HARCUS PARKER

ASDA equal pay comparability challenge

COURT OF APPEAL FINDS FOR CLAIMANTS IN ASDA EQUAL PAY COMPARABILITY CHALLENGE

In January 2019, the Court of Appeal handed down a judgment in the Asda Equal Pay case on the issue of 'comparators' (Asda Stores Ltd v Brierley [2019] EWCA Civ 44).

Thousands of store workers are bringing equal pay claims against Asda. Like the claimants in the Tesco, Morrisons and Sainsbury's claims, the (predominantly female) Asda store workers argue that they are paid significantly less than the (predominantly) male workers in distribution centres for work that they say is of equal value.

Of the four supermarket claims, the Asda case is the furthest along the equal pay claim process.

An employee can make an equal pay claim if she (it is usually 'she') believes that she is being paid less than an employee of the opposite sex who is doing work of equal value. The person to whom the employee compares herself is known as the comparator. If an employee proves that the terms of her employment contract are less favourable than the comparator's employment contract, the Equality Act 2010 amends the employee's contract to include the more favourable terms from the comparator's employment contract.

The first step in the equal pay claim process is to identify your comparator. Only once a comparator has been identified can a decision be made regarding equal value.

The comparator issue is complicated in supermarket equal pay cases because store workers and distribution workers tend to work at different sites. The Equality Act provides that employees at different establishments may be comparators if "common terms" apply at the establishments. Alternatively, EU law provides for comparison where there is a "single source" which sets the employment terms at the claimant and the comparator.

In the Asda case, the Employment Tribunal found that the claimants should be allowed to compare themselves to distribution centre workers, because there was a single source of employment and the claimants and comparators had common terms of employment. Asda appealed the decision to the Employment Appeal Tribunal (EAT) which also found in favour of the claimants (Asda Stores Ltd v Brierley & Ors UKEAT/0011/17/DM). The Court of Appeal heard Asda's appeal from the EAT in October 2018.

In its grounds of appeal, Asda argued, amongst other things, that:

- the judge at first instance had taken the wrong approach to applying the "common terms" test; and
- "single source" was not a sufficient basis for comparison (or, if it was a gateway to comparability, the claimants could not rely on the fact that they had the same employers as their comparators to prove that their terms of employment had a single source).

One of the difficulties which the Court of Appeal's judgment grappled with was what "common terms" meant and how the test could be applied where there were no distribution workers at supermarket stores and no supermarket store workers at distribution centres. To tackle the issue of whether common terms apply at different establishments, the Court had to ask itself whether, if claimant-type employees were to perform their claimant-type jobs at a comparator-type site, they would be subject to the same terms as claimant-type employees at claimant-type sites. This scenario is referred to as the "North" hypothetical (after a case called North v Dumfries and Galloway Council [2013] UKSC 45).

Lord Justice Underhill summarised the North hypothetical as it applied to Asda at paragraph 81 of the judgment:

- *It follows from the foregoing that the questions for the ET were whether (broadly) common terms and conditions applied (a) for retail workers irrespective of where they worked and (b) for distribution workers irrespective of where they worked. Since no retail workers were in fact employed at depots, or distribution workers in stores, that question could be framed in terms of the North hypothetical as follows:*

  (a) if (however unfeasibly) retail workers were employed, in retail jobs, in depots, would they be on the same terms as retail workers employed at stores? and

  (b) if (however unfeasibly) distribution workers were employed, in distribution jobs, in stores, would they be on the same terms as distribution workers employed at depots?

The Court of Appeal found that although the Employment Judge did not conduct the right exercise in the Asda case, the essential reason why his conclusion was correct was that Asda would apply common terms and conditions for both classes (claimant and comparator) wherever they worked.

Turning to the 'single source' issue, the Court of Appeal took the view that North was binding authority for the proposition that a claimant and comparator which have the same employer will ordinarily have a single source for their terms and thus that EU law permits comparison between them for equal pay purposes.

The Court of Appeal rejected Asda's argument that the Equality Act had changed the requirements for a comparator.

WHAT DOES THIS MEAN FOR THE TESCO CLAIM?

Although the Asda claim is still a long way from reaching a conclusion, this was a significant decision for the claimants involved in the case against Asda, as well as those bringing claims against Tesco and other supermarkets. The judgment makes it harder for the supermarkets to argue that it is not possible to compare store and distribution workers. This may mean the other supermarket cases proceed to a final hearing more quickly.

Asda has said that it will seek permission to appeal from the Supreme Court, having failed to secure permission from the Court of Appeal.

Article written by Jennifer Cassidy and Emily Fernando

Harcus Parker is acting for claimants in an equal pay claim against Tesco. For more information please visit our campaign page: https://www.equalpayaction.com

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Harcus Parker, 3 Lincoln's Inn Fields London, WC2A 3AA
E info@harcusparker.co.uk | T +44 (0) 20 7539 2915 | F +44 (0) 20 7539 3915