2021/29

Scope of equal pay comparisons by female shop workers under UK and EU law clarified (UK)

CONTRIBUTOR Carolyn Soakell*

Summary

The UK's Supreme Court (SC) has ruled that retail staff of the supermarket chain Asda can compare themselves under UK law to higher-paid distribution depot staff for the purposes of an equal pay claim. In a separate case against Tesco, the ECJ subsequently confirmed that the company's shop workers can rely directly on EU law to compare themselves to distribution centre workers for the purposes of such a claim.

Background

The UK's Equality Act 2010 (EqA) provides that men and women should receive equal pay for equal work. Employees can compare themselves with a comparator of the opposite sex who is performing either the same work or work of equal value. They must be in the 'same employment', meaning they need to be employed by the same employer or by associated employers.

The EqA also provides that the claimant(s) and comparator(s) must also be employed at the same establishment, or at different establishments at which 'common terms' apply. This means it is possible for a claimant to compare herself with a man doing a different job in a different location. When deciding if common terms apply, it is necessary to ask a hypothetical question – under what terms would the comparator be employed if he transferred to do his job in the same workplace as the claimant? If his terms would not change, the jobs can be compared.

In terms of EU law, Article 157 of the Treaty on the Functioning of the European Union (TFEU) allows a comparison to be made between employees if there is a 'single source' that is responsible for setting their pay (*Lawrence and others – v – Regent Office Care Ltd* C-320/00; [2003] ICR 1092). This approach means that it does not matter if the employees do different jobs in different places, so long as a single employer is responsible for ensuring equal pay. The EqA does not contain the single source test.

Facts of the Asda case

Female retail employees at Asda brought equal pay claims under the EqA, seeking to compare their work to that of male distribution staff. Their roles were quite different, and they were working in different places. Each of the groups of employees had negotiated and agreed separate terms and conditions of employment. No retail employees worked at the distribution depots, and no distribution employees worked in retail stores. Nonetheless, the claimants argued that this was a valid hypothetical comparison.

Asda argued that it was not possible to compare the roles, contending that the distribution and retail operations were fundamentally different. It also argued that the hypothetical comparison of terms a male distribution worker would have been on if he transferred to the same workplace as the claimants was not valid.

The Employment Tribunal (ET) decided the retail employees could compare themselves with the distribution employees and, on appeal, the Employment Appeal Tribunal and the Court of Appeal agreed that the comparison was permissible.

Supreme Court judgment

The SC also decided in favour of the Asda claimants, confirming that they could compare their pay with that of the male distribution employees. The ET had found that the distribution employees would have been employed on substantially the same terms if they had been employed at the claimants' site, and there was no reason to overturn that decision.

The SC clarified how to make comparisons between groups of employees who work in different establishments. If there are no employees of the comparator's group at the claimants' workplace, and it is not clear on

* Carolyn Soakell is a partner at Lewis Silkin LLP.

doi: 10.5553/EELC/187791072021006003006

what terms they would have been employed there, the hypothetical question needs to be asked – would the comparator have been employed on the same or substantially the same terms if he had been employed in the same role at the claimants' establishment? Put simply, would the distribution employees have kept broadly the same terms if they had moved to do their distribution work at a retail store location? It is immaterial that it is not feasible in practice for distribution employees to work at a retail store, as this is a hypothetical exercise.
The SC also made the point that this should not be a complex exercise, and ETs are not required to perform a line-by-line comparison of different sets of terms and conditions: only a broad comparison is needed. The point of the hypothetical comparison is that an employer could otherwise avoid equal pay claims by allocating certain groups of employees to separate sites to give them different terms, even where this is discriminatory. The question of whether there are 'common terms' to allow a comparison between employees is just the first step in an equal pay claim. It is a 'threshold test' to weed out comparators who cannot be used, and cases where the test cannot be met are likely to be exceptional.

Facts of the Tesco case

Several existing and former Tesco shop floor workers, who were mainly female, brought equal pay claims contending that their work was of equal value to that of more highly paid distribution centre workers, who were mostly men. The two types of job were done at different workplaces, meaning there was a question as to whether it was possible to compare the roles.
In contrast to the Asda case, the Tesco claimants primarily wanted to rely directly on the 'single source' test under EU law rather than the EqA. The ET hearing the case asked the ECJ to make a ruling on whether EU law can be used directly to make this comparison. Tesco argued that this was not possible in the UK for equal value cases.

