



26 March 2021

PRESS SUMMARY

Asda Stores Ltd (Appellant) v Brierley and others (Respondents)
[2021] UKSC 10
On appeal from [2019] EWCA Civ 44

JUSTICES: Lord Reed (President), Lord Hodge (Deputy President), Lord Lloyd-Jones, Lady Arden, Lord Leggatt

BACKGROUND TO THE APPEAL

This appeal arose from the trial of a preliminary issue in the equal pay claims that the Respondents (“**the claimants**”) are bringing against the Appellant, Asda Stores Limited (“**Asda**”), one of the UK’s major supermarket retailers.

A threshold requirement for equal pay claims to be brought is that claimants must be able to compare themselves to a valid comparator. The comparator must be a real person employed by the same, or an associated employer. If the claimants choose a comparator based at another establishment (which will involve the making of a “**cross-establishment comparison**”), “**common terms**” must apply at both the claimants’ and the comparator’s establishments (the terms do not have to be identical or the same). This “**common terms requirement**” is found in section 79(4)(c) of the Equality Act 2010, which replaced the earlier provision, section 1(6) of the Equal Pay Act 1970. The present equal pay claims are brought under both the 2010 and 1970 Acts because they relate to periods when the earlier legislation was still in force.

The claimants in this appeal are predominantly women and are employed in Asda’s retail business (“**the retail employees**”). The claimants seek compensation on the basis that in the six-year period prior to commencing proceedings in 2014 they received less pay than a valid comparator for the same work. The claimants’ chosen comparators are Asda employees employed at Asda’s distribution depots, who are predominantly men (“**the distribution employees**”). The retail and distribution locations are separate from one another. The Respondents therefore seek to rely on a cross-establishment comparison. The essential question on this appeal was whether common terms apply between the claimants’ and comparator’s establishments, satisfying the common terms requirement in the equal pay legislation.

Asda applied for dismissal of the claims on the basis that the comparator issue should be determined against the claimants. The claimants succeeded on the trial of the issue before the employment tribunal (ET Judge Ryan). Asda’s appeals were dismissed by the Employment Appeal Tribunal (the “**EAT**”) (Kerr J) and the Court of Appeal (Lord Sales JSC, Underhill VP and Peter Jackson LJ). Asda appealed to the Supreme Court.

JUDGMENT

The Supreme Court dismisses the appeal. Lady Arden gives the sole judgment, with which the other Justices agree.

REASONS FOR THE JUDGMENT

The Supreme Court’s dismissal of the appeal does not mean that the claimants’ claims for equal pay succeed. At this stage all that has been determined is that they can use terms and conditions of employment enjoyed by the distribution employees as a valid comparison [7].

Parliament did not define the expression “common terms” and the courts have sought to interpret it to give effect to Parliament’s intention [19]. The three leading cases, *Leverton v Chnyd County Council* [1989] AC 706; *British Coal Corporation v Smith* [1996] ICR 515 and *Dumfries and Galloway Council v North* [2013] ICR 993 demonstrate that the appellate courts have progressively elucidated and applied the expression across different circumstances [19]. This is the first case involving a cross-establishment comparison where the claimants’ and comparator group’s terms are not fixed on both sides by collective bargaining agreements [29].

In *North*, Lady Hale (with whom the other members of the Supreme Court agreed) confirmed that the purely hypothetical exercise to be undertaken to determine whether the terms are common (“**the North hypothetical**”) is to ask whether, assuming that the comparator was employed to do his present job in the claimants’ establishment, the existing terms and conditions would apply [25]. The employment tribunal may be satisfied on the facts that there are common terms without needing to apply the *North* hypothetical [32]. The *North* hypothetical serves the important purpose of preventing equal pay claims from being unduly stopped at the preliminary stage by an employer allocating groups of employees to separate sites so that they have different terms, even where this is discriminatory because the difference in terms is not due to a genuine difference of location [46, 51].

As recognised by the Court of Appeal, the employment tribunal considered the wrong question by asking whether there were “common terms generally as between claimants and comparators” [47]. The correct exercise is to make a broad comparison by asking whether the terms enjoyed by the distribution employees were substantially the same at the distribution depots and at claimants’ establishments [50]. The employment tribunal was wrong to perform a line-by-line comparison of the specific terms and conditions of employment of the distribution employees versus the retail employees [50]. In any event, the claimants succeed on the *North* hypothetical [50, 57].

The employment tribunal found that the distribution employees would have been employed on substantially the same terms if they had been employed at the claimants’ site [38]. Asda did not contend that there was any misdirection of law on the part of the employment tribunal [54]. In the absence of any misdirection of law and in view of the considerable experience of employment tribunals, the employment tribunal’s findings on the *North* hypothetical should stand [54].

It does not have to be “feasible” for the hypothetically relocated comparator group to be able to carry out their role at the claimants’ establishment [55]. It could have been envisioned that a depot was situated next to the retail store at the claimants’ establishment. The tribunal then had to ask whether, on this assumption, the distribution employees would continue to be employed on substantially the same terms as they were employed at their own establishment [56].

Looking to future case management by employment tribunals, the fact-finding exercise in relation to the common terms requirement should not be a prolonged enquiry [68]. The answer may more readily be found by inference from the relevant facts and circumstances [69]. Employment tribunals are not required to perform a line-by-line comparison of different sets of terms and conditions [70]. The common terms requirement should not be used as a proxy for other elements in equal pay claims [71].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>