiple discrimination claims reflects the lack of certainty or confidence in success in these cases.

The media attention has raised the profile of dress in the last six months. However, 2010 legislation\(^{35}\) is unlikely to be wholly inaccurate or unsafe to the 2016/7 political context. This thesis suggesting democratic reform must then be weighed against the view that the legislation at present reflects extensive domestic review\(^ {36}\) and conclusions regarding what non-discrimination looks like constitutionally. Similarly, as we consider the faults in the jurisprudence in the next Part, it must be acknowledged that without explicit legislative comment on dress discrimination, it remains “good law” and the mechanism for the judiciary to apply should cases reach litigation. Chapter Two’s critique of the law in Thorp’s case therefore must be read consciously alongside the perceived relevance and success of much of the law – I do not believe there is value in upholding discrimination, but the opposing view may represent the oft-criticised masculine lens of law which struggles with the nuances of the women’s advancement position put forward here. Significantly, shortly after the passage of the 2010 Act,\(^{37}\) Blackstone’s guide\(^{38}\) highlights that it was seen as “political correctness gone too far”, summarised – “white men need not apply”.\(^ {39}\) Law’s ambivalence can therefore demonstrate that, for many, the legal position is still suitable or even overly generous.

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\(^{32}\) Eweida v British Airways [2010] EWCA Civ 80.

\(^{33}\) Lemes v Spring and Greene (2009) ET 2201943/08 [21].

\(^{34}\) Marentette v Michigan Host Inc (1980) 506 F Supp 909 [32].

\(^{35}\) Equality Act 2010.


\(^{39}\) ibid.
E. Context

It is sustained here that the physical, psychological and economic pitfalls of discriminatory dress alone are worthy of analysing why the law sustains them. However, this Paper also attempts to locate the question of dress codes amongst some wider contextual debates and to contribute to their literature – concepts of identity, genuine legal redress and equality. Some of these discourses, not least Identities (Chapter Four) are so significant in considering legal discrimination that they are advanced to actively bar effective legal reform alone.

The Advisory, Conciliation and Arbitration Service (ACAS) have produced key Employment Law guidance which highlights many reasons why dress codes may be implemented; branding, professionalisation, health and safety, organisational identity.\footnote{ACAS, Dress Codes and Appearance Norms at Work: Body Supplements, Body Modifications and Aesthetic Labour (Research Paper 07/16, August 2016) 7.} In many public facing roles, differentiation through dress serves a useful function; from different seniority roles of nurses, doctors and surgeons within hospitals,\footnote{Katherine Bartlett, “Only Girls Wear Barettes: Dress and Appearance Standards, Community Norms, and Workplace Equality” [1994] 92, 8 Michigan Law Review 2541, 2557.} to that of differentiating police and emergency services from ordinary civilians for ease of recognition.\footnote{ibid.} Why gender must be the next signifier is unknown.

Fashion is rooted in social context,\footnote{Diana Crane, Fashion and its Social Agendas: Class, Gender and Identity in Clothing (University of Chicago Press 2000) 2.} and despite verging on anachronistic, it would be impossible to argue that those making and enforcing the law do not partake in an older, patriarchal system where the “choice” of dressing in line with a particular, public display of gender identity may indeed have been the norm (see “2.4 Judicial Cloaks”). However, whilst conformity is important in businesses, we could also see that dress discrimination is symptomatic of something much wider – the treatment of women in the workplace. The discourse must be read alongside gendered inequalities in work, dress representing a visible form of the commonplace objectification of women.

II. CRITIQUE OF LAW

A “PwC v THORP [2017]”?

A. Summary

This chapter will use the case study of Thorp’s high heels petition to identify the current law (if the case were hypothetically to come before the courts in 2017, what would happen?) before using its pitfalls to expand upon the pro-reform thesis.
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B. “Because of” Gender

Five decades of significant legislative intervention have not progressed the discussion needed in respect of Ms. Thorp’s treatment beyond one of direct discrimination. Discrimination “because of” gender. The layman’s discrimination (prima facie differential treatment), is engaged – women must wear high heels with no requirement for men.

