EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms S Brierley and others	v	**Asda Stores Ltd**

PRELIMINARY HEARING

Heard at: Manchester **On:** 20, 22, 23, 28-30 June 2016

Before: Employment Judge Tom Ryan

Appearances
For the Claimants: Andrew Short QC, Naomi Cunningham and Keira Gore
For the Respondent: Lord Falconer of Thoroton QC, Christopher Jeans QC and Patrick Halliday

RESERVED JUDGMENT

The claims are not dismissed. Employees at Asda stores may use employees at Asda's depots as comparators.

REASONS

Introduction

1. The structure of this judgment, after this introduction, is to identify the issues that I have to determine, the oral and written evidence and other information I received, the relevant findings of fact, the legal framework, the submissions of the parties and the discussion and conclusions leading to the determination of the issues.

2. This is an application by the respondent for the dismissal of the claims of the claimants on the basis that I should determine against them the preliminary issue which is set out below. The hearing was a preliminary hearing pursuant to rule 53(1)(b) of the Employment Tribunals Rules of Procedure 2013 which gives the tribunal, constituted in the form of an employment judge sitting alone, power to "determine any preliminary issue".

3. By way of further introduction, I adopt part of the opening two paragraphs of the judgment of Elias LJ, given on 22 June 2016 in the Court of Appeal in these same proceedings[1]:

> "This [case] concerns equal pay claims made by over 7000 claimants, overwhelmingly women, employed by the supermarket, Asda. They work in hourly-paid jobs in its retail stores. Most of those jobs are carried out by women. They are claiming equal pay with comparators employed in the distribution depots, jobs done overwhelmingly by men.
>
> The claimants lodged their claims in the employment tribunal alleging that the work they do is of equal value to their comparators and yet the comparators are being paid substantially more than they are. The claimants contend that this is an archetypal claim of equal pay based on the fact that historically the work done by the women was always perceived as women's work and therefore thought to be worth less than the work in the distribution depots which was traditionally perceived as men's work. They submit that the historical discrimination has never been corrected. Asda deny this and contend that there has been no discrimination and that accordingly the claims should fail on the merits."

4. To that I add the following observations. Some of these claims were brought in the period 2008 to 2011 by women who claim equal pay with comparators who worked at the respondent's depots in Wigan and Skelmersdale. Of those claims, which are referred to as the Simpson claims (because they were presented by Simpsons solicitors), 22 are still pending final determination. The more recent claims, known as the Leigh Day claims for a similar reason, were presented between 2014 and early 2016. These number, at the date of this judgment, about 7,270. However, all the claims presented after 23 October 2015 have by agreement of the parties been stayed to avoid the costs of, at least, serving responses. The parties had also agreed that this multiple should be closed with effect from 3 June 2016. Claims presented after that date comprise a separate multiple.

5. In all these claims the question of whether the work performed by a woman was of equal value to that of her comparator is and remains in dispute. The additional question under section 1(3) of the Equal Pay Act 1970 ("EPA 1970") or section 69 of the Equality Act 2010 ("EA 2010"), namely whether an equality clause (or sex equality clause in the EA 2010) shall not be held to operate or have effect because the difference in pay is because of a material factor which is not the difference in sex or involves treating a claimant less favourably because of her sex, also remains to be determined.

6. It is common ground that if I uphold the respondent's case at this stage upon the issues that I have to decide all these claims fail even if those other questions

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[1] **Asda Stores Ltd v Brierley & Ors [2016] EWCA Civ 566**

could be determined in favour of the claimants. If the claimants succeed at this stage and in relation to those further issues the consequences will be of very substantial effect, for Asda have some 130,000 employees in Retail. Although female employees predominate in the Retail part of Asda's business, if they succeed then the rates of pay for men performing equal work would also have to be considered. The financial implication of the claims is very great.

Issues

7. The issue for me to decide was encapsulated in a single question in the respondent's opening skeleton argument: can employees at Asda stores use Asda's depots as comparators? It is in that form that I have decided the issue in the judgment set out above.

8. In order to arrive at that determination, I was asked by the parties to consider a more detailed set of issues. As framed by the claimants the issues were set out as follows.

Issue 1

(1.1) Does EU law provide a "single source" gateway?

(1.2) If it does, in what circumstances is the gateway available?

Issue 2

Can the claimants get through any such single source gateway on the facts?

Issue 3

Given the answers to 1 and 2, are there common terms and conditions within the meaning of section 1(6) of the EPA 1970 prior to 1 October 2010?

Issue 4

(4.1) Was UK law changed (to remove the "***North** hypothetical*") when the EA 2010 replaced the EPA on 1 October 2010?

(4.2) Given the answers to 1, 2 and 4(1) are there common terms and conditions within the meaning of section 79(4) of the EA 2010 from 1 October 2010?

Issue 5

If the answers to 1 and 2 are "Yes" but the relevant statutes cannot be construed so as to permit the comparison, is EU law directly enforceable?

9. The issues were set out in a different order and in slightly different terms by the respondent.

(i) Before October 2010, were "common terms and conditions of employment observed either generally or for employees of the relevant classes" (within the meaning of section 1(6) of EPA 1970) at both stores and depots? In particular:

(a) were common terms observed "generally", simply by virtue of some similarity in the contents of Retail and Distribution terms;

(b) were common terms observed "for employees of the relevant classes", applying the "hypothetical" test from **British Coal**[2] and **North**[3]?

(ii) After 1 October 2010, did "common terms apply" at stores and depots "either generally or as between A and B" (within the meaning of section 79 of EA 2010)? In particular:

(a) did the EA 2010 repeal the "relevant classes" test, such that the Claimants can no longer rely on the **North** hypothetical;

(b) did common terms apply "generally"; and

(c) did common terms apply as between Retail colleagues and Distribution colleagues?

(iii) Does Article 157 of the TFEU[4] provide an additional relevant gateway on which the Claimants can rely, namely:

(a) "same service"; or

(b) "single source"?

(iv) If so, is Article 157 directly effective in this case?

(v) Insofar as the Claimants fail because Article 157 does not have direct effect in this case, can they nonetheless succeed on the basis that "fundamental principles" of EU law, and/or Articles 21 and/or 23 of the EU Charter of Fundamental Rights, has or have direct effect in this case?

(vi) If the Claimants do get through an additional gateway under EU law, should the domestic legislation be reinterpreted so as to incorporate that gateway?

10. Save perhaps in respect of issue (v) in the respondent's formulation there is no difference of substance between the 2 lists. In the event and as I have understood the closing submissions I am not now required to determine the respondent's issue at paragraph (v).

11. It would be possible to determine this case, say the parties, without necessarily having to determine every issue. For example, the claimants maintain that I could hold that under European law the claimants could successfully bring their claims relying only upon Article 157 of the TFEU. Nevertheless, I have been asked to make determinations on all the arguments that were made lest, as I suspect is almost inevitable, my judgment be considered elsewhere. This I have attempted to do.

Evidence & Documents

12. I next identify the oral and written evidence that I have received together with other written information and materials.

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[2] **British Coal v Smith [1996] ICR 515 HL**

[3] **North v Dumfries & Galloway Council [2013] UKSC 45**

[4] **Treaty on the Functioning of the European Union (2009)**

13. I heard oral evidence on behalf of the respondent only. It was given by Mr Ian Stansfield who held the position of Distribution Director from 2007 until February 2016. In that role he was in charge of Asda's Distribution operation but was not a director of any Asda company or subsidiary. Oral evidence was also given by Mrs Hayley Tatum who joined Asda in August 2011 as Executive People Director. In that role she is the senior human resources member of staff in Asda. She is a member of Asda's Executive Board. Both witnesses gave evidence in accordance with written statements. In the case of Mr Stansfield I was also provided with a statement that he had made in 2010 in preparation for a pre-hearing review which did not in the event take place.

14. I read witness statements from the following claimants: Mary Abraham, who has worked at Asda's Roehampton store since September 2000; Ellen Hills (nee Byrne), a personal shopper at the Brighton Marina store since 7 December 2008; Pauline Ohlsson who has worked at the Huyton store since August 2000 and who does chilled replenishment; Barbara Smith who has worked at the Southport store since June 2003, starting in the produce department and now working as a Self-Scan Host and Mavis Thompson who started in the respondent's Liscard store in March 1997 as a Checkout Operator and who worked latterly in the Cash Office before retiring on 12 March 2016. They did not, by agreement between the parties, attend for cross-examination.

15. I was provided with the following bundles of documents:

Bundle A	Pleadings
Bundle B	Orders and Applications
Bundle C	Authorities (3 files)
Bundle D	Chronological Documents (19 files with pages numbered 1-11209 to which I refer as eg "p11209")
Bundle E	Tribunal Correspondence
Bundle F	Interpartes Correspondence
Bundle G	Witness Statements
Bundle H	EPA 1970 and EA 2010 Questionnaires and Responses

During the hearing I was only referred to bundles C, D and G.

16. I was also provided with the following additional documents:

Opening skeleton arguments from both parties

An agreed chronology

An agreed cast list

A suggested reading list

A daily transcript of the hearing transcript (to which I shall refer when necessary in the form TD2/47/18 to signify, for example, Transcript, Day 2, Page 47, Line 18).

A table prepared for the claimants showing a summary of terms and conditions of claimants and comparators

Tables prepared for the respondent showing a summary of terms and conditions of claimants and comparators

Additional authorities - both **Asda v Brierley** (referred to above) and the **Royal Copenhagen**[5] case.

Closing submissions from both parties.

An additional note for the claimants on the proper construction of the EPA and the EA 2010 in the event that I were to find that Article 157 does not have direct effect.

A note from the respondent in reply to that point of construction

An additional note from the respondent on the Distribution centres that were covered by a National Recognition Agreement ("NRA") as from 2012

An additional note from the respondent on the **North** hypothesis

17. The hearing commenced on 20 June 2016 with opening speeches. I adjourned until 22 June in order to read witness statements and documents, skeleton arguments and some of the authorities. Oral evidence was taken on 23 and 24 June and oral submissions were made on 28-30 June 2016. These are Days 1 to 6 for the purpose of referencing the transcript. Judgment was reserved to be given with reasons in writing.

Findings of Fact

18. To a substantial degree the primary historical facts relevant for the determination of the issue were not in dispute. So far as possible I set them out here chronologically. I refer to the sources only where it is necessary to do so to give context or to show how I have resolved such conflicts of primary fact as existed. It is necessary for me also to make findings in order to determine certain elements of the issues, e.g. whether the contractual terms of the claimants and comparators are broadly comparable.

Corporate background

19. Asda was formed in 1965. It resulted from the merger of two small undertakings in Yorkshire.

20. In July 1999 the American retailer Wal-Mart Inc. acquired Asda which became a wholly-owned subsidiary and part of that company's international division. Between September 2011 and December 2015 Asda came under the intermediate oversight of a regional Wal-Mart unit, Wal-Mart EMEA. Asda, as a subsidiary of Wal-Mart, is required to conduct its business in accordance with corporate governance rules (p3111) laid down in November 2010 by the parent company.

21. Asda's main business is its retail operation ("Retail"). It now has around 630 stores. Some 133,000 hourly paid employees work in Retail.

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[5] **Specialarbejderforbundet I Danmark v Dansk Industri [1996] ICR 51 CJEU**

22. In the late 1980s, Asda began to establish its own Distribution operation ("Distribution"). Asda initially opened seven depots but as it did not have the experience to run all seven sites it only operated two. The remaining five were out-sourced and operated by third party specialists under "cost-plus" contracts with Asda.

23. Between 1989 and 2015 a total of 26 depots were owned and operated by Asda from time to time. The depots originally handled many types of goods. There are now depots of different types depending on the nature of the goods they handle. The type is designated by the letters used in the title of each depot. ADC connotes an ambient Distribution centre and CDC a chilled Distribution centre. Other depots for fast moving lines are identified by the letters XDC and clothing depots are identified by use of the word "Clothing" and one depot, Teesport, receives goods imported from abroad. One further depot, Lutterworth IDC is a heavily automated integrated centre for larger, slower moving stock.

24. Of the original 7 depots, Grangemouth ADC and Wakefield ADC have always been operated by Asda. The 2 depots upon which reliance is placed by the Simpsons claimants, Wigan ADC and Skelmersdale CDC, have both been operated by Asda since 2003. Wigan was previously operated by a third party and Skelmersdale was opened in that year. From that year third-party operation of Distribution centres ceased and by then the number of depots had grown to 19. Rugby ADC was opened from 2004 to 2010. North East Clothing opened in 2006. Ince clothing closed in 2008 and, more recently, the three XDC centres were opened: Yorkshire in 2010, Warrington in 2011 and Erith in 2013.

25. None of the Distribution centres are located on the same sites as any of the stores. It was common ground that for the purpose of considering the statutory term "establishment" no retail workers worked in a Distribution establishment, i.e. a depot, nor did any Distribution worker work in a Retail establishment, i.e. a store. There was some evidence of Distribution workers being deployed temporarily in stores from time to time.

26. There are now 24 Distribution centres open across the UK in which some 11,600 hourly paid employees work.

27. Mr Stansfield's evidence in paragraph 24 of his statement was:

> "Asda's distribution and retail sectors are fundamentally different. They have evolved differently over time; operate in separate industries; have different objectives; are located in markedly different physical environments; demand different skill-sets; are subject to varied regulation and, most importantly, have distinctly different functions. Asda is essentially a retailer; its stores are its profit-making centres. The primary function of Distribution is to act as an in-house provider of logistics services to Asda's retail stores: it is predominantly a cost centre, rather than a profit-making operation, and is not consumer-facing."

28. Ms Tatum described Retail as a "customer facing operation" where "it is essential from a brand perspective that the Aberdeen branch is indistinguishable in the customer's eyes from the Bournemouth branch."

29. The terms and conditions of the employees depend on the type of establishment at which they work. Retail employees are employed on Retail terms. Distribution employees are employed on Distribution terms. Those terms are set by reference to different processes.

30. The claimants' chosen comparators comprise two sub-sets of Distribution employees, Warehouse Operatives and Team Leaders. Team Leaders were, until the role was phased out from around 2010, essentially, Warehouse Operatives with some additional supervisory responsibilities. No separate issue arises in relation to the Team Leader role.

Terms and conditions in Retail

31. Retail terms and conditions are specific to stores. They are set out in offer letters and in the "*Your Contract*" section of the Retail Handbook.

32. The approval process for any changes to the terms and conditions that apply to Retail workers depends on the nature of the change. Significant changes will require the approval of the Asda Executive Board. A sub-committee of the Asda Executive Board known as Everyone Matters deal with more minor changes. Significant changes do not happen often.

33. Retail terms apply to all employees based in stores. Subject to some variations all Retail employees are on the same package of terms. Asda maintains consistency and operational simplicity is critical in running a multi-site operation of approximately 630 stores, some of which operate 24 hours a day, 7 days a week.

34. Within Retail the variations, as described by Mrs Tatum, are as follows. There are 3 regional pay bands described as, "London", "Middle" and "Provincial". "London" stores comprise those within the M25. In broad terms, "Middle" stores are in the M4 corridor and the South-East. The remainder are described as "Provincial". Those bands are intended to reflect regional differences in the cost of living.

35. Some Retail employees (about 1,700) are employed in specialist roles e.g. bakers, bakery section leaders, pharmacy accredited checking technicians and post office assistants. They receive higher base rate of pay. They receive the same annual percentage increase in pay as others unless for a specific reason their role has been red-circled.

36. The other variation concerns bank holidays. Many Retail stores now open over bank holidays whereas when Asda began they did not. Asda has gradually changed its terms but there is a range of different changes. Longest serving Retail employees do not have to work bank holidays but continue to be paid and receive an enhanced rate if they do work the bank holiday. For more recently joining employees bank holidays are treated as ordinary working days. By 2011 the standard offer letter (p3980) shows that employees may be required to work on public or bank holidays even if they fall on days when a particular employee would not normally be working. Employees may volunteer to work additional bank holidays but have no contractual right to work on any such day. Work done on such a day is paid at time and a half.