ECJ judgment

The ECJ ruled that the TFEU imposes obligations on employers to ensure both equal work and work of equal value, and this is one of the foundations of the EU. The wording is clear and precise, which means that these provisions can be relied on directly by individuals in equal value claims in the national courts.
The ECJ also confirmed that where unequal pay can be attributed to a single source, the work and the pay of those workers can be compared even if they work in different establishments. Article 157 of the TFEU may be relied upon before national courts in claims about work of equal value carried out by workers in different establishments of the same employer, provided that the employer constitutes a single source for setting pay.

Commentary

Both these decisions potentially make it much easier for equal pay claimants to compare themselves with employees working in different jobs in different locations. The SC's decision in the Asda case indicates that it should not be a complex exercise for employees to compare themselves with those working at different establishments under the EqA provisions, describing this as a 'threshold test'. The EU single source test endorsed by the ECJ in the Tesco case is even simpler to apply and claimants in the UK can now rely on it in all types of equal pay claim, so long as one single employer is able to rectify any pay inequality.
It is worth noting that this was an ECJ decision delivered after the UK left the EU under the Brexit arrangements. Although the European Union (Withdrawal) Act 2018 provides that direct EU legislation in force immediately before Brexit remains part of domestic law afterwards, the UK courts and tribunals are not generally bound to follow ECJ decisions which are made after the end of the Brexit transition period. They can take account of them if relevant and are likely to exercise caution in deciding to depart from them. However, the UK-EU Withdrawal Agreement separately provides that ECJ decisions will be binding in full where they are made in relation to cases which were referred before the end of the transition period. This means that Article 157 of the TFEU is still available to be relied on by UK claimants, and it seems unlikely there is much scope to argue that the Tesco decision should not be followed. UK courts and tribunals will still need to assess how the decision should be applied to the circumstances of a specific case, in particular by determining whether there is in fact a single source capable of being relied on.
It is important to remember that this was only the first stage of the equal pay claims in both the Asda and Tesco cases. The next step is to consider whether the roles are of equal value and, if so, whether any difference in pay is attributable to a material factor that is not sex discriminatory. The likely effect of these decisions is that legal arguments in equal pay cases will in future focus more on these potentially complex issues instead.

Comments from other jurisdictions

Austria (Hans Georg Laimer and Melina Peer, Zeiler Floyd Zadkovich): According to Austrian labour law, employees shall not be directly or indirectly discriminated against in connection with an employment relationship on the grounds of gender, in particular when determining remuneration. However, Austrian labour law does not explicitly stipulate the principle that equal pay is due for equal work or work of equal value. This principle applies nevertheless via Article 157 TFEU in Austria.

doi: 10.5553/EELC/187791072021006003006

The Austrian Supreme Court has already had to deal with the interpretation of the term 'work of equal value' in one case. In that case, the Supreme Court stated that the concept of work of equal value refers exclusively to the nature of the work in question. Therefore, an objective assessment of the specific work activity, in particular regarding the requirements of the job and the nature of the tasks, has to be done. Whether employees, who are employed in different establishments, can also invoke Article 157 TFEU has not yet been dealt with by the Austrian Supreme Court. However, it can be assumed that the Supreme Court would follow the interpretation of 'work of equal value' presented by the ECJ in the *Tesco* case.