However, this would likely be another frequent example of “demeaning” discriminatory women’s uniforms that are not treated judicially as less favourable to an “actual or hypothetical” man, and therefore fall short of the legal threshold. Comparability under s.13(1) Equality Act 2010 can be criticised as overlooking individual justice for business desires such as “smartness” and “conventionality” – lots of women wear heels for these two reasons with no complaint, and men also conform to strict (un)written dress codes, so it is not less favourable. If women’s polyester uniforms while men wore suits or women-only “little hats” did not lead to a legal remedy, why should high heels, which many see as conveying authority or power in Thorp’s role as a receptionist? The law is underpinned by the glamorised role of women, seeing it justified that they have to work harder and perhaps suffer harm for society’s conventions on smartness.

C. De Minimis?

Furthermore, “women must wear nail varnish” rules returned the verdict of de minimis – the requirement that women alone paint their bodies to display a version of their gender identity being so insignificant as to destroy the likelihood of a claim even though the elements of a direct discrimination claim were met. This suggests that even if Thorp’s high heels could be found to be more onerous than the men’s dress code and satisfied the test, it could be struck out by

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45 Equality Act 2010 S.13(1).
48 Stevenson v Aron Cosmetics [2014] WL 8663532 [2.4.6].
49 Equality Act 2010 S.13(1).
50 Equality Act 2010 s.13(1).
52 ACAS, Dress Codes and Appearance Norms at Work: Body Supplements, Body Modifications and Aesthetic Labour (Research Paper 07/16, August 2016) 32.
53 Murphy and Davidson v Stakis Leisure Ltd ET Case No. S/0534/89.
unsympathetic “judicial laissez-faire”. Highly offensive to the proposed significance of dress discrimination, *obiter* judicial statements to “restrict a culture of hypersensitivity” reflect a potential prevailing view explaining inaction and ambivalence from the Bench. Highlighted as out of touch with the progress of other sex discrimination claims, dress law interpreted on “conventional sex differences” is seen to rebut the underlying rationale of the legislation to challenge discriminatory assumptions. Alarming, this has led to commonplace attempts to strengthen cases through supplementary considerations encompassing some of the worst discriminatory elements; psychiatric damage, gender dysphoria or that the dress codes perpetuate stereotyped views of women as inferior or as sexual objects. The legal approach, therefore, remains one of a large margin of appreciation to employers, with “accessories” to law needed for substantive legal benefit.

**D. Judicial Cloaks**

It could be argued that the judiciary, sitting themselves in archaic wigs and gowns, remain immune to these problems. The unwritten rules of conventional smartness likely restrict their lives. Judges often represent masculine viewpoints, if not being all male. They see their wives applying make-up, or apply it themselves, so struggle to empathise with those bringing claims. Female judges put on their high heels to gain status in the courtroom. The privileging of the “ornamental” woman through appearance codes is seen as sensible, competitive and not illegal. Dress codes instigating specific and different rules for women and men are

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56 *Richmond Pharmacology v Dhaliwal* [2011] IRLR 336 [48].
58 *Fuller v Matercare Service and Distribution* [2001] All ER 189 [8].
59 *Rewcastle v Safeway,* in *Smith v Safeway plc* [1996] IRLR 465 CA [7].
60 *Lemes v Spring and Greene Ltd* (2009) ET 2201943/08 [36].
63 *Schmidt v Austicks Bookshops Ltd* [1978] ICR 85 [12].
64 Ruthan Robson, *Dressing Constitutionally: Hierarchy, Sexuality and Democracy from Our Hair to Our Shoes* (Cambridge University Press 2013) 48.
commonplace,⁶⁸ “conformity” with societal gender norms encouraged,⁶⁹ and the professional projection of companies successfully used to justify⁷⁰ an apparently non-derogable obligation.⁷¹ It is apparent that in this area the views that high heels should be a “choice not requirement”⁷² and an obligation to wear them “reeks of sexism”⁷³ remain unique to the abstract commentators lobbying the movement of a law that is static. Conclusively, until this position is debated, the law would respect the innocence of agency Portico and PricewaterhouseCoopers in looking to “common practice” within the industry, and “professional appearances” without analysing whether this could be achieved in a less onerous way.⁷⁴