37. Since 2004 Asda has had a "Partnership Agreement" with the GMB in stores under which the GMB performs certain defined limited functions (including representing members at grievances and disciplinary hearings). The GMB is not recognised for collective bargaining purposes in Retail and does not negotiate terms and conditions or pay for Retail employees.

38. The setting of Retail pay is done, without negotiation with the employees, by Asda after compliance with a process of corporate approval. This is now known as the "TRS" (Total Remuneration Strategy) process (formerly "TRR" i.e. the Total

Remuneration Review). The corporate governance rules require Asda to obtain the approval of a particular Wal-Mart decision-maker for a budget, or "Retail Pay Award Pot". This alternated between the President and CEO of Wal-Mart International and the President and CEO of Wal-Mart EMEA while that body was in effect. This budget sets the maximum amount in percentage terms by which Asda is authorised to increase the base pay of Retail employees in the following year. The process was summarised by Mrs Tatum in her statement. It consists broadly of four stages which are:

step one: formulating the proposal

38.1. In April or May of the year prior to implementation, Asda's "Reward and Recognition" department prepare a proposal for a sub-committee of the Asda Executive Board, Everyone Matters. Everyone Matters was formed in May 2014. Prior to this, the sub-committee mandated to consider the pay award for Retail staff carried the name of the overarching Wal-Mart process, i.e TRR and then TRS. For simplicity I refer only to "Everyone Matters". This is done in consultation with members of Wal-Mart International's compensation team. The proposal is informed by various factors, including (i) UK economic data; (ii) anticipated legislative changes; (iii) expectations as to what Asda's competitors will do and the average pay settlement in the private sector; (iv) data relating to employee turnover; (v) data from employee feedback surveys; and (vi) what Asda is likely to be able to afford and has budgeted for in the financial plan.

step two: presentation of proposal to Everyone Matters

38.2. The proposals are presented to Everyone Matters sometime in the summer of the year prior to the implementation of the pay award. Everyone Matters is a sub-committee of the Asda Board consisting only of Executive Board members, which since she joined in August 2001, included Ms Tatum. The proposals are debated and scrutinised by the members of Everyone Matters before approval is given by majority vote.

step three: presentation of proposal to Wal-Mart:

38.3. In the autumn of the year prior to implementation of the pay award, Asda seeks Wal-Mart's approval for the Retail Pay Award Pot as part of the global TRS process. This is not a rubber stamping exercise. For example in the context of the 2014 pay award proposal Wal-Mart raised affordability concerns. (p7550).

step four: Everyone Matters approves the final pay award:

38.4. In the year that the pay award is due to be implemented, the Reward and Recognition team, under Ms Tatum's supervision, re-evaluates the proposal made the year before in light of any changes in circumstances and recommends a final pay award for the consideration of Everyone Matters. Everyone Matters decides the final pay award.

39. The Retail 'package' both as to terms and conditions and pay is imposed by Asda (in conjunction with Wal-Mart approval as regards pay) and is the product of the Retail environment and market forces.

Terms and conditions in Distribution

40. The Distribution management team was headed by Mr Stansfield between 2007 and early 2016. He was not a member of the Executive Board but reported to

various members of Asda's Board over time. In his witness statement, Mr Stansfield described the degree of autonomy which he had in managing all aspects of Distribution. He described that generally the nature and extent of the Board's oversight of Distribution was in the form of budgetary oversight.

41. Mr Stansfield also described the sources of terms and conditions in prior to 2010, the annual and biennial reviews of those terms and conditions prior to 2010, the move towards a national collective agreement in 2010 and 2011 and the national recognition agreement ("NRA") reached with the GMB in 2012.

Sources of terms and conditions prior to 2010

42. In this period terms conditions were largely determined on a local site level. For some sites this was because they had been operated by third party providers and brought back in-house on existing terms and conditions. In respect of some sites the GMB had local collective-bargaining agreements with the respondent. For some sites local market forces was a factor. Mr Stansfield gave Didcot ADC as an example of a centre based in an affluent area with low unemployment rates. Higher rates of pay and beneficial terms and conditions were set there to attract and retain employees. Mr Stanfield's style of management was to promote engagement and ownership of the business of the Distribution centres by local management.

43. By the beginning of 2008 the terms and conditions for Distribution employees was found in: offer letters issued by each Distribution centre; collective-bargaining agreements where those existed for specific Distribution centres and the respondent's Distribution Colleague Handbook.

44. As to the offer letters these were issued by local management so the content varied between sites. However, terms and conditions commonly included: current pay rates (including standard rates of pay, overtime sick pay and holiday pay entitlements); hours of work; probationary periods; place of work and holiday entitlements.

45. At the beginning of 2008 the Distribution centres (then 23 in number) fell into 3 categories. 12 sites had a collective-bargaining agreement where the respondent recognised GMB for that purpose. 2 sites had agreements that required consultation with the GMB but not direct negotiation. 9 sites had no union affiliation.

46. By the start of 2012, 18 of 23 sites had collective-bargaining. These included some of but not all the same sites as had collective-bargaining in 2008. The agreements typically conferred rights for the GMB to negotiate pay and terms and conditions and provided for dispute resolution.

47. The Distribution Handbook, examples of which were included in the bundle, dealt with matters including those such as: frequency of payment of wages; deductions that could be made from pay; probationary period; maternity/paternity leave entitlements; hours of work; break; holidays and notice periods. Mr Stansfield's understanding was that a sticker in the Handbook made it clear that where there was variance between the Handbook terms and those agreed at the relevant Distribution centre the latter took precedence.

Annual and biennial reviews of terms and conditions prior to 2010

48. Prior to 2010 pay (and terms and conditions) was reviewed annually or biennially by the local management team at the Distribution centre. There was then further review by the regional management team and members of Mr Stansfield

central team. His personal involvement was at high level although the extent varied from time to time.

49. Mr Stansfield broadly devised the pay strategy in conjunction with Ms Clark (who was Head of People) and Ms Thomas (who was Head of Finance) within Distribution.

50. Together with his regional heads of Distribution ("HODs") and senior managers at Asda House Mr Stansfield created a rolling five-year plan for finance and budget setting. This was recast annually. The plan formed the starting point for detailed financial modelling of the likely costs in running Distribution in the following year. This is known as the desktop plan. In preparing the desktop plan Miss Thomas included an assumption as to the percentage pay increase to be applied in each of the Distribution centres. This assumption was provided by Asda's central finance team and represented a target approved by the Executive Board. This was a headline assumption without detailed consideration of site specific or other factors such as the effect of collective-bargaining.

51. However, Mr Stansfield and Ms Thomas would include other provisions within the desktop plan if they thought they would need a greater element for example for wage increases within Distribution. If they included a greater overall figure or percentage for pay, then savings would have to be made in some other area of cost within Distribution.

52. The completed desktop plan was sent to central finance within Asda to ensure it met the Executive Board corporate assumptions which might change over time. When those assumptions changed so too would Mr Stansfield have to change the desktop plan. He described it as an iterative process but once it was finalised it was his commitment to manage Distribution in accordance with the plan.

53. Based then upon the final plan Mr Stansfield with Ms Thomas and Ms Clark would establish a pay pot for each Distribution centre. In some cases they would set a lower figure than the Boards assumption for percentage increase in order to respond to contingencies. In some cases centres were given a larger target for pay increases. Unionised sites could be offered a larger pot so that a two-year deal could be established with the union to avoid repeated negotiations.

54. Once given their pay pot or target the local management team at each centre would prepare an annual budget. These were reviewed at the regional level, discussed, eventually agreed and signed off. Ultimately the regional/network plan was fed back to Mr Stansfield's team and finalised when he was satisfied that it matched the overall Distribution plan. That plan was rolled up into the respondent's general finance plan and presented to the Board for approval.

55. Mr Stansfield also described in more detail the circulation of documents and pay award principles as part of the pay award process. Each Distribution centre would assemble a pay award review team ("PART"). Local market forces would influence the pay review process at that level.

56. At sites where there was union recognition the GMB would be asked to submit a written pay claim. This will be discussed with the union and a negotiating committee formed. The pay proposals would be put to the regional management team. There was a meeting to discuss them. The proposals were submitted to Mr Stansfield's team. Proposals that were within the overall pay budget for Distribution could be signed off by Ms Clark and Ms Thomas. Those that were not referred to Mr Stansfield.

57. If necessary, there was then further consultation and negotiation with employee representatives at non-unionised sites or with the GMB at sites where it was recognised. Such negotiations could be protracted.

58. Once the process was completed and pay awards concluded and agreed Distribution employees were briefed on the award and any changes in terms and conditions.

The move towards a National Recognition Agreement in 2010 and 2011

59. The relationship between the GMB and the respondent's Distribution operation pre-dated Mr Stansfield's appointment as director in 2007. The relationship had become strained to the extent that in 2006 the GMB had notified the respondent that is intended to hold a national ballot on industrial action. This was averted when Asda and the GMB entered into a consultative agreement in that year, "A New Way of Working". This provided a framework for employees in Distribution to vote on union recognition and also established a National Joint Council for consultation.

60. After that agreement was formed the GMB's presence in the Distribution centres expanded. The union was increasingly voicing dissatisfaction about pay arrangements and calling for a move towards national collective-bargaining. The collaborative approach that came out of the consultative agreement was, in Mr Stansfield's opinion, not enough. Although there was hesitation within Asda to move towards collective-bargaining nationally, Mr Stansfield believed it was the proper strategy to employ.

61. Mr Stansfield explained that one of the specific triggers for this move was that the 5-year plan at that stage, seeking to fulfil one of Wal-Mart/Asda's guiding principles, known as "We Operate for Less" or "WO4L", required predicted budget saving over the five-year period of £106 million. He felt that that saving could not be delivered without the cooperation and flexibility of the Distribution workforce. He also thought not entering into an NRA had the potential to lead to the threat of a national strike as in 2006.

62. Against that background Mr Mike Gooddie, an industrial relations specialist was recruited in about January 2010 as Vice President of Labour Relations to assist Mr Stansfield in managing his dealings with the GMB.

63. At about the same time an Industrial Relations ("IR") Board was established comprising Mr Stansfield, Mr Gooddie, the head of Asda's employment law team, Asda's general counsel and members of the Executive Board including the CEO, the COO, the Executive People director and the CFO.

64. By this time, early 2010, national bargaining had become an item on the agenda at meetings of the NJC and the GMB was pushing for national collective bargaining. Local pay negotiations were put on hold. Mr Stansfield and his team negotiated with the GMB over this. Following approval from Wal-Mart, a memorandum of understanding was agreed with the GMB in August 2010. This was followed by further meetings with the GMB. By September 2010 Mr Stansfield and his team had already determined that the cost to fund the proposed pay increase under the national deal over 5 years was £40 million. The deal was intended to be self-funding.

65. Mr Stansfield sought a mandate from the IR Board on 7 December 2010 for the same £40 million pounds that he had already communicated to that Board in

September 2010. He explained that the mandate was to outperform the target set for Distribution and so to invest the resultant saving in the pay deal. Distribution would have the freedom as to the way in which the deal was negotiated.

66. On 14 December 2010, Mr Stansfield's proposals were put to Asda's Executive Board in general terms. The Executive Board decided that the proposed strategy should go back to the IR Board for discussion and approval there. That approval was granted and Mr Stansfield was then free to conduct the negotiations. Although he regularly updated the IR Board he did not go back for approval on any aspect of the deal before it was agreed in March 2012.

67. In late 2010, when it became apparent that a national agreement would not be concluded before the end of the year, the GMB agreed to an "interim offer" of a 2% pay award, and a £300 one-off payment. As the £300 additional payment resulted in Mr Stansfield exceeding his overall budget that year, it was discussed and agreed at a meeting of the IR Board and approval was obtained by Asda's CFO.

68. The 2% increase was awarded to all comparators working at depots with collective bargaining agreements, with the exception of those 3 collective bargaining sites which had concluded 2 year pay deals with the GMB the prior year. The 5 depots which did not have collective bargaining agreements, and which were not then the subject of national discussions with the GMB, undertook local pay reviews in the usual way.

69. Further interim pay increases of 2% were awarded to Warehouse Operatives and Team Leaders (separately) in October and December 2011 at the 18 depots with collective bargaining. Local pay reviews were undertaken at non-unionised depots in a manner broadly similar to the process followed in 2008 and 2009.

The negotiation of pay and terms and conditions under the NRA

70. Before negotiations started for a national recognition agreement Mr Stansfield sought to agree a number of principles with the GMB: "in particular in the balancing of and the need to fund pay through productivity increases. And those principles we tried to establish with them ahead of any negotiation, because they were not usual in what had happened in the previous years. This was a big shift in the way that we were trying to engage them more in the need to be more productive, to fund the larger increments in pay that they were seeking." (TD2/22/1-11)

71. Mr Stansfield and Ms Thomas determined the pay rates for the negotiation in accordance with complex financial modelling, Asda's productivity requirements as set out in the 5 Year Plan and ultimately subject to their affordability. Mr Stansfield was also seeking harmonisation of terms and conditions across the sites which would be affected.

72. The main events in the negotiations were set out at paragraphs 113-124 and 130-135 of Mr Stansfield's statement. This evidence was not challenged. For the purposes of these findings I record that the negotiations were led by members of Mr Stansfield's team in Distribution and various working groups consisting of delegates from Distribution and the GMB were set up to discuss pay, terms and conditions and policies.

73. The negotiations spanned two years and proposed deals were twice rejected at ballot by employees in Distribution in April and August 2011. The deal was rejected by 99% of those voting at the first ballot and 65% at the second. Mr Stansfield believed the latter "did not succeed because of an apprehension around

the scale of the change we were proposing and a concern by employees about their ability to achieve the increased levels of productivity."

74. As a result there was an interim pay award in 2001 and the deal was eventually approved in a ballot and concluded in May 2012.

75. The terms and conditions set out in the NRA (p8573) applied only to the 20 Distribution sites listed in Appendix 2 (p8588). They did not apply to 3 depots Dartford ADC, Didcot ADC and Brackmills Clothing. Dartford ADC came within the NRA in September 2012. The terms of the NRA applied to all Warehouse Operatives employed to work at or from the included depots, but not to Team Leaders, a role that was phased out across all unionised depots before the conclusion of the NRA.

76. Certain depots agreed local exceptions to the model terms as set out in the NRA and were documented in site-specific local agreements.

77. The Warehouse Operative terms are different to the Retail terms. The respondent produced Annexes 2 and 3 to their skeleton to demonstrate this. The NRA contained as a "Partnership Principle" (p8579) under the heading, "Continuous Improvement and Flexibility", a reference to productivity, thus:

> "in recognition of our goal of being the U.K.'s best value retailer, we are jointly committed to continuous improvement, implementing new technology, joint measured productivity and work standards and flexibility in everything that we do. We accept every day low price (EDLP) can only be delivered through every day low cost (EDLC). There is no place for autocratic leadership, restrictive practices, demarcations or work rules in a modern work place."

78. That sentiment was repeated in the Memorandum of Understanding and the statement of terms and conditions annexed to the NRA for warehouse employees under the heading, "Productivity and New Technology" stated:

> "Asda Distribution and the GMB share a common goal and understanding and commitment to achieve the highest levels of productivity, customer service and competitiveness. This will involve ongoing implementation of new technology, tools and methods of working, requiring strong team collaboration and employee flexibility to adapt to changing environments.
>
> Asda Distribution will continuously aim to improve its productivity in order to provide the customer with the most efficient and economical service. Both parties recognise, understand and accept the principle of work standards as set by the International Labour Organisation (ILO). From time to time, through significant changes to ways of working, there may be a need to apply professionally measured work standards to the planning of work and methods.
>
> On completion of training, colleagues will be required to perform in line with these set work standards and demonstrate the flexibility and collaboration required."

