

ASDA STORES LTD V BRIERLEY AND OTHERS

CIVILWATCH - CASE NOTE

As part of Goldsmith Chambers' Civil Watch series, we have invited members of our Civil Team to write case notes on recent landmark judgments.

In this post, Daniel Searle explains the Supreme Court's decision in Asda Stores Ltd v Brierley and others [2021] UKSC 10



1. The Supreme Court has recently dismissed Asda's appeal in equal pay proceedings brought by 35,000 Asda store workers seeking to compare their terms with those who work in Asda's distribution depots.
2. The essence of an equal pay claim is that a claimant must identify a comparator of the opposite sex "in the same employment" who is doing work which should be rewarded equally to the claimant's work.
3. There are generally three main limbs in a typical equal pay case:
 - (i) Whether the job roles are comparable;
 - (ii) If so, whether they are of equal value;
 - (iii) If so, whether there is a reason other than sex discrimination that means the roles should not be paid equally.
4. The appeal raised this question in respect of the first limb: whether two distinct parts of a workforce (specifically, female shop-floor workers and higher-paid male distribution centre workers) could be compared.
5. That may seem a strange question to the casual observer, however, the equal pay legislation recognises that some employers might operate their business from various different 'establishments', each with different terms and conditions

applying to the employees who work there (indeed, Asda's depots are located on separate sites from those on which their retail operation takes place).

6. Employees in those different establishments will only be 'in the same employment' if 'common terms' of employment apply to both establishments. In that regard, the fact that store staff do not work in warehouses (and vice versa) and the existence of differing terms and conditions applying at different establishments (including, in this case, a different procedure of calculating wages for the two categories of worker) gave cause to doubt the validity of the comparison between the two roles.
7. The question was tried as a preliminary issue. The claimants succeeded before the Employment Tribunal (Case No. 2406372/2008). Asda unsuccessfully appealed first to the Employment Appeal Tribunal ([2018] ICR 384) and then to the Court of Appeal ([2019] ICR 1118). The question on appeal to the Supreme Court was whether the "common terms" requirement for the purposes of equal pay legislation, namely s1(6) of the Equal Pay Act 1970 and s.79(4) of the Equality Act 2010, was satisfied.
8. Though "common terms" is left undefined by the legislation, the Courts have utilised what has become to be known as the *North* hypothetical: (in this scenario) if depot workers were moved to work in stores, would they remain on common, or *broadly similar*, terms to those enjoyed in the depots? As alluded to above, this was not a case in which the terms for each class of worker were governed by a collective agreement applicable to the jobs. Asda accordingly argued that there was no basis for the Tribunal's finding, pursuant to the *North* hypothetical, that its depot workers would remain on common terms and conditions if they were hypothetically moved to work in its retail stores.
9. The Supreme Court disagreed and determined that the "common terms" test is intended to ensure that employees at establishments of the same employer whose terms and conditions of employment are genuinely different for geographical or historical reasons are not used as comparators. The Court noted that "*Cases where the threshold test [i.e. the North hypothetical] cannot be met are likely to be exceptional.*" The Court further determined that a hypothetical scenario could be visualised in the present case by the installation of a depot next to a retail store. The Supreme Court held that the Employment Tribunal was entitled to conclude that the terms of employment would not have changed in such a scenario.
10. The claimants will now be permitted to rely on men working in distribution depots as their comparators. However, in order to successfully claim, workers

will still have to demonstrate that the roles are of equal value and, if they are, that there is not a reason other than sex discrimination which means the roles should not be paid equally. The case continues.

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