2017/42

# Asda retail employees can compare themselves to distribution centre employees in equal pay claim (UK)

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## Summary

Between 2008 and 2016, around 7000 Asda employees working in retail stores (who were largely women) issued equal pay claims in the Manchester Employment Tribunal ('ET'). The Claimants argued that retail store workers carry out work of 'equal value' to the predominantly male workforce working in the distribution centres, meaning they were appropriate comparators for the purposes of an equal pay claim. The ET upheld their claim, even though the stores and distribution centres were run by different departments and the rates of pay set by a different method. Asda appealed to the EAT, which dismissed all grounds of appeal and upheld the ET's decision, allowing the UK's largest private-sector group equal pay claim to proceed.



## Background

The principle that men and women should receive equal pay derives from article 157 of the Treaty on the Functioning of the European Union (the 'Treaty'), originally Article 119 of the Treaty of Rome 1957. The UK implemented this principle into UK law nearly five decades ago, by passing the Equal Pay Act 1970. When the Equality Act 2010 came into force on 1 October 2010, it repealed and replaced the Equal Pay Act.

The vast majority of equal pay claims are issued by women, and therefore this article assumes that a woman is the complaining party, but either gender can bring a claim under the equal pay legislation.

In order to bring an equal pay claim, the complainant must be an employee, an apprentice, a worker, or in some cases, a self-employed contractor. Some other individuals are protected as well.

The Equality Act 2010 provides that an employee (or other category of eligible worker) is entitled to contractual terms that are no less favourable compared with those in a comparator's contract. This 'sex equality clause' will only apply where the woman is engaging in 'equal work' to that of the man in the same employment. 'Equal work' means (a) like work, (b) work rated as equivalent, or (c) work of equal value. 'In the same employment' means being employed 'at the same establishment' or where the comparator works in a different establishment, where "common terms apply at the establishment (either generally or as between the Claimant and the comparator)".

If it is found that a term in a woman's contract is less favourable, section 66 of the Equality Act 2010 provides that the term is *"modified so as not to be less favourable"*. Equally, if the female complainant does not have a term which corresponds to a term of a man's that benefits him, her *"terms are modified so as to include such a term"*.

However, there is a notable exception which allows an employer to pay a man more than a woman when she is doing equal work. This is where it can show that the difference in pay is due to a material factor which is not tainted by direct or indirect discrimination. The success of this defence will depend on the individual facts and circumstances, but the following examples have succeeded in some claims (but not all): length of service, different locations, market forces and skills shortages, and different grades on a pay scale.

## Facts

Asda was formed in 1965. In July 1999, the American retailer Wal-Mart Inc. acquired Asda which became a wholly-owned subsidiary and part of that company's international division. Asda's main business is its retail operation ('Retail'), with around 630 stores in the UK, using some 133,000 hourly paid retail employees.

In the late 1980s, Asda began to establish its own distribution operation ('Distribution'). Between 1989 and

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doi: 10.5553/EELC/187791072017002004005

2015, a total of 26 depots were owned and operated by Asda from time to time. There are currently 24 Distribution centres open across the UK, in which around 11,600 hourly paid employees work. None of the Distribution centres are located in the same sites as any of the Retail stores.

The terms and conditions of the employees depend on the type of establishment at which they work. Retail employees are employed on Retail terms and Distribution employees are employed on Distribution terms. Those terms have been set using different processes. The ET judge found that the Retail workforce is not heavily unionised and terms are not set through collective bargaining, though there are differential rates based on cost of living differentials in three separate geographical areas. In other words, pay and terms are imposed from the top down. In contrast, the predominantly male Distribution workforce works on terms collectively bargained through the GMB, following national recognition agreements in 2012 and 2014.

The Distribution employees are paid a higher hourly rate than their colleagues in the Retail stores.

Between 2008 and 2011, a number of women working in the Retail stores issued claims seeking equal pay with comparators working in the Distribution centres. Of those claims, 22 are still pending final determination. Further claims were presented between 2014 and 2016.

## Judgment

The EAT dismissed all of Asda's grounds of appeal. This section deals with some of the main points of appeal, which were concerned with the central question of whether retail staff could compare themselves to distribution centre staff.

### Direct effect

In the ET, Employment Judge Ryan found that Article 157 of the Treaty is directly effective where a claim is founded on work of equal value. He found that direct effect was not excluded by the need for expert valuation in order to determine whether the jobs were of equal value.

Mr Jeans QC appeared on behalf of Asda and advanced a number of arguments asserting that this was wrong. He referred to the ECJ's comments in *Worringham – v – Lloyds Bank Limited [1981] ICR 558*, that direct effect can only exist where *"the court is in a position to establish all the facts enabling it to decide whether a woman receives less pay than a man engaged in the same work or work of equal value"*. Mr Jeans QC argued that for the court to "establish all the facts" it must not be required to engage in a complex fact-finding exercise or in evaluation of expert opinion evidence. It must be established, without such an exercise being necessary, that the work is of equal value for example, by internal job evaluation, as in *Worringham*, or by a concession from the employer. This was not the case here argued Mr Jeans QC.

Mr Short QC presented a number of counter-arguments on behalf of the Claimants. He stated that *Worringham* clarified that direct effect can extend to equal value cases. Mr Short also commented that there was nothing special about a court or tribunal making factual determinations about whether jobs are of equal value, whether using the specialised employment tribunal rules providing for expert evaluation, or in the High Court where an equal pay claim may also be tried. The task of the court was not conceptually different from that of determining, for example, a factual defence of objective justification in an indirect discrimination claim, in which article 157 would beyond doubt be directly effective.