79. No specific link to pay was referred to under the heading of productivity or its associated concepts. Under the heading "Negotiation" which comprises part of the section entitled "Scope of the Agreement" the NRA provides, "excluded from negotiation are ancillary discretionary benefits such as pensions, bonus, share save and colleague discount."

80. Although Asda set productivity targets for Distribution staff there was no equivalent in Retail. Ms Tatum described productivity in Retail as something which is "very hard to measure on an individual basis ... what it's tended to be used for is for budgeting purposes." [TS/3/75/1 – 12]

81. Pay rates continued to be set separately for each depot, based on local needs.

82. Some additional contractual terms appeared in a new edition of the Distribution Colleague Handbook (p6302-6369) which was agreed between Asda and the GMB as part of the NRA negotiations. This Handbook included a list of contractual provisions p6317 which were expressed to be further to those contained in the statements sent out with offer letters as forming "your main terms and conditions of employment". The list comprises: changes to the Colleague Handbook, other employment, punctuality, confidentiality, suspension, right to work, conflict of interest, data protection-consent, Working Time Directive, back pay, property and signing in and out.

Pay negotiations in 2014 under the NRA

83. Collective negotiations between members of Mr Stansfield's team and the GMB proceeded through the machinery established by the 2012 NRA.

84. As before, Mr Stansfield was required to operate within a budget approved by Asda's central management. His team negotiated with the GMB, although, he updated the TRS/IR Board, which had replaced the IR Board (and which later became Everyone Matters). The TRS/IR Board did not take on these negotiations itself. Ms Tatum gave the rationale as being that members of Everyone Matters trusted that Mr Stansfield would come out of the negotiation with a deal which suited the needs of Distribution.

85. In late 2013 Mr Stansfield formed a working group tasked with preparing for the negotiations. The working group undertook financial modelling in relation to the proposed new deal. On 3 February 2014 Mr Stansfield updated the TRS/IR Board on the proposal Distribution intended to put to the GMB for the 2014 pay award: a simple, one-year pay deal with a standard percentage increase of 2% across the sites. On 24 February 2014 the GMB submitted a formal written pay claim to Distribution, requesting a substantial increase in pay. Formal negotiations between Distribution and the GMB took place throughout March 2014.

86. On 20 March 2014 the Asda Distribution negotiating team put forward a formal offer to the GMB for a one year pay deal with an award of £471 per full time colleague. This offer was put to ballot in May 2014, and accepted by a majority of members. The terms of the 2014 pay deal were incorporated into an updated draft version of the 2012 NRA, produced in October 2014.

87. 23 out of 24 depots were covered by the 2014 NRA, but Didcot ADC continued with local collective bargaining. Since 2014 all depots have been subject to collective bargaining. The 2014 NRA was superseded in May 2015 by a new agreement. Didcot ADC continued to be excluded from its terms.

Comparison of Terms

88. Before identifying the contractual terms for the purpose of the broad based comparison I am required to make I record that there was no suggestion that claimants in stores were not employed on the same terms in the same establishments nor in establishments in the same region – eg London, Middle or Provincial. Nor was it suggested for those who were engaged in specialist roles.

It was not suggested that comparators who worked in a particular Distribution centre had variations between themselves, although the respondent's case is that terms for pay could vary from depot to depot.

89. In terms of carrying out the comparison, the contractual terms in Retail and Distribution were reached by separate processes. However, those processes were implemented and operated by the Executive Board which itself was subject to governance by Wal-Mart. The setting of terms was delegated by and within Asda to different persons or teams of persons. All those responsible for that task, whether in Retail or Distribution were answerable, directly or through other more senior personnel to the Board and derived their authority to do so from the Board as exercising control in the running of the business of their common employer. Such "autonomy" as they had was within that structure and was subject to the degree of oversight described above.

90. Whilst the processes for setting terms and conditions was markedly different in the two parts of the business, the reason for that was because that was the way Asda chose to undertake this part of its business activity. There was no evidence to show, for example, that any particular terms and conditions in a specified Distribution depot derived from terms that had been those of comparators transferred to Asda under the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

91. The terms and conditions for the purpose of comparison were summarised by the claimants in tabular form. Given the period covered by the Simpson claims and the more recent claims the table first compares claimants in 2008 with the Wigan depot in 2008 and the Skelmersdale depot in 2008/9 and the Wakefield depot in 2011. It also compares claimants and depots in 2014.

92. Although the respondent does not agree with much of the comparison it was not submitted, when I enquired of counsel, that I should seek at this stage to compare claimants' terms with each separate depot although the respondent's tables analyses the Retail terms and the Distribution terms depot by depot, year by year and in respect also of Team Leaders. The respondent's detailed analysis is done by reference only to hourly rates, overtime, shift premiums, bank holiday entitlements and sick pay. Although I refer to the parties' submissions in my conclusions I state here that I consider that, adopting the claimants' table as a starting point and referring to the other matters I set out below, is an appropriate basis upon which to perform the broad comparison.

93. The contractual terms appear from a number of sources. In summary, they are: offer letters, statements of terms and conditions and parts of the Colleague Handbooks.

94. The headings under which the claimants invite me to make comparison are:

Pay – i.e. that all claimants and comparators were hourly paid employees.	Pay Cycle	Hourly rate
Shift pay	Bank Holidays worked	Bank Holidays not worked
Overtime rate	*Company Sick Pay*	*Paid holiday – i.e. holiday entitlement*
Holiday Pay	*Breaks*	Bonus scheme

Discount card	Pension	Death Benefit Scheme
Share Save Plan	Maternity Pay	Paternity Pay
Adoption pay	Bereavement pay	Jury service pay
Place of work	*Working hours*	*Variation clause*
Notice periods	*Probation*	Clothing
Training	Deductions	*References*
Right to search	*Working for others*	

95. However, I note also that the 2011 Retail Handbook, from which the claimants have derived many of the references in their table of comparisons, contains (p 5360) a statement that some of the sections following also comprise part of the main terms and conditions of employment. Those that are listed in that statement I have indicated by italics in the table above.

96. Those terms that are not listed in the table are: right to work, whistleblowing, confidentiality, punctuality and suspension. The Distribution Handbook provides terms that are effectively the same, although worded slightly differently, in respect of: right to work, whistleblowing and suspension. The punctuality obligation is slightly more particular in that it states the amount of deductions from wages that will be made for lateness whereas the Retail Handbook merely specifies the right to make deductions. The Retail Handbook has a slightly more detailed confidentiality term making specific reference to the need to treat customers' credit and debit card details as confidential.

97. Neither party addressed me specifically on these additional terms nor on the additional contractual terms included in the Distribution Handbook to which I have referred above, namely: conflict of interest, data protection-consent, Working Time Directive, back pay, property and signing in and out.

98. The Retail Handbook does not contain a corresponding Working Time Directive provision concerning drivers' hours whilst the Distribution Handbook covers drivers working from Distribution centres. Neither does the Retail Handbook provide a back pay provision. That provision covers the entitlement of Distribution employees at the end of contract to back pay in connection with pay reviews. Save for those terms, those relating to: conflict of interest, data protection, property and signing in and out are materially identical.

99. Returning to the claimants' table, they acknowledge that some of the matters contained in their table are not contractual or are derived from statute. Of those I find, that there is no material difference between Retail and Distribution in the following matters: hourly pay, admission to the bonus scheme after 6 months service, eligibility to a discount card after 12 weeks in service, matched contributions of 2 or 3 percent to pension, death benefit scheme entitlement, admission to the share save plan, maternity pay, adoption pay, bereavement pay, jury service pay, mobility, dress requirement, deductions from pay by Asda and the right to search.

100. It appeared to me that, subject to such weight as I attach to the respondent's arguments to the contrary, there could be said to be a greater degree of variation in respect of the following:

100.1. Pay cycle. All claimants and comparators were paid 4 weekly. Claimants in 2008 and 2014 were paid one week in arrears. Depot workers at Wakefield in 2011 and Depot workers in 2014 were paid four weeks in arrears.

100.2. Paid holiday entitlement. All claimants and comparators had an escalating entitlement of a number of days plus one floating day. For claimants the entitlement was said to be 22-29 days. For Wigan Depot employees in 2008 the entitlement is 21 (or 22)-27 days. For Skelmersdale and Depot workers in 2014 it was 23-29 days. For Wakefield in 2011 it was 23-26 days. I observed to Counsel during the course of the hearing that I considered it likely, after the 2007 amendments to the Working Time Regulations 1998 which introduced over a period of time an increased annual paid leave entitlement from 4 to 5.6 weeks, that at some point (and certainly by 2014) the effect of the Regulations would be such as to erode any difference in that entitlement insofar as the express term appeared to afford an entitlement that was less than that provided by regulation. I did not understand Counsel to dissent from that proposition.

100.3. Holiday pay. For all relevant employees this seems to have been based on an average of the previous 12 weeks' pay. For claimants this has included night rate premiums. For depot workers other than in Wakefield it has also included shift premiums. For Wigan in 2008 it also included overtime. For Wakefield in 2011 it was based on the higher of the hourly rate including premiums or 85 percent of average hourly earnings from the P60.

100.4. Breaks. In 2008 the claimants did not have a paid break. In 2014, according to the Retail Handbook, meal breaks were paid in some circumstances. I was not given a detailed explanation of what those circumstances were. In Distribution, all received a 30 minute paid break. At Wigan in 2008 and generally in 2014 employees had to further 10 minute breaks which were paid.

100.5. Paternity pay. Save for Retail employees from 2014 all received the statutory entitlement with an option for 3 months unpaid. From 2014 Retail employees had that option for 52 weeks.

100.6. Mobility. All employees were assigned to a place of work whether store or depot. According to the witness statement of Lorraine Rendell (then Head of Reward) which was prepared for the earlier preliminary hearing that did not take place, Retail employees in 2008 were being issued with an offer letter that referred to "such other place within a reasonable area as we may determine" but that other, unspecified, offer letters that had been previously provided did not require a mobility obligation. Apart from that, all employees then and thereafter had a mobility clause in their terms.

100.7. Working hours. Standard hours for Retail employees were 38 hours per week. For Distribution employees standard hours were 40 hours per week. In Retail, Asda established a rota or usual pattern. In Distribution Asda fixed a rota. Across the Board the working pattern was subject to change by Asda.

100.8. Variation clause. In all cases Asda reserved the right to make unilateral changes to terms and conditions. After 2014 this was made subject to consultation with the GMB for those within the NRA.

100.9. Notice periods. The notice to be given by the employer was that required by statute in all cases. There was some variation in the notice to be

given by employees. In Retail and in Skelmersdale in 2008/9, employees had to give one week's notice or 2 weeks' after 5 years' service. In Wigan in 2008 the requirement was to give one weeks' notice after 4 weeks' service. In Wakefield in 2011 employees had to give one week's notice after 13 weeks' service and 2 weeks' notice after 5 years' service. In Distribution after 2014 employees had to give one week's notice after 4 weeks' rising to 2 weeks' notice after 5 years.

100.10. Probation. Employees in Retail together with those that Skelmersdale Wigan had a 12-week probationary period. Wigan in 2008 operated a 13-week period. In 2014 in Distribution the probationary period was 13 weeks but extendable to 20 weeks.

100.11. References. All employees are required to provide references. The claimants' analysis shows that all might have their employment terminated on the basis of inconsistent references. For Distribution workers after 2014 the position was not set out in the table. Neither was it confirmed in the evidence as I recall. I consider it reasonable to infer that the provision was the same. It is highly unlikely to have been changed.

100.12. Working for others. All employees could only work for others with the respondent's written consent. For Skelmersdale and Wakefield it was recorded that that consent was not to be unreasonably withheld.

101. The remaining areas of the analysis show more substantial differences. Whilst they have included tables showing the hourly rates of pay which finally were substantially different, I do not consider that these are relevant in deciding whether on a broad comparison there are common terms. The differences in pay are the very subject matter of the principal dispute. At this stage of the legal analysis of the claims I do not see how the employer can rely upon the differences in rates of pay as demonstrating that there are not common terms. By the same token I do not consider that the fact that there are different rates adds to the claimants' argument for common terms. They are relying on the factor of all being hourly paid employees. If that is a relevant fact the actual hourly rate paid does not make it any more persuasive.

102. The other areas of difference are: Shift Pay, Bank Holidays, Overtime and Company Sick Pay.

103. Shift Pay. In Retail claimants received a night premium for work performed between 10 pm and 6 am. In general terms Distribution employees are paid a night rate premium and a late shift premium. So far as the night rate premium is concerned for Skelmersdale and Wakefield this was paid for the same hours as Retail employees, 10 pm to 6 am. After 2014 the night rate premium was paid in depots for hours between 10 pm and 7 am.

104. In Wigan I was told that the late premium was paid for shifts finishing between 6 pm and 12 am and at a higher rate if the shift finished between 12.15 am and 6 am. In Skelmersdale the late premium was paid for full shifts between 2 pm and 10 pm and part shifts after 6 pm. In Wakefield the late premium was paid between 2 pm and 10 pm. In Depots after 2014 the late premium is paid for the same hours 2 pm - 10 pm.

105. Were it not for the late shift premiums in depots I would have considered the difference in hours for night rate premium working to fall in the category of less significant differences.

106. Bank holidays. Different terms applied depending upon whether these were worked or not worked.

107. For those that were worked, pay in Retail was at a time and a half. In Distribution there were differences between different depots prior to 2014. In Wigan pay was at double time plus an employee could take a day in lieu. At Skelmersdale there was an enhanced rate and a day in lieu. At Wakefield pay was at double time plus a day in lieu or its equivalent. In Depots after 2014 pay is at double time plus day in lieu or at a normal time plus double time in lieu.

108. For bank holidays that are not worked there is no requirement for employees to work in Retail. If they do work on a bank holiday they receive their normal rate of pay including any night rate premium. In Distribution there were again differences between depots prior to 2014 and differences overall when compared to Retail. In Wigan employees could nominate another day as a notional bank holiday. In Skelmersdale, employees receive paid time off in lieu. At Wakefield they received basic pay plus their shift premium even if not rostered to work. After 2014 in Depots employees were paid 1/5th of the working week or given a day in lieu even if not rostered to work.

109. Overtime. Here the position is the same both before and after 2014. Retail employees do not receive overtime pay. Distribution employees receive an overtime rate after 40 hours of work have been performed in a week.

110. Company Sick Pay. All employees are entitled to company sick pay which escalates with service. For Retail employees throughout the period employees are entitled to up to 6 weeks' sick pay after 39 weeks' service. This entitlement rises to 12 weeks' sick pay after 5 years' service. Distribution employees at Skelmersdale in 2008/9 and Wakefield in 2011 had the same entitlement. For Wigan in 2008 employees received 5 days' sick pay after 26 weeks' service. This escalated to 65 days' full pay and 65 days' half pay after 5 years. Depot workers from 2014 have an entitlement to 13 weeks' sick pay after a probationary period of 13 weeks rising to 26 weeks' pay after three years' service.

Facts material to the North hypothetical

111. There was some evidence of Distribution employees being seconded to work in Retail stores when there was a need for extra staffing. The evidence was to the effect that was to carry out Retail tasks. One particular example concerned the respondent's Carlisle store earlier this year. Due to flooding caused by the severe weather other supermarkets operated by the respondent's competitors were unable to open for a period of time. This caused an increased customer demand in the respondent's store which was open. Distribution employees were deployed temporarily to assist in meeting that demand. They carried out Retail work but were paid their Distribution rates of pay.

112. A document from 2009 (p1483) was referred to in the cross-examination of Mr Stansfield. It concerned an enquiry about the redeployment of Distribution employees by someone whom I infer was a member of Distribution management since Ms Clark was copied into the e-mail. It stated:

> "It has come to my attention today that Distribution temporarily re-deploy Distribution Colleagues into Stores dependent upon peaks and troughs within the business.