Germany (Frank Schmaus, Luther Rechtsanwaltsgesellschaft mbH): If the *Asda* case had been decided in Germany the judge would be likely to add employees of the opposite sex from other establishments to the equal pay assessment as well. The other establishments would only be excluded from the equal pay assessment if there were contrary remuneration schemes in existence which derive from regional specifics (e.g. reference to CBA's that only apply regionally, different level of purchasing power): Section 12 II no. 2 of the Remuneration Transparency Act (*Entgelttransparenzgesetz*, 'EntgTranspG').
The right to equal pay for equal work and work of equal value without discrimination on grounds of gender follows under the German jurisdiction both from the directly applicable Article 157 TFEU and from Section 3 I and Section 7 EntgTranspG. The latter provides the employee with a right to information on the comparative pay (median pay) the comparator(s) of opposite sex earns. It is common to initiate legal actions with asserting the right of information under the EntgTranpsG as an undue or wrongful employer's response would place the burden of proof on the employee that there is no discrimination against them.
However, it is important to note that the right to information is reserved to employees alleging gender discrimination who are deployed in establishments having usually more than 200 employees *and* whose activity is identical, similar or of equal value to those carried out by the putative comparator(s) of opposite sex. The claimants in the *Asda* case would need to meet these additional conditions under the German jurisdiction in order for their claim for information to be granted. This means at the same time that, contrary to the law of the United Kingdom, German law does not require the factual or hypothetical verification that the distribution employees from another establishment have kept broadly the same terms if they had moved to do their distribution work at a retail store location.
The *Tesco* case does not require any changes in the German jurisdiction, as the legal principles established there had been already implemented by German case law. German jurisdiction not only allows motions for equal pay due to gender discrimination referring directly to Article 157 TFEU but also applies the equal treatment test across all establishments run by the 'single source' which is tantamount to the same employer. The claimant doing so would need to prove that the criteria for the existence of a difference in pay between men and women and comparable work are met in the present case, which would be a *prima facie* case of discrimination and it would be for the employer to prove that the principle of equal pay was not violated (ECJ, judgment of 26 June 2001 – C 381/99). Establishing such a *prima facie* case is for the claiming employee often an obstacle that is hard to overcome as they have only limited or no access to other employees' remuneration structures. Therefore, the claimant would be better advised to first claim for information under the EntgTranspG.

The Netherlands (Peter Vas Nunes): I have followed the *Asda* and *Tesco* cases with interest. They are noteworthy because of their collective nature and the magnitude of the claims involved. If I am not mistaken, tens of thousands of (former) employees of Asda, Tesco, Sainsburys, Morrisons and other supermarket chains stand to benefit from the outcome – if ultimately positive, a big if – of these lawsuits. The value of their claims is said to exceed one billion (!) GBP. Although the number of (potential) plaintiffs pales in comparison with the 'Walmart claim' in the US, where litigation on behalf one and a half million retail workers could have resulted in even larger awards (see the disappointing outcome in *WalMart Stores, Inc. – v – Dukes et al* 564 US (2011)), the *Adsa/Tesco* cases appear 'American' in size. We have yet to see a collective equal pay claim in The Netherlands.
Can we expect such a claim in The Netherlands in the future? Yes and no. Yes, there are similarly large supermarket chains here, employing a total of over two hundred thousand retail workers and distribution workers. It will not surprise me if the former are predominantly female and the latter predominantly male, nor if the former earn less than the latter. Thus, a collective claim is not unthinkable. On the other hand, the *Asda* case is not likely to inspire Dutch retail workers to follow the example of their British colleagues. My information is that Ms Brierley and her co-claimants began their journey through four (!) judicial instances as long ago as 2014. This would mean that they have had to litigate for seven years merely to overcome the first hurdle in their claim (the 'common terms' issue). As this case report notes, this was only the first stage of the equal pay claims in both the *Asda* and *Tesco* cases. The claimants will now need to argue before the ET that their work has the same value (whatever that is – I can think of many hurdles here, such as the meaning of the concept that work of equal value, as determined by the ECJ, is a concept 'entirely qualitative in character') as that of the staff in the distribution centres. I wonder whether this second stage in their lawsuit can be litigated as collectively as the first stage, given that there are, so I suspect, several types of retail jobs (stockers, cashiers, etc.) and several types of distribution jobs (drivers, order pickers, etc) within each company. There may have to be several 'comparator debates'. I expect that if a Dutch retail

 doi: 10.5553/EELC/187791072021006003006

worker got the idea that she is being underpaid in comparison to distribution staff doing work of equal value, she would identify one or more individual comparators in a distribution centre and litigate on that individual basis. Nevertheless, Ms Brierley and her co-plaintiffs are setting an example that the Dutch unions may find inspiring.

Subject: Equal Pay
Parties: Asda Stores Ltd – v – Brierley and others; K and others – v – Tesco Stores Ltd
Courts: Supreme Court (Asda); European Court of Justice (Tesco)
Dates: 26 March 2021 (Asda); 3 June 2021 (Tesco)
Case numbers: [2021] UKSC 10 (Asda); Case C-624/19 (Tesco)
Internet publications: https://www.supremecourt.uk/cases/docs/uksc-2019-0039-judgment.pdf (Asda); https://www.bailii.org/eu/cases/EUECJ/2021/C62419.html (Tesco)

doi: 10.5553/EELC/187791072021006003006