E. Safety

Hans Christian Anderson’s Red Shoes⁷⁵ depicts a young woman controlled (patriarchal?) by a pair of red shoes (attention-seeking?), leading to her punishment through removal of her feet. This gruesome tale highlights the symbolic harm inherent in footwear. This Paper has already acknowledged that wearing high heels makes many women feel uncomfortable, objectified, prostituted.⁷⁶ However, the College of Podiatry consulted during the present inquiry,⁷⁷ stated genuine health concerns arise when considering heels. Findings that permanent back, posture, ankle and foot problems⁷⁸ are exacerbated by constant pain for around 7/8 ordinary working hours⁷⁹ are shocking, but show that the aesthetic reason compelling high heels on dress codes is not taken lightly, and is ingrained and normalised amongst many fashion choices that impede health. Opponents arguing the fragility of the symbolic argument would surely struggle to argue with the medical harm caused by gendered dress. Furthermore, in a “compensation culture”, we would question why high heels on shiny marble floors are not

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⁶⁸ Schmidt v Austicks Bookshop Ltd [1978] IRLR 360 [1].
⁷³ ibid [2].
⁷⁶ Lemes v Spring and Greene Ltd (2009) ET 2201943/08 [38].
⁷⁸ ibid [3].
prohibited rather than mandated to avoid employer liability, following trends elsewhere.

F. Formal Equality

English and Welsh law only considers “formal equality”, leaving substantively discriminatory practices outside its scope, often being required to legislate by higher European-level scrutiny rather than responding to their own wishes or democratic demand. In asking more from the law, we must be cautious that an extensive legal mechanism is not implemented to quieten interest from the political masses. Administrative unworkability of the discrimination laws in place also leads the question of whether the premise and aims of the law are flawed at the outset – why is discrimination in difference not good enough for legal protection? Anderson’s view reflects where the law should go to provide effective, individual, substantive remedies to those who challenge their dress, which does not allow “loopholes” erring on the side of employer protection; “the harm is not just in the fact that some dress codes harm women (or some women). Rather, the harm is that all gender-based dress codes suggest that sex is a relevant distinction in a workplace context”.

G. Wobbling in Heels: The Stability of the Law?

The UK Equality Act’s definitions and application in case law raise little contention in their fulfilment of European Convention rights or EU directives. Little noise is made for gender rights protection on the impending “Brexit” decision, and silence on this specific issue, suggesting that UK protection for gender discrimination is for many, adequate. Active support of the legal framework is commonplace; Wadham noting the 2010 Act as a “vital partner to the Human Rights Act in providing the twin columns of a modern and civilised constitutional settlement”. Whilst criticisms have been advanced, European arbiters’ intervention would not provide substantive equality through appeals – consistency and validity proved in cases that have followed that route and Member State discretion respected in this area. Instead, we can see that the law may indeed have operated at its current threshold for a long while, with international approval,

80 Rutherford v Secretary of State for Trade and Industry [2006] UKHL 19, 71.
82 Equality Act 2010.
84 European Communities Act 1972.
had Thorp’s petition not raised the profile of a particularly dangerous example of the gendered codes that are entirely common in most workplaces.

**H. Conclusion**

This section has identified the operation of high-threshold law such that legal representatives pursue numerous additional strands of claim – Thorp’s case would undoubtedly run all four types of discrimination, as well as health and safety concerns to strengthen the case. In a culture without legal aid, this creativity necessary for successful application of the law is unsuitable. The masculine-lensed ambivalence of the judiciary in implementing law prohibits true efficiency through legal reform alone, and that notions of gender normality in society need to be outlined in some form for any intended consequence to trickle down to individualised justice in employment tribunals. The next section will probe further why this is the law, focusing on capitalist “freedom of contract” views in that “sex sells”.

### III. BARRIERS TO LEGAL REFORM

#### A. Sexualities – The “Occupational Qualification” of Sexism: Lessons from the USA?

1. **Summary**

This chapter will argue that, within “sex” discrimination, the central consideration premising differential treatment is the objectification of women for the purposes of sex. It will build on the idea of the “privileging of the ornamental”\(^{89}\) across Western societies, most notably comparing the domestic situation with the explicit American legislation through Title VII\(^{90}\) to draw attention to the prevalence of sexualisation in the dress code discourse; though arguing that the US

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\(^{90}\) Civil Rights Act 1964 Title VII.
Exemption for discrimination when “selling sex” jars with a satisfactory resolution of the autonomy/equality discourse.\(^91\)

