

UK Court of Appeal Allows Asda Supermarket Employees' Equal Pay Claims to Proceed

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Earlier this year, the UK Court of Appeal held that a class of 30,000 female Asda retail employees could compare themselves to male employees working in Asda's distribution warehouses for purposes of their equal pay lawsuit. The Court's analysis and decision has broad implications for gender pay litigation in the UK.

Background

The Court of Appeal's decision is only the latest development in this long-running litigation. In fact, although this case has been pending since 2014, this decision still only tackles the preliminary issue: whether female employees working in Asda's retail stores may compare themselves to male employees employed in an entirely different position and at a different location. After holding a hearing on that preliminary issue, the Employment Tribunal ruled in October 2016 that the plaintiffs were entitled to make such a comparison. Asda appealed to the Employment Appeal Tribunal, which affirmed. Asda then appealed to the Court of Appeal.

Decision

The Court of Appeal analyzed UK's Equality Act of 2010, which in relevant part permits plaintiffs in an equal pay lawsuit to compare themselves to either: (i) higher-paid comparators at their same employment establishment; or (ii) at a different establishment where "common terms" of employment apply. Here, the plaintiffs sought to rely on the second limb of the standard, meaning that the court had to determine its meaning. After a thorough review of the case law, the Court of Appeal determined that the plaintiffs may compare themselves to male employees at Asda's warehouses so long as the warehouse employees' terms and conditions of employment would be the same had they worked at the supermarkets where the plaintiffs worked, and vice versa (referred to as the "*North hypothetical*").

This concept can be tricky to apply. Essentially, a court must first determine the hypothetical question of whether the male distribution employees would have broadly the same terms of employment had they worked at the plaintiffs' retail stores, even if they never would in reality. Similarly, the court then asks the further hypothetical question of whether or not the female retail employees would have broadly the same terms of employment had they worked in the distribution centers. As the Court stated, "[t]he effect of the case-law and of *North* in particular is that in such a case 'wherever they work' extends even to a workplace where they would never in practice work because the nature of its operations is so different." To be clear, the proper analysis *is not* to compare the terms of the plaintiffs' employment to the terms of their comparators. Instead, the court compares each group's terms to the terms that the hypothetical group of the same employees working at the other location would have.

Here, the Court recognized that Asda employees enjoy the same terms of employment regardless of where they worked. Therefore, because each group would have the same terms had they worked at each other's establishment, plaintiffs' claims could proceed.

Implications

Unless Asda appeals to the Supreme Court, this case will now proceed to the next two relevant questions—whether plaintiffs and their comparators roles are of equal value, and if so, whether their pay differential is based on sex. Asda has argued that any pay differences are instead based on market rates for the different positions.

The Court of Appeals' determination seems to be moving towards a high water mark of ruling that essentially all of a company's employees will be suitable comparators in an equal pay lawsuit, provided that the company's terms and conditions of employment do not differ for each location. With similar cases currently pending against British supermarkets Tesco, Morrisons, and Sainsbury's, this decision likely will have an important impact on how UK courts analyze those and other equal pay cases going forward.

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