> I have put a call into all HODs today and have so far spoken to Martin and Craig whom [sic] both confirm this does happen.
>
> This is quite alarming as this is a risk to the business in relation to the Equal Pay/Equal Value claims within Retail."

113. The e-mail goes on to ask depots to report whether this happened, and matters such as frequency and reason and numbers of employees. A question was also asked whether the pay and terms and conditions remained the same during the redeployment.

114. The responses from depots at Wakefield, Skelmersdale, Lymedale, and Wigan are recorded (p1489-1490.3). I suspect that these were the sites upon which there was focus because the claims at that stage were citing employees from those depots as comparators. The redeployments generally seemed to occur to assist stores. The practice had been in place for between 3 and more than 15 years depending upon the depot concerned. All the depots reported that the employees retained their depot terms and conditions during temporary re-deployment. Depots at Bristol, Brackmills, Bedford, Didcot, Chepstow, Dartford and Erith also responded. In those cases, the reason for redeployments was a mixture of store requests and excessive headcount in depots and sometimes to assist with return to work and rehabilitation. The periods over which this occurred and the position on terms and conditions for temporary deployment were the same as for the Lancashire depots, i.e. depot terms and conditions were retained. Some depots reported that if there was a permanent redeployment to a store, store terms and conditions would pertain.

115. The construction of the hypothetical comparison in this case is not an easy task. The question that has to be asked is: would the comparators have common terms amongst themselves if they were to work at the same establishment as the claimants. The respondent also suggests that the converse question should also be addressed.

116. The two kinds of establishment are obviously different. In the course of the hearing the claimants postulated something in the nature of a small Distribution centre co-located with a retail store. One might postulate some small section of a Distribution centre being given over to a small retail outlet. Whether either of those is a correct postulation or not, it is clear that the hypothetical situation is not reflected by, for example, Retail employees being temporarily deployed into depots and doing depot work or depot employees being temporarily redeployed into stores and doing Retail work.

117. Both Mr Stansfield and Mrs Tatum were asked in evidence what would be the position in the event of Distribution employees, however unlikely that might be, performing Distribution work in stores. Both clearly answered that if the Distribution employees were carrying out Distribution work they would be paid the rate for the job they were actually doing. (Mr Stansfield, TD2/128/6-17; Mrs Tatum, TD3/72/21 – 73/120). Both witnesses also maintained their primary position that Retail terms would apply to Distribution employees deployed to work in stores and Distribution terms to Retail employees deployed to work in depots.

118. I consider one further factual topic, whether the respondent acted as it did in relation to the setting of terms because of stereotypical assumptions about "men as breadwinners and women as secondary earners".

119. The respondent's case is that is not supported by the evidence and is irrelevant to the issue of comparability. I consider such evidence as was placed before me below. I state, lest there be any doubt, that the parties and I are all aware that there was a preliminary hearing on the issue of discovery of privileged material. I simply ignore the fact that there may be other privileged communications. The findings I make below are based solely on the evidence I saw and heard.

120. As to the relevance of the evidence which might be admissible in considering issues of discrimination concerning the stereotypical assumptions alleged by the claimants, I do not wholly agree with the respondent's overarching submission that it is not relevant to this issue. For reasons which will become clear nothing finally turns upon this point. Since it was raised and it is pertinent to my assessment of part of Mrs Tatum's evidence I deal with it now. In the course of final submissions I asked Lord Falconer what would be the effect upon his argument that the different mechanisms for setting terms meant that they could not be held to be common terms. I asked what the respondent's position would be if I were to find, as I make it clear I do not upon reflection so find, that the respondent had deliberately adopted or perhaps continued such a practice specifically to avoid the terms being considered properly as comparable for the purposes of equality of pay. Lord Falconer accepted that in those circumstances I would have to reject the argument.

121. In cross-examination a number of documents were put to the respondent's witnesses for comment. I do not refer to them all but to a selection which illustrate the points that are made by the claimants.

121.1. In February 2008 Gary Smith of the GMB wrote to Ms Massingham, the respondent's People Director thus, "Given the possible issues around equal pay/equal value we believe it is incumbent on your [sic] as employer to undertake an equal pay audit..." (10072).

121.2. A PowerPoint presentation for an IR Strategy Discussion (10130ff) on 8 July 2009 contains the following comments,

> "The need for flexibility of resource coupled with the changing collective-bargaining landscape in Distribution IR signals the need to face and take control of the inevitable
>
> Any change enacted in distribution will have an impact on the retail relationship - plan for these moments"

The next slide shows three boxes labelled "Overarching Control", "Retail Relationship", and "Distribution Relationship" under the words "The relationships run separately with an overarching span of control..." A later slide again (10140) identifies equal value as what is called the "key challenge lever" for the GMB.

121.3. Another presentation document entitled "PAY STRATEGY 2010 and beyond" (10146ff) which related only to Distribution referred to "equal pay claims" (which I understand to be the first tranche of claims in this case). Then under the heading "Equal Pay Exposure" it referred to an equal pay audit to be carried out to determine any further exposure.

121.4. In February 2010 Mr Goodie wrote to Mr Stansfield and others (10221) concerning a paper that was to be prepared for the IR Board in March of that year. One of the things that he suggested an agreement must deliver was "Protection for Retail and protection from EP/EV".

121.5. A "Pay Strategy – Headline" document (10223) from about the same time makes the same point and describes as an option "JES to be carried out for future protection of EP claims." I observe that neither an equal value audit nor a job evaluation scheme ("JES") was, on the evidence, carried out by the respondent at any point.

121.6. In response to an email from Mr Stansfield in September 2010 concerning IR activity in distribution Mr Andrew Moore responded (10236) "I guess my query is how we maintain a separation between Distribution and Retail to avoid any precedent-setting."

122. Those documents were all created before August 2011 when Mrs Tatum took up her position. She maintained in evidence that before starting she did not read the "large degree of documents" that was delivered to her in advance of joining the company. Bearing in mind that she was joining this organisation at a level that would give her seat on the Executive Board I have to say that this struck me as a surprising proposition. She said that she did not have any discussions with Mr Gooddie on what was described as a key element of the industrial relations business plan namely, equal pay/equal value, until the first IR Board that she attended.

123. At a later stage of her evidence, it was also suggested to Mrs Tatum that attitude Asda chose to "insulate distribution pay from retail pay in part to provide some protection from EV claims". Mrs Tatum did not agree with that proposition saying that there were very different considerations in the setting of Retail and Distribution pay and that had always been the case during her tenure in the business. When the question was repeated Mrs Tatum said that they were not trying to bring it all together and that the view was to keep it separate.

124. It did not seem to me that that was an answer to counsel's question and I reformulated it for the witness as, "was there a discussion about it explicitly linked to providing a defence to equal value litigation?" After an entirely appropriate intervention by Lord Falconer warning of possible privilege issues, when Mr Short put the question again Mrs Tatum's answer was, "There were discussions that were connected to the litigation."

125. In my judgment, even after the question was asked a third time as I have described Mrs Tatum did not provide a direct answer to the question.

126. This allied with the evidence that she did not read any documents before joining Asda cause me to have some reservations whether Mrs Tatum's evidence was fully frank. However, I have in mind that Mrs Tatum was not specifically challenged upon her assertion about reading documents prior to starting in her employment. It might be the case for example that she intended to convey that she had not read all of the documents. Furthermore, in relation to the specific questions about discussions I accept that it may be the case that Mrs Tatum was conveying that the only discussion she had were connected to existing litigation.

127. Drawing these evidential threads together, I find that, although the documents and the oral evidence raise more than a slight suspicion that Asda may have sought deliberately to keep the setting of terms processes entirely separate in order to resist equal value comparisons, there is no proper evidential basis for a finding of fact that on the balance of probabilities they did so.

Legal Framework

European law

128. By Article 119 of the Treaty establishing the European Community each member state was to ensure and subsequently to maintain the application of the principle of equal pay for equal work. The new member states, including the United Kingdom, joined the community by the Treaty of Accession, which came into force on 1 January 1973. On 10 February 1975, the Council adopted Directive 75/117 which by article 1 established, there was to be equal pay for men and women for the same work or for work to which equal value was attributed. The provision then became Article 141 of the consolidated Treaty on the European Community.

129. This became, by virtue of TFEU, from 1 December 2009, Article 157 which provides:

> "1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied."

130. There is no dispute between the parties in these proceedings that that provision is and has always been the European provision in relation to these claims. It is also common ground that, however formulated in the Article the Treaty has always applied to work of equal value.

131. The two European concepts relied upon by the parties, although their submissions are to opposite effects, are those of direct effect and single status.

Direct Effect

132. The starting point is the case of **Defrenne**[6]. The passages of the European Court of Justice ("ECJ") (to which my attention has been drawn repeatedly) are at paragraphs 18-24 and 40.

> "18. For the purposes of the implementation of these provisions a distinction must be drawn within the whole area of application of article 119 between, first, direct and overt discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by the article in question and, secondly, indirect and disguised discrimination which can only be identified by reference to more explicit implementing provisions of a community or national character.
>
> 19. It is impossible not to recognise that the complete implementation of the aim pursued by article 119, by means of the elimination of all discrimination, direct or indirect, between men and women workers, not only as regards individual undertakings but also entire branches of industry and even of the economic system as a whole, may in certain cases involve the elaboration of criteria whose implementation necessitates the taking of appropriate measures at community and national level.
>
> 20. This view is all the more essential in the light of the fact that the community measures on this question, to which references will be made in answer to the second

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[6] **Defrenne v SABENA (Case 43/75) [1976] ICR 547 ECJ**

question, implement article 119 from the point of view of extending the narrow criterion of "equal work," in accordance in particular with the provisions of Convention No. 100 on equal pay concluded by the International Labour Organisation in 1951, article 2 of which establishes the principle of equal pay for work "of equal value."

21. Among the forms of direct discrimination which may be identified solely by reference to the criteria laid down by article 119 must be included in particular those which have their origin in legislative provisions or in collective labour agreements and which may be detected on the basis of a purely legal analysis of the situation.

22. This applies even more in cases where men and women receive unequal pay for equal work carried out in the same establishment or service, whether public or private.

23. As is shown by the very findings of the judgment making the reference, in such a situation the court is in a position to establish all the facts which enable it to decide whether a woman worker is receiving lower pay than a male worker performing the same tasks.

24. In such situation, at least, article 119 is directly applicable and may thus give rise to individual rights which the courts must protect.

...

40. The reply to the first question must therefore be that the principle of equal pay contained in article 119 may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public."

133. The ECJ considered direct effect further in **Macarthys Ltd v Smith**[7] where it said at paragraph 10:

"As the court indicated in Defrenne v. Sabena, that provision applies directly, and without the need for more detailed implementing measures on the part of the Community or the member states, to all forms of direct and overt discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to by the article in question. Among the forms of discrimination which may be thus judicially identified, the court mentioned in particular cases where men and women receive unequal pay for equal work carried out in the same establishment or service."

134. Both **Defrenne** and **Macarthys** were like work cases. The scope of cases where direct effect might apply was considered again in two cases in the following year **Worringham v Lloyds Bank**[8] and **Jenkins v Kingsgate**[9]. In each case the Advocate General invited the ECJ to clarify the scope.

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7 **Case C-129/79 [1980] ICR 672 C**

8 **Case C-69/80 [1981] ICR 558**

9 **Case C-96/80 [1981] ICR 592**

135. In **Worringham** at paragraph 23 the ECJ explicitly stated that equal value may be within the scope of direct effect.

> "As the court has stated in previous decisions (judgment of April 8, 1976, in Defrenne v. Sabena (Case 43/75) and judgment of March 27, 1980, in Macarthys Ltd. v. Smith (Case 129/79), article 119 of the Treaty applies directly to all forms of discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to by the article in question, without national or Community measures being required to define them with greater precision in order to permit of their application. Among the forms of discrimination which may be thus judicially identified, the court mentioned in particular cases where men and women receive unequal pay for equal work carried out in the same establishment or service, public or private. In such a situation the court is in a position to establish all the facts enabling it to decide whether a woman receives less pay than a man engaged in the same work or work of equal value."

Single Status

136. It is not necessary, in order for the Article to have direct effect, that the claimant and her comparator are employed in the same "establishment or service" but there must be a "single source". In the case of **Lawrence**[10] the ECJ held at paragraphs 17 & 18 months:

> "17. There is, in this connection, nothing in the wording of article 141(1) EC to suggest that the applicability of that provision is limited to situations in which men and women work for the same employer. The court has held that the principle established by that article may be invoked before national courts in particular in cases of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which work is carried out in the same establishment or service, whether private or public ...
>
> 18. However, where, as in the main proceedings here, the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment. Such a situation does not come within the scope of article 141(1) EC. The work and the pay of those workers cannot therefore be compared on the basis of that provision."

137. The ECJ affirmed that approach in **Allonby**[11]. The concept of single source was considered by the EAT and the Court of Appeal in **Robertson v DEFRA** [12 & 13]. Although the claimants and their comparators were all in Crown employment they worked for different departments of central government and both the EAT and the Court of Appeal held that on the facts there was no single source. The case involved delegation of powers in complicated circumstances which are set out at

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[10] **Lawrence v Regent Office Care Ltd Case C-320/00 [2003] ICR 1092**

[11] **Allonby v Accrington & Rossendale College Case C-256/01 [2004] ICR 1328**

[12] **DEFRA v Robertson [2004] ICR 1289**

[13] **Robertson v DEFRA [2005] ICR 750**

length in the reports. I recite this helpful passage from paragraph 59 of the claimants' closing submissions.

> "In summary, responsibility for pay and other terms and conditions ceased to be exercised centrally by the treasury or Minster for the Civil Service (i.e. the Prime Minister) but was delegated to each Minister of the Crown in respect of his or her Department, so that the Secretary of State for Transport became responsible for pay within the Department of Transport and the Secretary of State for the Environment, Food and Rural Affairs became responsible for pay within DEFRA. The Treasury and Cabinet Office were not involved in pay negotiations and their approval was not required."

138. In paragraph 18 of its judgment, referring to **Lawrence,** the EAT held:

> "We are satisfied that ... the simple fact of common employment is not sufficient for article 141, any more than it is sufficient for the purpose of the 1970 Act, although of course the test for the latter is derived from the statute itself, whereas the former is governed by the Court of Justice's jurisprudence. It is clear to us that what the Court of Justice is setting out is a justification, a principled basis upon which responsibility for difference and discrimination can be pinned. This basis is that the "differences identified in the pay conditions of workers performing equal work or work of equal value [can] be attributed to a single source", that "there is [a] body which is responsible for the inequality and which could restore equal treatment". This is almost invariably the case where there is a common employer: the best example of such a single source of such a body is a common employer. But the justification can be found not in the common employment but in the single source, and if there is not such single source, no such body, then common employment is not sufficient, as the tribunal found."

Then at paragraphs 21 and 22:

> "21 Of course it is, as is normal, the much more streamlined judgment of the Court of Justice which binds us. But it appears to us that the court is in fact following and adopting the reasoning of the Advocate General, and applying it in more concise terms to the particular problem before it, making it entirely plain that the first matter which distinguished the present case from others was that "the persons whose pay is being compared work for different employers" (p 1108, para 15). We conclude that **Lawrence** is not authority for the proposition that common employment is sufficient. It is rather authority for the proposition that what underlines the applicability of article 141 is that which is ordinarily exemplified by common employment, namely the existence of a common source, the existence of a central responsibility for terms and conditions. If that is absent, then comparability is not available.
>
> 22 ... We are satisfied that what is important for the purpose of article 141 is reality, and that an artifice would be no answer. It is obvious that there will be an evidential burden on an employer to displace the ordinary conclusion that the existence of common employment would fulfil the "single source" test."