2. Hyper-Sexed

When seeking a comparator for Chapter Two’s compulsory high heels for organisational professionalism,\(^93\) we draw an uneasy parallel with the same requirement alongside “tight-fitting, sexy, uncomfortable costumes”\(^94\) in the casinos of McGinley’s “Babes and Beefcakes”.\(^95\) She uses this case study effectively to highlight the US practice of defending the statutory Title VII prohibition against sex discrimination by allowing employers to hire women for sex appeal, if the “central mission” of the business is to sell sex - a “bona fide occupational qualification” (BFOQ).\(^98\) Perhaps counterintuitively, this means that

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\(^{96}\) Civil Rights Act 1964 Title VII.


\(^{98}\) Civil Rights Act 1964 Title VII s.703(e).
the highly-legislated, constitutional “protection”\(^9\) which we could be calling on for best practice UK reform advice, means exotic dancer clubs,\(^10\) and perhaps Hooters\(^11\) or the Playboy mansion,\(^12\) can rebut a sex discrimination claim by invoking that their business model necessitates women only, scantily clad.

3. Autonomy?

If the link of sexuality in Thorp’s case\(^13\) was inexplicit, an additional element of the BFOQ test\(^14\) springs from another, albeit relatively archived, \textit{PriceWaterhouse} litigation\(^15\) - discrimination must adversely affect the claimant’s ability to her job.\(^16\) The law’s utility is therefore demarcated by the idea of “willingness to serve”\(^17\) and the fact that many women feel empowered, in control, valued for their sexuality and autonomous by such dress codes that others would find discriminatory. The argument could be invoked that women have earned the right to dress in a provocative manner and be proud of their sexuality,\(^18\) and if sex-based industry is a reality, the US law would be paternalistic to not respect the proven effectiveness for sex to drive up business if involved with willing participants. However, this goes to the heart of a feminist debate of allowing the right to choose to be sexually attractive vs. protecting equal treatment for men and


\(^11\) ibid.


\(^14\) Civil Rights Act 1964 Title VII s.703(e).


\(^16\) ibid.


Not only are there boundary-policing problems with the extension of this exception, this law highlights the centrality of sex to the debate – women in high heels have their own statutory provision in the USA.

4. Virgin Atlantic

Busted’s 2003 punk-pop single “Air Hostess; I like the way you dress” highlights the relatively recent, normalised and public objectification of gendered airline staff often famed for their glamorous appearances. The dangers of justifying sex discrimination through Title VII have led to its narrow successful application by courts in the case study of airlines; Diaz and Wilson highlighting BFOQ failure where “safe transportation of passengers” was the business purpose, with “the sex appeal portion of the job tangential to its duties”. However, Virgin Atlantic was mooted as one of the worst offending dress codes in a recent ACAS paper. Falling short of the US legal test for justification on aesthetic labour should not prevent us from engaging that the appearance of air hostesses is seen as relevant to their role, despite and perhaps above their performance. While we could see the “extremely feminine silhouette” of professionally styled Vivienne Westwood uniforms as a genuine ode to power-dressing and truth in Sir Richard Branson’s “If you dress in clothes that make you feel you look good… [you] do your job a lot better”. Comments like this mirror the direct gendered discrimination of Chapter Two as they are targeted at the “erotic capital” of women in exclusive hiring. When considering a

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110 Civil Rights Act 1964 Title VII.
113 Civil Rights Act 1964 Title VII s.703(e).
115 ACAS, Dress Codes and Appearance Norms at Work: Body Supplements, Body Modifications and Aesthetic Labour (Research Paper, 07/16, August 2016).
116 ibid [18].
117 ibid [18].
historically glamorised profession, we must be cautious that “conventionality” and autonomy justifications do not rebut direct discrimination in the UK; they have elegant, professionally-designed uniforms (PCP), so are treated “more” favourably than male comparators.