After considering both sides, the EAT agreed with Mr Short QC and found the *"better view"* is that *"evaluation of the factual elements"* for the purposes of deciding whether work is of equal value is not *"beyond the normal powers of investigation and application of any court"* and therefore Article 157 of the Treaty is directly effective.

### Single source of pay

The second ground of appeal centred around whether the ET judge correctly applied EU law on the existence of a 'single source' of pay. The ET had accepted that the presence of a single source of pay and conditions of work was sufficient to allow comparability. There were no additional requirements. However, Mr Jeans QC argued before the EAT that this was wrong and that there must in addition be a single establishment, collective agreement or statutory framework. Mr Short QC counter-argued this, quoting Lady Hale in the Supreme Court case of *Dumfries and Galloway Council – v – North [2013] ICR 993*, in which she said *"for the principle of equal pay to have direct effect, the difference in treatment must be attributable to a single source which is capable of putting it right"*. The EAT agreed with Mr Short QC and held that a single source means a common source and the 'vertical' presence of a parent company (i.e. Wal-Mart) sitting above its subsidiary (i.e. Asda) does not make the source of pay and conditions other than common to Claimant and comparator. The EAT remarked that *"Asda or Wal-Mart could interfere at the stroke of a pen or, more likely, the click of a mouse"*, to remedy the difference in pay, should it wish to do so.

### Common terms and conditions

Mr Jeans QC also argued that the ET judge had misdirected itself and acted perversely in relation to the treatment of the issue of common terms and conditions. Mr Jeans asserted that the Retail employees' terms and the Distribution employees' terms were not 'common'for a number of reasons. He commented that the terms were set by the physical location of the staff concerned and so there were no common terms across stores and depots. Further, each depot paid its own rates and Distribution employees had productivity clauses in their contracts.



doi: 10.5553/EELC/187791072017002004005

The two sets of employees also enjoyed different packages of terms and overall, the two sets of terms were *"geographically, historically and qualitatively distinct"*. Mr Jeans QC argued the fact that both sets of terms are set by the same employer is a neutral factor, not a pointer in the direction of the terms being common.

The EAT rejected Mr Jeans QC's arguments and dismissed these grounds of appeal. It expressly rejected his contention that the terns could not be common because they were tied to particular locations. He clarified his reasoning by explaining that there are no comparators working at the Claimants' establishment, and vice versus, and so the starting point is that the terms that are being compared are observed at different establishments (which is permitted). You then look at whether they are "common" from the statutory sense. On that basis Mr Jeans QC's argument did not work.

### The 'North hypothetical'

The remaining grounds of appeal related to a hypothetical comparator in equal pay cases, borne out of the *Dumfries and Galloway Council – v – North [2013] ICR 993* case. As no Retail employees work at Distribution depots and no Distribution employees work in Retail stores, the ET considered the hypothetical question whether, if Distribution employees did their jobs at store locations, broadly similar terms would apply, such that it can be said that common terms are observed at both types of establishment. The ET judge answered yes to that question.



Mr Jeans QC submitted that the Tribunal must not consider whether distribution staff terms "might apply in stores in an alternative reality …"; instead, the Judge should have asked "do Distribution terms apply to those doing depot jobs in stores and do Retail terms apply to those doing store jobs in depots?" Mr Short QC disagreed, and said it cannot be the law that both sets of terms under consideration must actually be observed at both depots and stores. That would mean the exercise is not hypothetical at all and the legislative purpose would be defeasible by the expedient of job segregation and gender segregation. Instead, he argued, it is permissible and relevant for the Tribunal when applying the test to ask itself what would happen if the Distribution employees did their jobs at the same establishment as a store, and the likely attitude of those workers, applying industrial common sense.

The EAT agreed again with Mr Short QC, and said it could not accept that the ET judge should have adopted Asda's proposition that the *North* hypothetical test cannot be satisfied unless terms are actually observed across establishments. That would "*deprive the test of its hypothetical character*".

## Commentary

The language adopted by Mr Justice Kerr's suggests that he was not certain about every decision he made in his judgment. On several occasions he states that his finding was the "better view", indicating that both sides of certain arguments were persuasive and could have been successful.

Given the potentially wide-ranging implications of this decision, the EAT gave Asda permission to appeal to the Court of Appeal (and it has indicated that it will submit an appeal). The EAT indicated in its judgment that the Court of Appeal is better placed to decide whether a reference to the Court of Justice of the European Union is appropriate, and so it is quite possible that a referral will be made.

## Comment from other jurisdiction

*The Netherlands (Peter Vas Nunes, BarentsKrans):* Dutch law does not include a 'common terms' requirement. As long as there is a single source of pay, if the work performed by a female employee is of equal value to that of a male employee working within the same 'establishment', she is entitled to the same pay unless the employer demonstrates that the pay differential is due to a non-discriminatory factor. I would expect a Dutch court to see Asda's stores and distribution centres as one establishment. Difference of geographical location would not be a relevant factor, but I can imagine that in a larger country such as the UK, with price regional differences, it could be. A Dutch court would not need to perform a test similar to the North hypothetical test.

**Subject**: Discrimination, equal pay

**Parties**: Asda Stores Limited – v – Brierley and Others

**Court**: Employment Appeal Tribunal

**Date**: 31 August 2017

**Case number**: UKEAT/0011/17/DM

**Internet publication**: http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKEAT/2017/0011_17_3108.html&query=(Asda)+AND+(Stores)+AND+(v)+AND+(Brierley)


doi: 10.5553/EELC/187791072017002004005