139. The Court of Appeal, in a judgment of Mummery LJ with which Maurice Kay and Gage LJJ agreed, adopted and expanded the analysis thus:

"13 In **Lawrence** the Court of Justice held that, for equal pay proceedings to come within the ambit of article 141(1), the pay differences between workers of different sex performing equal work must be "attributed to a single source". As I understand it, the focus of this rather imprecise approach is on the location of the body responsible for making decisions on levels of pay in the relevant employment or establishment rather than on the identification of the relevant legal source of that decision-making power. The comparator issue does not turn on precise legal analysis or on a comparison of the employment relationships between the workers and their respective employers or, in the case of state workers, on particular constitutional doctrines and arrangements, which condition the nature of the legal relationship between a member state and its civil servants and which are liable to differ from one member state to another.

...

22 It is true that, in a typical equal pay case, the comparison is made between men and women working for the same employer, who is normally responsible for the levels of pay in the workforce and for discriminatory differences in pay between the sexes, which the employer is in a position to correct.

...

28 I agree that the issue in **Lawrence** was different from this case and that the judgment of the Court of Justice does not directly deal with the case of a common employer. It appears, however, to lay down an approach of general application. In my judgment the statements of principle in paras 17 and 18 indicate that something more than just the bare fact of common employment is required for comparability purposes. I reject the submission that in those paragraphs the Court of Justice proceeded on the basis that common employment is sufficient for comparability purposes. I agree with the appeal tribunal [2004] ICR 1289, 1306, para 21, that:

> "Lawrence is not authority for the proposition that common employment is sufficient. It is rather authority for the proposition that what underlines the applicability of article 141 is that which is ordinarily exemplified by common employment, namely the existence of a common source, the existence of a central responsibility for terms and conditions."

29 I agree with the appeal tribunal (see [2004] ICR 1289, 1304, para 18) that the Court of Justice was setting out a justification in the form of a "principled basis upon which responsibility for difference and discrimination can be pinned" and that the justification is in the "single source" rather than in common employment. The Court of Justice made it clear that it is not necessarily the person with whom the workers have contracts of employment that determines comparability. The relevant body is the one "which is responsible for the inequality and which could restore equal treatment". The body responsible for the state of affairs will often be the same employer of both the applicants and the comparators, but that is not necessarily so. It depends on the circumstances of the particular case as to whether further inquiry be may necessary. If that were not the case, Mr Langstaff's submission would tend to have the extravagant consequence that every civil servant would be entitled to compare himself or herself with any other civil servant of the opposite sex, subject only to objective justification by the employer of differences in pay. That does not seem to be a sensible or practical

approach to the preliminary task of identifying appropriate workers in circumstances comparable to the applicants."

140. The Court of Appeal also upheld a finding that there was no single source where a National Health Trust ("NHT") had some involvement in the negotiation of terms and conditions concerning bonus at a departmental level but had not thereby assumed responsibility for the terms and conditions of all the employees for the purposes of the **Robertson** test. See: **Armstrong v Newcastle upon Tyne NHS Hospital Trust.**[14] In the later decision of the Supreme Court in **North** the question of whether **Armstrong** was wrongly decided was not addressed. The claimants before me reserve their position to argue that **Armstrong** should not be followed if my judgment is considered on appeal.

141. My attention has also been directed to another three recent cases. In **Potter**[15] at paragraphs 107 and 108 the EAT held that the references in Robertson and Armstrong to the body 'responsible for setting the terms of both groups of employees' did not mean responsibility for creating the inequality. It is an issue of fact for the tribunal to determine, depending upon an evaluation of all the evidence whether a particular body is responsible for the inequality and could restore equal treatment.

142. In **Beddoes**[16] the EAT rejected the suggestion that the requirement for a single source which is necessary for the application of article 157 was to be imported into cases under UK equal pay law.

> "52 ... The most that can be said is that, in certain highly unusual cases (for it will on any view be very unusual for an employer not to have the legal power to determine the terms and conditions of employment of his own employees), the 1970 Act may be more generous in the comparisons that it permits than EU law; but that is not objectionable in principle. In fact we doubt whether there is any real difference. It seems to us that in a case where an employer accords different terms and conditions to employees doing equal work of value only because some other person has the power to set the terms of the comparator he would very probably have a defence under s.1(3) of the Act."

143. Finally, I turn to the **Fox Cross** case[17]. This case is more recent in time than that of **North** to which I shall refer below. The case was concerned whether there were associated employers for the purpose of section 1(6) EPA. The EAT decided the issue on a purposive construction of the domestic jurisprudence. However, there was full argument on single source and, albeit the passages were obiter, paragraphs 82 to 84 and 87 and 88 are of assistance in this case.

> "82 It is important to place in context what is contemplated by a single source. Where the comparison which a claimant working for A seeks to make is with an employee in the employment of B, the issue is not whether employer A has power to control the wages of the claimant. Plainly, he is always likely to have, since by definition a contract of employment is one in which the employer has control of the employee and centrally

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[14] **Armstrong v Newcastle upon Tyne NHS Hospital Trust [2006] IRLR 124**

[15] **North Cumbria Acute Hospitals NHS Trust v Potter [2009] IRLR 176**

[16] **Beddoes v Birmingham City [2011] 3 CMLR 42**

[17] **Fox Cross v Glasgow City Council & others [2013] ICR 954**

a contract of employment will concern wages. Control by employer A of wages in employment A has nothing to say about the wages of B in employment B. What must be explored is the position of the body which it is said has responsibility for and power to alter the wages in both A and B. This is the party or institution or collective agreement which is said to be the single source.

83 To focus on the powers of the immediate employer of a claimant is therefore potentially to look in the wrong direction. It is not irrelevant, for those powers may be such as effectively to exclude any superior or distinct body having responsibility and power: but that the central investigation must be as to the powers and responsibilities of the person, institution or agreement alleged to be the single source must not be in doubt.

84 ... First, the factual inquiry was not simply into who had set the terms in respect of pay. The question per **[Lawrence]** para 18 is whether there is a "body which is responsible for the inequality and which could restore equal treatment." **[Potter]** is Employment Appeal Tribunal authority on the meaning of the first part of that phrase: responsibility for inequality. The sense it adopts is one of ongoing rather than of causative responsibility for the disparity. It is to be followed unless we are persuaded it is in error, and no submission has been made to that effect before us. We adopt it. But the second part of the phrase is crucial and it goes together with responsibility in this sense. It is, "which could restore equal treatment".

...

87 The lay members and, in particular, Ms Gaskell, have significant experience in the government of large organisations. They point out that control is rarely exercised directly. A Board will run its operations by putting in place systems of governance and audit. The presence of audit enables the Board exercising an overall responsibility to step in if decisions are not to its liking. The governance arrangements will normally be such that it should not need to do so. The fact that it does not demonstrate its powers by intervening on a day-to-day basis is not at all surprising, but that it retains overall responsibility and power to remedy any errors is undoubted. If somewhat forensically, the point can be demonstrated by considering the sense in which the Minister for Health has responsibility for the treatment of a named patient in a particular ward in a named hospital: he does not himself intervene in the treatment, yet it is generally accepted that he has such a responsibility. It is exercised through systems and governance and, critically, audit. The lay members point out that both were in operation as a matter of practice here. Thus they accept the points made by the claimants that it is unsurprising that in the short time the ALEOs had been in operation there has been no demonstrable interference with pay bargaining with their employees, and that there is undoubtedly scope for the tribunal to have found that Glasgow had responsibility and could remedy inequality, had it asked the latter question and not been distracted by its focus on the question of the initial setting of wage rates.

88 Further, the use of the words "plays no direct part" in para 101 suggests an unnatural separation between direct and indirect control, as their familiar understanding of management systems shows is inappropriate. Operational management was bound to be with the ALEO. The question is whether the strategic management and powers were such that Glasgow was responsible for and could remedy the pay disparity. The distinction between direct and indirect control could not answer the factual issues on its own and suggested an erroneous approach which equated operational responsibility

with what was being referred to in the last two sentences of para 101, rather than the central issue as posed by **[Lawrence]**."

144. On appeal to the Inner House of the Court of Session[18] the decision of the EAT was upheld and **Robertson** and **Lawrence** were considered further in paragraph 49 of the Opinion:

> "The tribunal made very full findings of fact which clearly demonstrate why, as the tribunal stated at para 101 of its judgment, it was not in dispute between the parties that Glasgow retained control of the ALEOs. There was plenty of material which would permit the conclusion that it was open to Glasgow to direct the affairs of Parking and Cordia at every level.... However, while recognising the extent of Glasgow's power over Parking and Cordia, the tribunal, founding on its understanding of the judgment of the Court of Appeal in **Department for Environment, Food and Rural Affairs v Robertson** and ors, did not find Glasgow to be the body responsible for setting the terms and conditions of both its employees and the employees of the ALEOs. According to the tribunal, it was not enough to be a single source that a body retained legal power to remedy disparity in pay if that power was not in fact exercised. As the tribunal had found that Glasgow had, as a matter of practice, restricted its control over the ALEOs to a strategic level, it was to be regarded as the equivalent of the Crown in **Robertson**. In our opinion the tribunal's decision is based on a misreading of **Robertson** and the decision of the Court of Justice in **Lawrence v Regent Office Care Ltd** upon which **Robertson** is based. As Mummery LJ explained in **Robertson** (para 29) the correct approach is to determine whether there is a single source setting the relevant terms for the relevant employees. The single source is the body 'which is responsible for the inequality and which could restore equal treatment'. Consideration must be given to 'responsible for the inequality' but for present purposes the focus is on 'which could restore equal treatment'. Based on its reading of **Robertson**, the tribunal took the view that, irrespective of whether it had power to do so, if in practice Glasgow did not concern itself with the terms and conditions of those employed by Parking and Cordia then it could not be held to be a single source. That is not what was said in **Lawrence** and to adopt that reading is to fail to have regard to the facts in Robertson where the power to negotiate and set most aspects of pay of the civil servants employed in the Department for Environment, Food and Rural Affairs was specifically delegated by the Minister for the Civil Service by statutory instrument."

Domestic law

145. The material statutory provisions under UK law were set out succinctly in the claimants' opening submissions and I adopt that formulation.

146. The EPA 1970 provided for the equality clause to operate where a woman was in the "same employment" as the man. The term "*same employment*" was defined by section 1(6) of the EPA 1970 as follows:

> "men shall be treated as in the same employment with a woman if they are men employed by her employer ... at the same establishment or at establishments in Great Britain which include that one and at which common

[18] **[2014] CSIH 27**

terms and conditions of employment are observed either generally or for employees of the relevant classes."

147. The EPA was replaced with effect from 1 October 2010 by the EA 2010 which introduced a sex equality clause into contracts of employment. The permissible comparators in cases relying upon the sex equality clause are identified by section 79:

> (2) If A is employed, B is a comparator if subsection (3) or (4) applies.
>
> (3) This subsection applies if—
> (a) B is employed by A's employer ..., and
> (b) A and B work at the same establishment.
>
> (4) This subsection applies if—
> (a) B is employed by A's employer or an associate of A's employer,
> (b) B works at an establishment other than the one at which A works, and
> (c) common terms apply at the establishments (either generally or as between A and B).

148. Subsection 79(4)(c) of the EA 2010 is expressed in different terms to the equivalent words in the EPA 1970: "one at which common terms and conditions of employment are observed either generally or for employees of the relevant classes." The respondent argued that this effected a change in the law. In support of the contrary proposition the claimants rely in part upon the terms of the Explanatory Notes published by the government. It was agreed that this was material to which I could refer so for the sake of convenience I set out the note at this point:

> "Effect
>
> 275. This section sets out the circumstances in which employees and others are taken to be comparators for the purposes of Chapter 3. A person who claims the benefit of a sex equality clause or sex equality rule must be able to show that his or her work is equal to that of the chosen comparator. The application of Article 157 of the Treaty on the Functioning of the European Union, which has direct effect, will ensure that existing case law on the breadth of possible comparisons is carried forward, so that, for example, in relevant circumstances the concept of a comparator will include a predecessor doing the same job.
>
> 276. If two persons share the same employer and work at the same establishment, each may be a comparator for the other.
>
> 277. If two persons work at different establishments but share the same employer and common terms and conditions of employment apply, each may be a comparator for the other. ...
>
> Background
>
> 282. These provisions generally reflect the effect of provisions in previous legislation.
>
> Example

A woman is employed by a company at a factory. A man works for the same company at another factory. Common terms of employment apply at both establishments. The woman may treat the man as a comparator, if they are doing equal work (as defined in section 65)."

Domestic case law

149. In **Leverton**[19] Lord Bridge said at 745F-G

"The concept of common terms and conditions of employment observed generally at different establishments necessarily contemplates terms and conditions applicable to a wide range of employees whose individual terms will vary greatly inter se. On the construction of the subsection adopted by the majority below the phrase "observed either generally or for employees of the relevant classes" is given no content. Terms and conditions of employment governed by the same collective agreement seem to me to represent the paradigm, though not necessarily the only example, of the common terms and conditions of employment contemplated by the subsection.

But if, contrary to my view, there is any such ambiguity in the language of section 1(6) as to permit the question whether a woman and men employed by the same employer in different establishments are in the same employment to depend on a direct comparison establishing a "broad similarity" between the woman's terms and conditions of employment and those of her claimed comparators, I should reject a construction of the subsection in this sense on the ground that it frustrates rather than serves the manifest purpose of the legislation. That purpose is to enable a woman to eliminate discriminatory differences between the terms of her contract and those of any male fellow employee doing like work, work rated as equivalent or work of equal value, whether he works in the same establishment as her or in another establishment where terms and conditions of employment common to both establishments are observed. With all respect to the majority view which prevailed below, it cannot, in my opinion, possibly have been the intention of Parliament to require a woman claiming equality with a man in another establishment to prove an undefined substratum of similarity between the particular terms of her contract and his as the basis of her entitlement to eliminate any discriminatory differences between those terms.

On the construction of section 1(6) which I would adopt there is a sensible and rational explanation for the limitation of equality claims as between men and women employed at different establishments to establishments at which common terms and conditions of employment are observed. There may be perfectly good geographical or historical reasons why a single employer should operate essentially different employment regimes at different establishments. In such cases the limitation imposed by section 1(6) will operate to defeat claims under section 1 as between men and women at the different establishments. I take two examples by way of illustration. A single employer has two establishments, one in London and one in Newcastle. The rates of pay earned by persons of both sexes for the same work are substantially higher in London than in Newcastle. Looking at either the London establishment or the Newcastle establishment in isolation there is no sex discrimination. If the women in Newcastle could invoke section 1 of the Act of 1970 to achieve equality with the men in London this would eliminate a differential in earnings which is due not to sex but to geography. Section 1(6) prevents them from doing so. An employer operates factory A where he has a long standing collective agreement with the ABC union. The same employer takes over a

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[19] **Leverton v Clwyd County Council [1989] AC 706**

company operating factory X and becomes an "associated employer" of the persons working there. The previous owner of factory X had a long standing collective agreement with the XYZ union which the new employer continues to operate. The two collective agreements have produced quite different structures governing pay and other terms and conditions of employment at the two factories. Here again section 1(6) will operate to prevent women in factory A claiming equality with men in factory X and vice versa. These examples are not, of course, intended to be exhaustive. So long as industrial tribunals direct themselves correctly in law to make the appropriate broad comparison, it will always be a question of fact for them, in any particular case, to decide whether, as between two different establishments, "common terms and conditions of employment are observed either generally or for employees of the relevant classes."

150. In **British Coal v Smith** Lord Slynn explained what was required for and the approach to "common terms and conditions" at 526B-528A. Both parties referred to these pages so I set out extracts at some length.