5. “Naked” Abercrombie Models

Abercrombie provides an example of an all-American teenage/tweenaged brand where explicit sexuality would no doubt be age-inappropriate. Nonetheless, perpetuating a “cool” brand has seen much of the aforementioned law applied – their business aims aligned with strict application of appearance codes and the aestheticisation of labour. From prosthetic arms to headscarves, a number of litigations have led Abercrombie to “overhaul” its distinctive exclusive hiring policy, where “models” were previously selected for interview when shopping in store rather than being able to apply and were weighed at interview, as well as “sexualised marketing” such as through featuring semi-nude models on gift cards and shopping bags. However, while official statements reassure customers of the hardly novel or forward-thinking approach that Abercrombie will not “discriminate based on body type or physical attractiveness”, the real motive behind the change can be summarised in plans “to cater for more shoppers” and remedy the 39% fall in shares. Using the language of BFOQ defence in its public statements, it is clear that the “famously preppy, rumpled, hormonally charged aesthetic” in its Look Policy is at the “very heart of its business model”. Whilst this section is explicitly rebutting “lessons” from US practice,

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122 Equality Act 2010 s.19.
123 ACAS, Dress Codes and Appearance Norms at Work: Body Supplements, Body Modifications and Aesthetic Labour (Research Paper 07/16, August 2016) 17.
128 ibid.
129 ibid.
131 ibid.
132 Jenni Avins, “Abercrombie & Fitch’s Absurd Dress Code is Going All the Way to the Supreme Court” Quarts (03 October 2014).
Abercrombie being a company caught for discriminating particularly frequently, we could perhaps see the example that once media coverage and the financial cost of litigation are imposed, companies will genuinely re-think their discriminatory dress attitudes. It could, therefore, be advanced that Abercrombie’s exposure evidences an effective “stick” for law enforcement and can rebut claims that, once the law is made practicable through reform, it will operate only in extreme situations by a judiciary with different priorities.

6. Conclusion

As the law mobilises to address gendered discrimination, it must have open and frank discussions about exclusive hiring arrangements and the commoditisation of female sexuality leading to tolerance of discrimination. Directly skewed against the interests of equality for women, the US approach to Title VII\textsuperscript{134} is inappropriate in purpose - to allow equal access to job opportunities, not to abolish every sex dependent practice from the workplace in the abstract.\textsuperscript{135} While acknowledging differential context, not least in the European influence on our equality laws, it is evident that our messy, judicially-created law should not draw influence from the American situation which considers employee protection last.

While this chapter has argued strongly that women are disproportionately treated as sex objects through their dress codes, the next will argue that the problem becomes exponentially more difficult when we consider that our perceptions of female sexuality may be incorrect \textit{ab initio}, and that discriminatory practice may be enhanced when considering those who do not identify with the oppressive sexualised femininity that is laid down in these codes. The tale of a transgender employee suing for $35 million from Abercrombie’s flagship store\textsuperscript{136} after being forced to ascribe to the already-criticised gendered dress as what “customers want to see”\textsuperscript{137} provides an ideal bridge between questioning how we Use Sex (Chapter Three) and the relevance of mixed Identities (Chapter Four) in our debate.

B. Gender Identities – “Women are from Venus” and Disparate Femininities

1. Summary

\textit{Chapter Two} highlighted that the relevant legal framework for gendered dress codes is no more nuanced than one of direct discrimination – “women must wear high heels”. This chapter

\textsuperscript{134} Civil Rights Act 1964 Title VII.  
\textsuperscript{135} Willingham v MacOn Telegraph Publishing Co (1972) 352 F Supp 1018.  
\textsuperscript{136} Brandon Showalter, “Abercrombie & Fitch Faces Lawsuit for Requiring Transgender Employee to Dress Like a Girl” Christian Post Reporter (03 August 2016).  
\textsuperscript{137} ibid.
will argue that direct discrimination premised on conventionality is even more problematic when we consider disparate notions of “what woman is”, representing neither a homogenous (universally accepted) or hegemonic (dominant) viewpoint.

2. A Note on Non-Binary

We need not consider the Human Rights campaign urging that transgender employees be able to dress in accordance with their full-time gender presentation. While women could be required to wear high heels, a “conventional standards” approach means even now it would be almost impossible following *Ryder Barratt v Alpha Training* for a man to claim less favourable treatment because he was not allowed to wear the same. Where the claimant does not intend to go through gender reassignment surgery to ascribe to the “other” dress code as in *Kara*, there will be no domestic or European remedy. Judicial anachronism can be highlighted in that they seem to use sex and gender interchangeably in judgements, despite prevailing views that one is biological and one reflects gender identity (the legally relevant option mostly). Conventionality is so ingrained amongst judges to effectively ignore their severance.