"Common terms and conditions of employment must be observed either generally (i.e. for all or perhaps for most workers) or for employees of the relevant classes. Subject to a misdirection in law it is for the industrial tribunal to decide on the evidence what is or are the relevant class or relevant classes. It has been said by the corporation that the relevant class here is "ancillary workers" so that all the claimants must be treated as one relevant class. The effect of that would be that not all ancillary workers in the relevant class would be women, even though a majority might still be. In my view having regard to the nature of the work and the different ways in which their pay structures were established the industrial tribunal was perfectly entitled to take the various categories of worker separately. Thus canteen workers and cleaners are separate groups largely composed of women.

The real question, however, is what is meant by "common terms and conditions of employment" and between whom do such terms and conditions have to be common.

It is plain and it is agreed between the parties that the woman does not have to show that she shares common terms and conditions with her comparator, either in the sense that all the terms are the same, since necessarily his terms must be different in some respect if she is to show a breach of the equality clause, or in regard to terms other than that said to constitute the discrimination.

It is accepted by the corporation that for the purposes of this appeal as between the different establishments common terms and conditions do in any event apply to the two classes of claimants, canteen workers and cleaners. What therefore has to be shown is that the male comparators at other establishments and at her establishment share common terms and conditions. If there are no such men at the claimants' place of work then it has to be shown that like terms and conditions would apply if men were employed there in the particular jobs concerned.

The corporation contends that the claimants can only succeed if they can show that common terms and conditions were observed at the two establishments for the relevant classes in the sense that they apply "across the Board" (see *per* May L.J. in *Leverton v. Clwyd County Council [1989] I.C.R. 33* , 44); in other words the terms and conditions of the comparators (e.g. surface mineworkers) are "common in substantially all respects" for such workers at her pit and at the places of employment of the comparators. This in effect means that all the terms and conditions must be common, i.e., the same, subject only to de minimis differences.

The claimants reject this and contend that it is sufficient if there is a broad similarity of terms rather than that they are strictly coterminous.

Your Lordships have been referred to a number of dictionary definitions of "common" but I do not think that they help. The real question is what the legislation was seeking to achieve. Was it seeking to exclude a woman's claim unless, subject to de minimis exceptions, there was complete identity of terms and conditions for the comparator at his establishment and those which applied or would apply to a similar male worker at her establishment? Or was the legislation seeking to establish that the terms and conditions of the relevant class were sufficiently similar for a fair comparison to be made, subject always to the employer's right to establish a "material difference" defence under section 1(3) of the Act.

If it was the former then the woman would fail at the first hurdle if there was any difference (other than a de minimis one) between the terms and conditions of the men at the various establishments since she could not then show that the men were in the same employment as she was. The issue as to whether the differences were material so as to justify different treatment would then never arise.

I do not consider that this can have been intended. The purpose of requiring common terms and conditions was to avoid it being said simply "a gardener does work of equal value to mine and my comparator at another establishment is a gardener." It was necessary for the applicant to go further and to show that gardeners at other establishments and at her establishment were or would be employed on broadly similar terms. It was necessary but it was also sufficient.

Whether any differences between the woman and the man selected as the comparator were justified would depend on the next stage of the examination under section 1(3) . I do not consider that the section 1(3) inquiry, where the onus is on the employer, was intended to be excluded unless the terms and conditions of the men at the relevant establishments were common in the sense of identical. This seems to me to be far too restrictive a test.

Your Lordships have been referred to *Leverton v. Clwyd County Council [1989] I.C.R. 33* where the questions were different. There the critical question was between whose terms and conditions should the comparison be made. In the present case the question is, having established the persons between whom the comparisons should be made, whether there was a sufficient identity between the respective terms and conditions for them to be "common." In the Court of Appeal May L.J. (dissenting but with whom the House of Lords agreed) rejected the argument that "common" meant "the same;" if it did so "the consequent required identity of the terms and conditions of employment of the applicant and comparators would defeat the whole purpose of the legislation" (p. 44). Lord Bridge of Harwich said, at p. 59:

> "The concept of common terms and conditions of employment observed generally at different establishments necessarily contemplates terms and conditions applicable to a wide range of employees whose individual terms will vary greatly inter se."

He referred, at p. 60, to "essentially different employment regimes at different establishments" (which could not by inference be said to have common terms and conditions) and said:

> "So long as industrial tribunals direct themselves correctly in law to make the appropriate broad comparison, it will always be a question of fact for them, in any particular case, to decide whether, as between two different establishments,

'common terms and conditions of employment are observed either generally or for employees of the relevant classes.'"

151. Beyond those passages, in considering the first-instance judgment in that case, which the House of Lords restored, Lord Slynn also said at 528G:

> "In any event it seems to me that when dealing with the comparison of terms and conditions, the relevant classes having been established, the tribunal clearly adopted a broad common sense approach which seems to me to have been in accordance with the speech of Lord Bridge of Harwich."

152. Before leaving the cases of **British Coal** and **Leverton** I consider it significant to note that the speeches both referred to the dissenting judgment of May LJ in the Court of Appeal in **Leverton** which is set out in the same report that was cited. That dissenting judgment was approved by all members of the House on appeal. Although my attention was not drawn specifically to it in submissions, because of the way part of the argument has been framed in this case I consider it helpful to set out part of the reasoning of May LJ which appears at page 718 C-F:

> "It may be, however, that the man to whose work the woman alleges her work for the same or any associated employer is of equal value may be employed at a different establishment of the employer or associated employer. Then she is to be treated as in the same employment as the man if her establishment and his establishment are in the same concern and if at those establishments (this follows from the use of the words 'at which' in the subsection) common terms and conditions are observed either generally or for employees of the relevant classes, that is to say, the class of employee of which the woman is a member and the class of which the man is a member. Before the woman can have an equality claim there must, either throughout the employer's business, or at least in relation to the classes of employee to which each belong, uniformity of employment. A woman working in an establishment A, ex hypothesi doing work of the same value as the man, cannot have an equality claim in respect of that man working in establishment B, cannot to that end claim to be in the same employment as the man, unless at least she and her fellow employees doing the same work in establishment A and the man and his fellow employees doing the same work in establishment B each are subject to common terms and conditions. Otherwise either the woman or the man or both might be a 'rogue' enjoying uncommon terms and conditions of employment, possibly because of the particular establishment in which they work."

153. At the conclusion of this part of his judgment, in which no authorities are referred to, May LJ (page 719B) indicates that he did not need to have recourse to EU law in order to construe section 1(6) properly. I note that he observed that his construction was entirely consistent with the decision of the ECJ in **Defrenne.** It therefore seems to me likely that this was the first judicial formulation of what has been referred to before me as the **North** hypothetical.

154. The Supreme Court returned to the effect of, and the approach to s1(6) of the EPA 1970 in **North**. Since I have been asked to consider whether the **North** hypothetical still applies after the inception of the EA 2010 I must perforce quote at length from Baroness Hale who gave the single judgment of the Court. These passages (paragraph 36ff) also encompass the Court's decision relevant to the principle of direct effect.

155. Referring to the **Leverton** and **British Coal** cases the Court summarised the principles:

"12 The principles to be derived from these two cases are therefore plain. First, the "common terms and conditions" referred to in section 1(6) are not those of, on the one hand, the women applicants and, on the other hand, their claimed comparators. They are, on the one hand, the terms and conditions under which the male comparators are employed at different establishments from the women and, on the other hand, the terms and conditions under which those male comparators are or would be employed if they were employed at the same establishment as the women. Second, by "common terms and conditions" the subsection is not looking for complete correspondence between what those terms are, or would be, in the woman's place of work. It is enough that they are, or would be, broadly similar.

13 It is also plain from the reasoning of both Lord Bridge in *Leverton* and Lord Slynn in *British Coal Corporation* that it is no answer to say that no such male comparators ever would be employed, on those or any other terms, at the same establishment as the women. Otherwise, it would be far too easy for an employer so to arrange things that only men worked in one place and only women in another. This point is of particular importance, now that women are entitled to claim equality with men who are doing completely different jobs, provided that the women are doing jobs of equal value. Those completely different jobs may well be done in completely different places from the jobs which the women are doing."

156. The judgment went on to consider the parties' positions as regards the need for a "real possibility" that the comparators would be required to work at the same establishments as the claimants and, beyond that the congruence of the conclusion with EU law.

"*Discussion*

30 Not surprisingly, Ms Dinah Rose QC, on behalf of the appellant claimants, argues that the tribunal should not speculate about the adjustments to the comparators' present terms and conditions which might be made in the unlikely event that they were transferred to the claimants' workplace. The hypothesis is that the comparators are transferred *to do their present jobs* in a different location. The question is whether in that event, however unlikely, they would remain employed on the same or broadly similar terms and conditions to those applicable in their current place of work. As Lord Slynn had recognised in the *British Coal Corporation* case, the object of the legislation was to allow comparisons to be made between workers who did not and never would work in the same work-place. An example might be a manufacturing company, where the (female) clerical workers worked in an office block, whereas the (male) manufacturers worked in a factory.

31 She also argues that ... the tribunal was clearly entitled to conclude that there was no compelling evidence that the comparators would not be employed on the same or broadly similar terms and conditions in the unlikely event that they became based in schools.

32 Mr Truscott, for the local authority, agrees that there is no need to show a "real possibility" that the comparators could be transferred to do their current jobs in the claimants' workplace. But ... he argues that it should at least be *feasible* that they might be ...

33 I have no hesitation in preferring the arguments presented by Ms Rose. In the first place, it is by no means clear from the facts reported in the *British Coal Corporation* case that all the women claimants were based in collieries where there might also be surface mine-workers employed. In the second place, there is no hint of a "real

possibility" or "feasibility" test in that case and I find it difficult to discern a genuine difference in principle between them. Both add an unwarranted gloss to the wording of the subsection as interpreted in the *British Coal Corporation* case.

34 In the third place, to adopt such a test would be to defeat the object of the exercise. This is not just a matter of preventing employers from so organising their workplaces that the women work in one place and the men in another. There may be perfectly good reasons for organising the work into different places. But the object of the legislation is to secure equality of treatment, not only for the same work, but also for work rated as equivalent or assessed by the experts to be of equal value. It stands to reason, therefore, that some very different jobs which are not or cannot be carried out in the same workplaces may nevertheless be rated as equivalent or assessed as having equal value. One example is the (female) office worker who needs office equipment in a clean environment and the (male) factory worker who needs machines which create dirt and dust. But another is the (female) factory worker who puts microscopic circuits on silicon chips in one factory and the (male) factory worker who assembles computer parts in another. The fact that of necessity their work has to be carried on in different places is no barrier to equalising the terms on which it is done. It is well known that those jobs which require physical strength have traditionally been better rewarded than those jobs which require dexterity. It is one of the objects of the equality legislation to iron out those traditional inequalities of reward where the work involved is of genuinely equal value.

35 In the fourth place, it is not the function of the "same employment" test to establish comparability between the jobs done. That comparability is established by the "like work", "work rated as equivalent" and "work of equal value" tests. Furthermore, the effect of the deemed equality clause is to modify the relevant term of the woman's contract so as not to be less favourable than a term of a similar kind in the contract under which the man is employed or to include a beneficial term in her contract if she has none (section 1(2)(a), (b) or (c) as the case may be). That modification is clearly capable of taking account of differences in the working hours or holiday entitlement in calculating what would be equally favourable treatment for them both. Moreover, the equality clause does not operate if a difference in treatment is genuinely due to a material factor other than sex (section 1(3)). The "same employment" test should not be used as a proxy for those tests or as a way of avoiding the often difficult and complex issues which they raise (tempting though this may be for large employers faced with multiple claims such as these). Its function is to establish the terms and conditions with which the comparison is to be made. The object is simply to weed out those cases in which geography plays a significant part in determining what those terms and conditions are.

36 In the fifth place, the construction of section 1(6) favoured by the appellants is more consistent with the requirements of European Union law than is the construction favoured by the respondents. The 1970 Act was the United Kingdom's way of giving effect in United Kingdom law to the principle of equal treatment of men and women, first enshrined in article 119 EEC, then translated into article 141 EC, and now translated into article 157 of the Treaty on the Functioning of the European Union. The Court of Justice held as long ago as 1976, in the case of *Defrenne v Sabena* (Case 43/75) [1976] ICR 547, 566, para 12 that the principle of equal pay for men and women "forms part of the foundations of the community" and has direct effect in the member states in relation to direct discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay. As Advocate-General Geelhoed explained in *Lawrence v Regent Office Care Ltd* (Case C-320/00) [2003] ICR 1092:

> "It is not evident from the wording of Article 141 EC that the comparison must be confined to one and the same employer. Its case law demonstrates that the Court has consistently stood by its requirement that for a finding of direct discrimination there must be a clear difference in pay *vis-à-vis* male co-workers working in the 'same establishment or service' (see, *inter alia*, *Defrenne v Sabena* (Case 43/75) [1976] ICR 547, 567, para 22) or that the difference in pay must have its origin in legislative provisions or provisions of collective labour agreements (*Defrenne*, para 21)." (para 46)

37 There were three categories of case where it was possible to go outside the individual undertaking or service in order to make the comparison: first, where statutory rules applied to the working and pay conditions in more than one undertaking, establishment or service, such as the pay of nurses in the National Health Service; second, where several undertakings or establishments were covered by the same collective works agreement or regulations; and third where terms and conditions were laid down centrally for more than one organisation or business within a holding company or conglomerate (paras 50, 49). This was because:

> "The feature common to the three categories is that regulation of the terms and conditions of employment actually applied is traceable to one source, whether it be the legislature, the parties to a collective works agreement, or the management of a corporate group" (para 51).

38 This was an essential criterion because article 141 was "addressed to those who may be held responsible for the unauthorised differences in terms and conditions of employment" (para 52). Hence:

> "It is clear from the foregoing that the direct effect of article 141 EC extends to employees working for the same legal person or group of legal persons, or for public authorities operating under joint control, as well as cases in which for purposes of job classification and remuneration, a binding collective agreement or statutory regulation applies. In all these cases the terms and conditions of employment can be traced back to a common source" (para 54).

39 In the *Lawrence case* itself, the Court of Justice agreed that the principle was not limited to situations in which men and women worked for the same employer (Judgment, para 17). But in the case in question, the differences "cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment" (Judgment, para 18). This was because the claimants, women cleaners and catering workers who had previously been employed by North Yorkshire County Council and whose work had then been rated as equivalent to that of men doing jobs such as gardening, refuse collection and sewage treatment, were now working for the private company to whom the cleaning and catering service had been contracted out. They could no longer, therefore, compare their pay and conditions with the men who now worked for a different employer. (It is worth noting that no question had been referred to the court about the effect of the regulations governing the transfer of undertakings.)

40 The position is thus that, for the principle of equal pay to have direct effect, the difference in treatment must be attributable to a single source which is capable of putting it right. As it happens, the researches of counsel have discovered no case in the Court of Justice in which the principle of equal pay has not been applied between men and women who work for the same employer. However, in *Department for Environment, Food and Rural Affairs v Robertson* [2005] EWCA Civ 138, [2005] ICR 750, the Court of Appeal held that the terms and conditions of civil servants working in

different Government departments were not attributable to a "single source" for the purpose of article 141 EC. Although they were all the servants of the Crown, responsibility for negotiating and agreeing their pay and conditions had been devolved by delegated legislation to the individual departments concerned. It was common ground that the claimants and their would-be comparators in the Department for Transport, Environment and the Regions were not in "the same employment" within the meaning of section 1(6) of the 1970 Act, because they did not work at the same establishment and common terms and conditions had not been observed in the two departments since the delegation.