This Paper considers one facet of an artificially binary system, not the impact of dress for trans individuals, but this extreme end of a continuum where gender identity jars with required “conventional” dress can illuminate the struggles of individualistic element of femininity and how this is often mapped significantly away from what may be considered uncontentious in some dress codes.

3. Conventionality

It has already been established that what is perceived as fair treatment is premised on conventionality; women wearing skirts; men wearing suits. Some dress codes use this explicit terminology “no unconventional hairstyles” without

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141 *Ryder Barratt v Alpha Training* ET No. 43377/91.
145 See *Lemes v Spring and Greene Ltd* (2009) ET 2201943/08 [38].
146 Gender Recognition Act 2004.
further explanation, expecting the socialisation of individuals in a binary, conservative society to be to the extent of understanding what a subjective employer will find conventional. ACAS research is consistent that many “unwritten” appearance codes expect employees to “learn the dress norms.” This suggests that even for professionals aware not to implement gendered codes that may come under litigation scrutiny, conventionality in dress is seen as relevant. Whilst in 1996 it was recognised that discrimination would change as society changes, and this Paper advances this position of an outdated law twenty years later, dress codes are still sustained not in “physiological difference” but a “question of custom and fashion”. This superficial appearance focus, perhaps to the detriment of performance, would likely be ridiculed if it were not so commonplace; however, if the clients’ conservatism is relevant to them, it is perpetuated. Moreover, difficulties in situating conventionality have had a marked impact; “uncertainties about what is fair and legal are made more complex by shifting societal norms and values”.

4. Two Rules

Conventionality is rooted in gender difference; “men and women… obviously different… [have] two rules”. Yet three feminist viewpoints challenge this artificiality; Butler’s view that gender is communicated through social performances via appearance, not the other way around, with no concrete, inherently feminine or masculine self; Davis’ view that hegemonic femininities are patriarchal, emphasising sexuality and appearance for control; and Hekman that feminism is no longer based on a universal concept of womanhood. This “new conventionality” is making an impact.

However, judicial reasoning represents the polar opposite. In 2009, a waitress’ refusal to wear an indecent, red short dress misunderstood as “vehement”, her views about modesty and decency “unusual in Britain in the 21st century” as

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150 ACAS, Dress Codes and Appearance Norms at Work: Body Supplements, Body Modifications and Aesthetic Labour (Research Paper 07/16, August 2016) 32.
153 ACAS, Dress Codes and Appearance Norms at Work: Body Supplements, Body Modifications and Aesthetic Labour (Research Paper 07/16, August 2016) 52.
156 ibid [19].
157 Susan Heckman, Feminism, Identity and Difference (Frank Cass 1999) 1.
158 Lemes v Spring and Greene Ltd (2009) ET 2201943/08 [36].
159 ibid [38].
“not the victim of malice or unkindness, rather a single misjudgement”. One questions which feminist theorists, or even women, were consulted to get this homogenous view of conventional femininity and their attitudes towards modesty. With the unilateral modification of dress, without consultation, making the claimant “constitutionally unable” to work, we question why this does not form precedent as a good example of constructive dismissal, sexualised dress only justified anywhere if it is relevant to the performed role, unlike waiting. The answer is that conventionality is perceived by the judiciary with no objective analysis, catching here a dress which most women regardless of their politicisation would class as inappropriate. This is not anomalous; Stevenson’s non-conformity misunderstood and justified - “the image of a stereotypical heterosexual female is a female wearing a dress, heels and make-up... The claimant normally wears trousers, flat shoes and no make-up. She dresses well, would normally wear a trouser-suit for work” and her above average performance ignored. Short of a “lesbians ignite” badge, reflecting a freedom of expression case but jarring with standard notions of appropriate dress, the claimants in these cases were still dressing conventionally in business dress, simply refusing elements of a dress code they found grossly offensive, and could not find legal remedy.

5. Applied to Thorp

Thorp falls into this category – she would have looked smart, if not smarter, in flat shoes with a business suit, yet she was dismissed. In Thorp’s case, de minimis and conventionality arguments make it likely that her discrimination claim would have failed without the current debate and scrutiny of high heels. However, it has already been mentioned that the claim could be strengthened using supplementary legal tools. Regarding identity, Nicola herself in the Parliamentary inquiry offers that if she identified as “Nicholas”, her case may be stronger. Ultimately, this represents how while individual identities are overlooked in legal treatment, they are seen as significant in the rank of dress code violations. Whilst the marginalisation of trans individuals is frequent in law, it would probably be

160 ibid [41].
161 ibid [59].
162 Employment Rights Act 1996 s.95(1)(c).
163 Civil Rights Act 1964 Title VII s.703(e).
164 Stevenson v Avon Cosmetics [2014] WL 8663532 [7].
165 ibid.
prioritised over the inherent problems with conventional femininity, ranking last and accepted/justified in law. The value of the current petition and raising of awareness must, therefore, be recognised.

6. Conclusion

This section has advanced that disparate identities make a law premised on “reasonableness and conventionality” difficult. It argues that the nuances of why female dress code conventionality sustained on patriarchal norms is absurd, nor the increasing range of individualistic notions of identity, is not understood or enforced by the current judiciary which must be addressed during the reform considerations in the next chapter.

CONCLUSION

“COVERING UP”

This research has identified gendered discrimination in dress codes through the lens of the current High Heels Inquiry. However, the expected conclusion of Equality Act reform has been tempered by societal barriers to reform, suggesting that removing the law as it currently operates without addressing why our constitutional protection of discrimination was so limited in the first place that it would lead to foundational flaws. In providing effective reform, consultation and democratic consideration of the issue is needed; for example, in analysing why we distinguish between gender.

Similarly, this research has maintained a narrow focus that privileges gendered discrimination in line with the Inquiry. In tackling dress discrimination, we must acknowledge that in granting intermittent equality protection for minority groups, we send a discriminatory message. Reform proposals should acknowledge beyond “high heels, skirts and make-up”, not least the societal ignorance of dress customs of religious groups that are not catered for in contemporary dress codes. Furthermore, the law’s approach could be too juvenile to deal with linked discourses surrounding how the Equality Act has focused its “protected characteristics”, and whether discrimination falling outside of the scope of the current law such as against tattoos and piercings in the workplace should be considered.

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170 Equality Act 2010 s.4.

There is no way of predicting the outcome of the current Inquiry – there are precedents for upholding the minimum level of formal equality to suit political desires, without necessarily engaging with the disparate views on the issue. Disquiet on other gendered issues has not led to complete reform as proposed, and indeed we may question whether the law wants to get involved, or change its inherent attitudes. Therefore, a conscious effort should be made to perhaps even re-route the likely legal solution concentrating on high heels, of limited protection against a backdrop “hypersensitivity” viewpoint, and locate the relevance of the debate with macro approaches. Law can provide an element of “stick” through effective legal enforcement of new rules and punishment and “carrot” through raising awareness to change attitudes, such as has been sustained already through media and social media attention.

This Paper has contributed the formal literature on the legal reform position – “law must do more”, proposing reform of discrimination generally, acknowledging pitfalls out of the law’s control and trying to use legislation and law enforcement procedures to ensure an effective, sustainable mechanism. The problems with dress discrimination are symptomatic of discrimination generally and narrow legislation or ill-addressing the outmoded views of tribunals and employers could lead to discrimination change rather than eradication. This research could, therefore, act as a springboard for further analysis opportunities into judicial training and appeal procedures, for example, which could contribute to an extensive consultation process.

However, in explaining why discrimination exists political contexts have been important – sex sells, and in a capitalist society, over-intervention may challenge business growth; regulation and legislation must be justifiably important to retract from a laissez-faire approach otherwise. Similarly, law’s utility in prompting change in this issue is restricted as the vehicle of historic perpetuation of binary genders and patriarchal control. The predominant approach is one of “separate but equal”, “different but not less favourable” rather than seeking true equality and the opinions of those affected. Law does not operate in a vacuum and in a post-Brexit turbulent climate, political insight to challenge this issue is unlikely. Whilst perhaps tempering the likelihood of wholesale reform, law-makers’ ignorance to the issue demonstrates the need for the accountability of media, the value in Parliamentary Petition and not least the importance of academic theorising in an area which could perhaps otherwise have escaped scrutiny.