41 Mr Robin Allen QC, for the Equality and Human Rights Commission, tells us that it is the view of the Commission that *Robertson* was wrongly decided, because it did lie within the power of the Crown to put matters right. It is not necessary for us to determine that question now. In this case it is quite clear that the difference in treatment between the claimants and their comparators is attributable to a single source, namely the local authority which employs them and which is in a position to put right the discrepancy if required to do so. If section 1(6) were to operate as a barrier to a comparison which was required by EU law in order to give effect to the fundamental principle of equal treatment, it would be our duty to disapply it. However, for the reasons given earlier, it sets a low threshold which does not operate as a barrier to the comparison proposed in this case."

Submissions

157. I have identified above the documents in which the parties made extensive submissions. Rather than attempting to summarise them separately I refer to them on an issue by issue basis in the following section.

Discussion and Conclusions

158. The parties have asked me to make findings on all the disputed areas even if some of my conclusions are sufficient to dispose of the primary issue for determination. I have agreed to do so.

159. I deal with the doctrines of direct effect and single source first. Although the respondent puts the argument on the basis that these do not provide a separate gateway through which claimants can pass if the gateway of domestic legislation were barred against them, I agree with the formulation by the claimants, consistent with the dictum of Lady Hale in **North** paragraph 41 that:

> "If section 1(6) were to operate as a barrier to a comparison which was required by EU law in order to give effect to the fundamental principle of equal treatment, it would be our duty to disapply it."

160. Thus, this tribunal also must disapply domestic provisions which preclude a comparison that could be properly made under directly effective EU law.

Direct Effect

161. The respondent contends that Article 157 is not directly effective. The respondent argues that the decisions of the CJEU show that there cannot be direct

effect here because the discrimination cannot be "judicially identified" or "detected" by a "purely legal analysis", "solely with the aid of the criteria based on equal work and equal pay".

162. The respondent's argument is founded upon the proposition that there needs to be an evaluation by expert methodology of the respective values of the jobs of the claimants and comparators.

163. The respondent submits that the cases relied upon by the claimants do not assist them for the reasons set out in their written closing argument (paragraphs 156-177). In paragraphs 164 and 165 the respondent argues that this is a paradigm case in which it can be said that the issue of discrimination which underpins the complaint of equal value cannot be "judicially identified" or "detected" by "a purely legal analysis", "solely with the aid of the criteria based on equal work and equal pay" This they submit is because beyond the fact-finding, which the respondent accepts the tribunal can do, there needs to be an evaluation.

164. The respondent maintains that **Worringham** does not assist the claimants because it was a like work case and that **Walton Centre for Neurology & Neurosurgery NHS Trust v Bewley**[20] only concerned whether the rights extended to periods before the comparators joined the trust and that the EAT identified the need for "a secure factual premise" before the article could be applied. They submit that the other cases relied upon, **EC Commission v UK**[21], **Royal Copenhagen**, did not concern direct effect.

165. The claimants take the contrary position. They submit that the point was decided in **Worringham** and that is not open to the respondent to maintain that the decision there should not be followed or is otherwise wrong. The court there was plainly intending to clarify the law in general even though it was a "same work" case i.e the equivalent of a like work case. The court did not limit its judgment to a particular form of equal pay case. Neither they submit did the EAT find that there could not be direct effect in an equal value claim in **Walton.** In **EC Commission v UK** the government's argument that the concept of equal value was too abstract to be applied by the courts was rejected and member states were required to endow an authority (here the tribunal or the High Court) with "the requisite jurisdiction to decide whether work has the same value as other work after obtaining such information as may be required". In the **Royal Copenhagen** case (decided some 17 years later) the ECJ identified what was required of the national court. In summary the claimants submit that the respondent's argument is based on a much narrower reading of the authorities than they should bear.

166. The claimants submit that the respondent's reference to the specific machinery provided by the Employment Tribunal Rules of Procedure is nothing to the point since equal value claims may be determined in the High Court as well as in the Employment Tribunal. Indeed, Asda earlier sought to persuade the tribunal in this case to make orders that would have resulted in just that effect. The claimants rely also on **Murphy v Bord Telecom**[22] and maintain that that case cannot be distinguished, as the respondent suggests, on the basis there was already a mechanism for identifying equal value in national law.

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20 **[2008] ICR 1047**

21 **Case C- 61/81 [1982] ICR 578**

22 **Case C-157/86 [1988] ICR 445 ECJ**

167. On this issue I prefer the argument of the claimants. I do not consider that the decision of the court in **Worringham** only establishes that there can be direct effect in equal value claims where it is established by concession or an internal JES. Neither was there any suggestion in the other cases that the right was not directly effective. The tribunal carries out fact-finding in like work cases in which expert evidence is not a frequent feature nor subject to the procedural steps provided by the Employment Tribunal Rules of Procedure. In an equal value case it may carry out fact-finding with the assistance of expert evidence but it is not required to admit such evidence. I grant that it would normally do so. I reject the suggestion that the evaluation of equal value achieved, as it may be, with the assistance of expert evidence takes the exercise out of the scope of fact-finding which is necessary for the article to be directly effective. Once the facts are found and/or evaluated then in both types of case, like work and work of equal value, the issue of equal pay can be determined by the tribunal based, if necessary, upon the application of Article 157.

Single Source

168. The respondent argues that single source is not a separate gateway to comparability under article 157. Further they argue that on the facts of this case there was no single source.

169. In respect of the first point they say that single source is an additional requirement above and beyond one of the other gateways such as same establishment, same collective agreement or same statutory scheme which they go on to describe as "a common employment regime". The concept of a single source emerges from the judgments of the CJEU where claimant and comparator have separate employers. It is in such cases more likely that a single source will be absent. The same cases, **Lawrence** and **Allonby** say that comparison may be made in such cases provided there is a common employment regime and a single source responsible both for the inequality and which has the ability to put it right.

170. Based upon this the respondent argues that single source is an additional requirement for comparability. The respondent suggests that this point has not been raised in UK cases hitherto.

171. The respondent goes on to argue that here the claimants fail both limbs of the test since are not employed in the same establishment or under the same collective agreement or statutory scheme. In addition, it is submitted, there is no single source responsible for the inequality between their pay and the Distribution employees' pay.

172. In particular the respondent relies upon **Robertson** and **Armstrong**. Where in **Robertson** Mummery LJ referred to the focus as being "on the location of the body responsible for making decisions in the relevant establishment rather than on the identification of the relevant legal source of that decision-making power" the respondent contends that "body" is distinct from legal person.

173. Developing that argument the respondent contends that the question is whether the same body is responsible for the pay terms in Retail and Distribution. It is said that budgetary control or oversight is not sufficient and that for example the Treasury had direct budgetary control over the two departments in **Robertson** but that was not sufficient. The respondent also argues that the distinction is most vividly brought out by the facts of **Armstrong** where separate regimes of different hospitals had been incorporated into the Trust. Although there had been some

harmonisation under the Trust the regimes had not been fully merged so the conclusion that there was no single source was upheld. Thus, Arden LJ in paragraph 30 in the Court of Appeal:

> "Unlike the situation in the Robertson case this is not a case where there was no involvement whatever by the employer in the negotiation of terms and conditions at departmental level, but in my judgment the Robertson case does not turn on a bright line test of that kind. The question is always whether the [Trust, the alleged single source] was responsible for setting the terms [of the relevant employees]."

174. The claimants' position starts with the decision of the ECJ in **Lawrence.** In summary the court held there was nothing in Article 141 that limited the application of the provision to situations in which men and women worked for the same employer. In paragraph 18 of the judgment the Court held that where:

> "the differences identified in the pay and conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment"

the situation did not come within the scope of the Article. This was affirmed and **Allonby.**

175. The claimants submit that, save in the most exceptional circumstances, it should follow from the fact of there being a single employer that there is a single body responsible for the inequality which could restore equal treatment. They describe the respondent's conclusion that the claims cannot be pursued where there is a single employer and, as the claimants maintain, a single source as "unlikely".

176. The claimants also derive support from the opinion of the Advocate General in **Lawrence** who gave as an example of a single source (paragraph 49 of the opinion), terms being set from more than one organisation or business within a holding company or conglomerate. Although the judgment of the court does not refer expressly to that example the claimants rely upon the reference at the beginning of paragraph 17:

> "There is, in this connection, nothing in the wording of article 141(1) EC to suggest that the applicability of that provision is limited to situations in which men and women work for the same employer."

177. In its judgment in **Robertson** the EAT held that the ECJ had applied the reasoning of the Advocate General. In the Court of Appeal Mummery LJ, with whom Maurice Kay and Gage LJJ agreed, upheld the EAT and also derived support from the opinion of the Advocate General. See: paragraphs 21 and 29 respectively set out above.

178. The claimants' argument proceeded from that basis in paragraphs 62 to 70 of their skeleton. The summary of their responses to the respondent's position on single source is set out on page 30 of their closing argument. They address the question of "gateway" on page 35 and the factual issue of whether the claimants can get through any such gateway on pages 36 to 39.

179. I conclude that the parties are correct to maintain that it is not enough for there to be a single employer and that there must also be a single source.

180. I accept that in **Robertson** both the EAT and the Court of Appeal have determined that where there is a single employer the article will be applicable if

there is a single source. I do not agree with the proposition that there must be, in addition to that and in order to engage article 157 a single establishment, collective agreement or statutory framework. The claimants are correct to say that the authorities do not suggest there is any such requirement. There is no reason why the comments of Baroness Hale in **North** that single source would have applied should not be observed and applied though *obiter*.

181. Nor do I consider that the claimants' submission based upon paragraph 38 of the judgment of Mummery LJ in **Robertson** is not well founded.

182. I agree with the submission of the claimants that the treaty permits comparisons to be made where there is in fact a single source. In my judgment it is even more the case that they may be made where there is a single employer and a single source. See: **Lawrence** paragraphs 17 and 18 and the application of that in **Robertson, Armstrong** and as approved in **North**. I do not agree with the respondent that any further requirement such as a single establishment is needed for that purpose.

183. I therefore turn to the second point; whether the facts establish that there was a single source. Since there is no dispute that there was a single employer I agree that an evidential burden rests upon the employer to demonstrate the contrary.

184. I agree that the evidence here demonstrates that a single employer has allocated responsibility to different internal structures for the purposes of setting terms and conditions. Those "internal structures", that is to say the persons or groups of persons in Retail and Distribution who are given the task of setting terms and conditions, do so under the authority of and are responsible to their common employer embodied in the Executive Board of the respondent. In so far as the respondent's argument relies upon **Robertson** as showing that a single employer, there the Crown, can be held not to be a single source where it devolves the setting of terms and conditions to different departments than I consider that it is distinguishable. I note in passing that it was suggested in **North** that there might be a future argument that **Robertson** was wrongly decided but I proceed on the basis that it is correct in law. I consider that the distinction is both in fact and degree. The description of the circumstances in which the power to set terms and conditions was devolved in **Robertson** is wholly different from, presumably, a resolution of a Board of Directors of a commercial undertaking even one as large as this respondent. I say "presumably" because I was not taken to any specific decision of the Executive Board of Asda which showed how the two mechanisms for setting terms in Distribution or Retail were initiated. In **Robertson**, the complex history set out at length in paragraphs 10 and 11 of the judgment of the EAT, in itself shows that the result involved a consideration of powers derived from statutes and statutory instruments, and other decisions of ministers of the Crown and provisions of the Civil Service Management Code. On the one hand this case involves a consideration of the authority of private bodies and individuals including private commercial undertakings to manage their own affairs. On the other hand, **Robertson** involves a consideration of the arrangements between the Crown and those in the public service of the state.

185. As my findings of fact also indicate those charged with the decisions to set terms and conditions within the respondent were, as the claimants submit, subject to a degree of oversight so that there was control in practice as well as in theory of those matters by the respondent's Executive Board.

186. Insofar as the respondent here relies upon the fact that Wal-Mart exercised control then I agree that that control could have been exercised as much in respect of one area of the business as another. Wal-Mart owned the respondent as a subsidiary company. Ultimately, as a person akin to a sole shareholder, Wal-Mart had the power to direct the Executive Board of the respondent to carry out the business of its subsidiary in the way that it chose. So much is evidenced by the fact that the respondent was part of Wal-Mart's international division which set Corporate Governance Rules with effect from 2010. I do not understand it to be suggested that Asda was not subject to similar rules prior to that date.

187. The submissions at paragraphs 12 and 13 on page 37 of the claimants' closing argument provides support for those conclusions. They are supported in my judgment by the indications of central control or, to put it in an alternative way, an absence of true autonomy, in the findings of fact set out in the earlier passages of this judgment at: paragraphs 38, 38.1, 38.3, 39 (as regards Retail).

188. Perhaps more significant are the facts set out at paragraphs 40, 50, 52, 54, 63, 66, 67, and 84, since it is "autonomy" in relation to the setting of Distribution terms on which the respondent seeks to rely.

189. I do not understand it to be argued by the respondent that if there was unlawful inequality of terms and conditions that it does not have the power to restore equality.

190. For these reasons I can and do make the findings set out in paragraphs 15 and 22 of the claimants' closing argument at pages 38 and 39. The Executive Board of Asda and the members or subcommittees of that Board had and exercised budgetary control and oversight over both Distribution and Retail at all material times. The Executive Board was responsible for the differences in pay and could, or could subject to the overarching control of Wal-Mart, have introduced equality.

Conclusions on the position under European law

191. Based on my findings in respect of direct effect and single source I also uphold the claimants' submission that because of the primacy of European law the UK domestic legislation should be construed where possible in accordance with article 157 but, if it cannot, any barrier to a comparison that would be permitted under EU law must be disapplied.

Common terms

192. Common terms need to be considered in three ways: first, whether there are (and were) common terms generally as between claimants and comparators; secondly, whether there were common terms, in the alternative, "for employees of the relevant classes" under s. 1(6) EPA 1970; and thirdly, whether there are common terms "as between A and B" under s. 79 of the EA 2010 i.e where A is a claimant, and B is a comparator who works at an establishment other than A's.

193. The third of these involves a consideration of the respondent's argument that the change in wording to the legislative provision has effected a change in the law and, if so, what is the effect of that change.

Common terms generally

194. The respondent submits that the basic question posed by the test is whether there are "essentially different employment regimes" at the establishment of

claimants and comparators. This they derive from the speech of Lord Bridge in **Leverton** at page 746C.

195. The respondents point out that the terms and conditions are to be considered mean contractual terms. This they derive from the natural meaning of the words and the statutory language.

196. The respondents accept that the terms do not need to be identical but must be broadly similar or "on a broad basis ... substantially comparable". See: **British Coal v Smith** at page 530D. For terms to be observed generally they must apply "for all or perhaps for most workers" at the two establishments (ibid. page 526B).

197. The respondent submits that the simple fact of this case is that because different terms were applicable depending upon where the employees worked there were no common terms and that should dispose of the claim in domestic law.

198. They submit that the claimants' argument: that because of the degree of similarity between Retail and Distribution terms, the terms are comparable, is wrong.

199. To support this argument they say that it is too narrow an approach and that since the question is whether there were essentially different employment regimes there must be a consideration of the geographical or historical reasons for their being different sets of terms. The respondent then repeats the argument as to why they say there are different regimes. They submit that the claimants' reliance on the fact that both Retail and Distribution employees are paid hourly is "obviously hopeless" because it ignores most contractual terms, for example working hours, breaks, sickness absences and probationary periods and focuses on a single abstract feature of the contracts which is not even stated to be a discrete term.

200. The respondent submits this focuses on a contractual term which is different as between claimants and comparators namely the rate of pay after the probationary period.

201. The respondent submits that the tribunal cannot rely upon the summary provided by the claimants to which I have referred pointing to errors which were explored in evidence, the fact that it provides only a high-level description of terms rather than transcribing the actual terms. Further the respondent submits that the table cites a number of terms which do no more than reflect statutory rights e.g. notice periods, maternity and adoption pay and that commonality in those terms should be given no real weight. Next they say the table cites a number of non-contractual policies.

202. The respondent says that the annexes to their skeleton argument show that different packages of terms apply as between stores and depots for core aspects of the relationship including: pay (basic pay, overtime premia, night pay and bank holiday pay) and the conditions on which they are payable; working hours; sickness absences; productivity targets; breaks; probationary periods; increase in rate of pay after an initial period of employment and Asda's right to vary contractual terms.

203. Finally, the respondent contends that the circumstances here are similar to those in the example used by Lord Bridge in **Leverton** at page 746D to E.

204. The claimants' argument begins with the following propositions. So far as possible the provisions of the statutes are to be construed in accordance with article 157. This permits a comparison where there is a single source. The test is intended to provide a low threshold. A broad similarity is exactly what it says.

Differences in detail do not defeat broad similarity. The terms and conditions referred to are not confined to contractually binding terms but extend to any terms that shape the employment relationship and are observed in practice. This is not a case where the discrepancy is explained by geography.

205. The claimants develop their submission on common terms relying on the fact that these are all hourly paid employees and that identifies them as a class. They submit the terms and conditions taken as a whole are broadly similar. The Retail and Distribution Handbooks, which contain both expressly contractual terms and terms which although not "avowedly" contractual (to use Mr Short's expression) are constrained by contractual obligations, are strikingly similar in structure and in much of the detailed content.

206. The claimants also submit that the differences which form the subject matter of the complaint must be disregarded for this purpose. The other differences are not so extensive as to permit the respondent to say that there are no common terms. There is sufficient commonality for the terms to be common generally.

207. The claimants accept that this is a matter of fact and degree but rely upon the social purpose of the legislation, the decision in **North** and the need to construe the legislation in accordance with EU law as showing that a fairly broad similarity will suffice.

208. To these remarks about the submissions I should add the observation that the respondent relies particularly in evidence upon the productivity clause which came into the contractual terms at the time of the national recognition agreement.

209. My conclusions on this issue are as follows.

210. I accept the argument that common terms were observed generally. Whilst I agree with the respondent's contention that the focus must be on contractual terms I do not think that carrying out the broad comparison requires an exclusive focus on those terms. It is likely that the very reason that the claims are brought is because of differences in significant contractual terms. To that extent the tribunal must guard against differences which may themselves be discriminatory in creating a barrier to an appropriate comparison. In addition, I consider the claimants' reliance upon the social purpose of the legislation and the derivation from EU law, which are two aspects of the same principle since the article clearly has foundation in upholding the freedoms upon which the EU treaties are themselves founded, is appropriate and this is reflected in the requirement to consider a broad similarity.

211. I reject the respondent's argument that simply because there are different locations for the work and that terms depend upon where an employee works, provides a simple answer to the point. Were that point to have merit it would tend to serve to defeat the claims of any employees who work at different establishments from the comparators.

212. The analysis I have set out in the findings of fact show that there is a significant correlation or comparison in a broad way between the terms in Retail and Distribution. Although not determinative, the fact that these terms have all been set by staff within the same employer is reflected in the strong similarities in the Handbooks and is for that reason a material factor. The fact that there are similarities in the two classes both of which are hourly paid employees is also capable of supporting the comparison. For completeness I should say that I accept the submissions made by the claimants in paragraphs 106 to 113 of their closing argument at pages 51 and 52.

213. I reject the respondent's submission that because these terms were negotiated over periods of time in different ways for the different groups they cannot be common terms. If a single employer were able to set up a different negotiating arrangement and rely upon that fact to maintain there were not common terms it creates a path to subvert the legislation. Indeed, Lord Falconer in answer to a question in final submissions accepted that were a tribunal to find that the employer had deliberately set up the processes in order to achieve that effect it could not be upheld.

214. I accept that there are some differences in terms but I do not consider that they are so extensive as to undermine the broad comparison which has to be made. The geographical and historical origins of some terms or specific terms that relate to the work in Distribution may be relied upon by the employer to establish a statutory defence.

215. For the sake of completeness I should say also that I do not accept that it is appropriate to consider a factual comparison between the circumstances in a reported case, here **Leverton,** and the factual circumstances in the instant case. If the authorities all demonstrate one thing it is that in the field of equality jurisprudence there is an almost unremitting variation of factual circumstances. In my judgment it would be an error of law to seek to equate, even in general terms, a comparison that might be made in one case with another as an alternative to applying the test for common terms that is established by authority.

216. In deference to the argument of the respondent I should perhaps specifically deal with the submission that the introduction of the productivity term introduced by the NRA. I have set out the term at paragraph 78 above. I accept that the respondent for entirely legitimate commercial reasons was seeking to enter into an agreement with the GMB which would make pay negotiations more simple and effective. I recognise that year-on-year disputes with individual branches would be disruptive and expensive and affect adversely the principle of "WO4L" (we operate for less). I acknowledge that productivity and flexibility on the part of Distribution employees was part of the respondent's motivation for entering into the NRA. For those reasons I understand the importance to the respondent of the term. Nevertheless I do not agree that the introduction of this term represents a significant difference between the group of Distribution employees as a whole and the Retail employees. It seems to me to be as much a statement of aspiration or intent than creating a contractual obligation. Put another way, if it were alleged that an employee was in breach of that term, assuming that some such allegation could be framed, I find it difficult to conceive that it would not amount to an allegation either of lack of capability or misconduct which I have little doubt would be already covered by appropriate procedures and on which, even though they might be non-contractual, the respondent could properly rely.

217. If this finding, that common terms apply generally, is correct then the claimants succeed on this preliminary issue by application of domestic law read, as it must be, in the light of the European law principles and authorities.

Common terms "for employees of the relevant classes"

218. I address this alternative, which I have referred to as the **North** hypothetical, both because I have been asked to do so and unless it be held that I am wrong in my analysis of the "common terms generally" issue.

219. The respondent addresses this in paragraphs 114 to 118 of its closing submissions.

220. It is submitted that the tribunal must consider whether if store workers were transferred to perform their current jobs in depots, they would remain on broadly similar terms to those that they enjoy in the store where they would otherwise work. It is submitted that the tribunal should also consider the converse namely the transfer of the comparator workers to perform Distribution work in stores.

221. The respondent submits that both these must be considered because of the judgment in **British Coal.** They submit that Baroness Hale elided the first of the two questions in **North.**

222. The respondent submits that the answer to both questions must be in the negative because the applicable terms depend on the establishment at which someone works.

223. The respondent submits that the evidence shows that a depot employee would not keep his terms were he to perform his job in a store because: such terms are and have always been location-based; depots had site-specific pay rates and other terms before the NRA and since the NRA some depots (although now only Didcot) continued to have site-specific terms and under the NRA each depot has its own pay rates.

224. Further, the respondent submits that a depot employee moving between depots acquires the terms applicable at the new depot.

225. The respondent's reason for having standardised employment terms in Retail is because homogeneity is a critical characteristic of the stores and customers must see the different stores as part of the same brand so operations are simplified and coordinated centrally.

226. It is submitted that the factual situation contrast starkly with the cases such as **North** and **British Coal** and the other cases cited in paragraph 116(iv) of the written closing submissions.

227. The respondent submits that for similar reasons a store employee would not keep his or her terms were she to be transferred permanently to a depot.

228. The respondent submits that the claimants' argument to the contrary should be rejected. Evidence of what has happened to the terms of employees who transfer temporarily does not assist. They submit that the documents relied upon by the claimants support the respondent's contention that on a permanent transfer there would be a change of terms and conditions (page 1491).

229. The respondent criticised the claimants' counsel for cross-examining only upon pay rates and addressed the wrong test by asking what would happen, "if hypothetically you had a depot put on the same [i.e. a store] site but in the car park".

230. The claimants' submissions were to the effect that Mr Stansfield had accepted in evidence that terms and conditions would be maintained if there was a hypothetical depot at the store. It was accepted by both witnesses that the hourly rate would not change upon a hypothetical relocation since the employees would be paid the rate for the job.

231. The claimants submit that there is no reason to suspect that other matters of detail would change. This, it is said is not such a case such that all employees who

work in Manchester are on one contract and all those who work in London are on another. Mr Short pointed out that Baroness Hale in **North** accepted a submission that the tribunal "should not speculate about the adjustments to the comparators' present terms and conditions which might be made in the unlikely event that they were transferred to the claimants' workplace".

232. It was submitted there was no factual basis for concluding that there would be significant changes in terms and conditions because there are no Retail workers anywhere employed other than on Retail terms such that for example none receive premiums for hours worked between 2 and 10 pm nor for overtime. Similarly, no Distribution workers are employed other than on Distribution terms. Whilst there are differences to the enhanced rate paid after 2pm, all receive a premium after that time and all receive overtime.

233. Where there is great similarity in relation to the terms as between Retail and Distribution they would clearly not change. The claimants point to holiday entitlements after the third year of service and pension arrangements.

234. Again the claimants submit that the terms do not need to be identical in this hypothetical situation but only broadly similar.

235. Whilst the claimants accept that the treatment of depot staff temporarily deployed to stores is not directly comparable they suggest it gives a better indication than witnesses' speculation.

236. In my judgment, the claimants' argument is again to be preferred.

237. As to whether the claimants must establish this test, as it were, in both directions, as the respondent contended I remain in some doubt. It does not seem to have featured in the formulation by May LJ in the Court of Appeal in **Leverton**. However, since both parties put the converse argument generally I am content to assume for the purposes of this decision that at least on this point the respondent's position is the correct one. I do not consider that it is for me to decide whether the view expressed by Baroness Hale is to be preferred to that of Lord Slynn. It might be thought that a purposive construction of the legislation should entitle a claimant to choose her comparator and construct a comparison in the way that she wishes. Nevertheless, I do not consider that anything turns on that for the purposes of this analysis.

238. I do not attach any weight to the suggestion that a worker moving between depot and depot takes the new depot terms as assisting in this analysis. If I am correct in excluding that then the fact that there are some depots on different terms to others is also not relevant.

239. Neither am I persuaded that the homogeneity argument is of great weight here. Recognising that this is a hypothetical comparison it is a postulation that a depot worker is carrying out his depot work although located at a store. It does not seem to me that that necessarily means that it has to be postulated that he is carrying out that work in the customer facing part of the store. Indeed, recognising the factual hypothesis is inherently unrealistic, it seems to be much more likely that depot workers doing Distribution work would not be in physical proximity to Retail staff and customers. I therefore conclude that homogeneity is unlikely to be a safe basis for concluding that terms would change particularly in view of the evidence of Mrs Tatum and Mr Stansfield that Asda would pay the rate for the job that was being done.

240. I agree that the temporary redeployment of depot workers into stores, or hypothetically vice versa is not properly comparable. It provides some slight support for the claimants' case. I do not consider that Mr Short's attempt to construct a hypothetical depot in a Retail car park is fatal to the claimants' argument.

241. In my judgment greater support is derived from the fact that the respondent operates what appear to be more favourable terms for the depot workers and it is inherently unlikely that depot workers would be willing to see those extended to Retail employees if hypothetical relocation of Retail employees occurred in that direction and equally unlikely that depot workers would be willing to give up their terms if there were hypothetical relocation of them into stores.

242. Furthermore the claimants rightly, in my judgment, submit that weight can be placed upon the fact that there is significant similarity of certain parts of the contractual provisions and that these would be maintained in the hypothetical situation even if they are not sufficiently similar to amount to common terms generally.

Common terms "as between A and B" - a change in the law?

243. I address the question of whether there has been a change in the law by the adoption of different language in the EA 2010. If I find there has not then the previous jurisprudence in respect of the **North** hypothetical holds true and my answer, logically, must be the same as that I have previously given.

244. If my answer is that the law has changed then I have to consider whether the reformulated provision extends or restricts a claimants' ability under UK law to enforce her treaty rights. If I find that there has been a restriction, then because of the view I take in respect of direct effect and single source, I should disapply the restrictive interpretation of the law consistently with the approach of Baroness Hale in **North.**

245. The respondent's argument is that the **North** hypothetical has been repealed and that claimants can no longer rely upon it. They contend that the claimants' attempt to have me read section 79 of the EA 2010 as if it contained the words (underlined here):

> "common terms apply or would apply (either generally or as between A and B if each was employed at the other establishment."

246. The respondent submitted that it was not permissible to read words into the statute since it would cross the "boundary between construction and legislation". See: **Inco Europe Ltd v First Choice Distribution (a firm).**[23]

247. The respondent's second argument is that even by "re-drafting" section 79 as the claimants suggest it does not preserve the hypothetical. This they submit is because the hypothetical permits comparisons where there is commonality within each class (i.e. the claimants' class and separately the comparators' class). They submit that even in the claimants' formulation it would still require commonality between claimant and comparator terms.

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[23] **[2000] 1 WLR 586**

248. The claimants' argument is that the change in language was not intended to narrow the test of probability. They submit that any such narrowing would have been contrary to the social purpose of the legislation and contrary to article 157.

249. They submit in particular that the change is not intended to impose the sort of requirement rejected in **Leverton** whereby a woman was required to establish an undefined substratum of similarity between her terms and those of the comparator as a precondition. They submit there was no intent to remove the possibility of reliance upon the hypothetical examples permitted by **British Coal**.

250. The claimants submit that section 79 as enacted can be read in the way they have suggested, i.e. as if it contained the words underlined above but that in addition to being read in that way it also enables a claimant, if she can do so, to rely generally on a particular comparator at a different establishment whose terms are broadly similar to her own.

251. My first difficulty with the respondent's general submission is that there was no suggestion at the time of the enactment of the EA 2010 that any change in the law was contended for or was intended by Parliament. I suspect, although this is not determinative, that by using the designations "A and B" as the draftsman did in several other places in the new Act it was intended for there to be consistency of language.

252. Beyond that, the EU jurisprudence recognises that a comparison may be made even where claimant and comparator are not employed by a common employer or at the same establishment. This to me seems to suggest that a hypothetical comparison of terms is within contemplation. **North** and the earlier authorities support this view. If the respondent is right that the EA 2010 has repealed a hypothetical basis of comparison then there has been a restriction or narrowing of the opportunity for claimants in the UK to afford themselves in this factual situation of a directly effective route to making a potentially valid claim. I cannot uphold that interpretation.

253. My answers to the issue are as follows. Parliament must be taken to have intended to permit some comparison beyond "common terms generally". If that was all that was intended then the extra words add nothing. In cases with a single claimant and a single comparator the new words may be entirely apt. But if, as I find, the words may be read as intending to reproduce the effect of the earlier formulation then it seems to me that they may be read in that way i.e. that A is a person who is a member of a class that enjoys common terms between themselves and B is a member of the other class e.g. of comparators. That reading is consistent with the language used for the reason argued by the claimants here and is consistent with Parliament not intending to have change the law.

254. In the alternative, if the law has changed as the respondent contends. I agree that the effect of that law must be to make access to a remedy for the assertion of a breach of the equal pay term in the treaty very much more difficult to establish. The claimant would, as a precursor to bringing the issues of like work/work of equal value before a tribunal or court, have to identify a particular comparator with whom her terms were broadly comparable. This is a much more onerous task than that allowed for by the previous formulation under the EPA 1970.

255. If in **Leverton** May LJ was correct in defining the hypothetical as consistent with EU law and if the later authorities have affirmed that as an extension of the principle of reading the domestic legislation consistently with the predominant EU

law then a domestic provision that reduces a claimant's access to proper comparison is, I believe, a restriction of the rights derived from the treaty.

256. In those circumstances, I hold that, if necessary, it would be the duty of this tribunal to disapply this restrictive reading of the implementation into domestic law of the claimants' directly effective right to rely upon article 157 of the Treaty.

Conclusion

257. For these reasons I prefer the submissions of the claimants on the issues that I have to decide and therefore do not strike out the claims. Should it be appropriate to do so I will give directions for the further disposal of these claims upon application being made by either the claimants or the respondent.

258. May I add my gratitude to Counsel for their assistance during the hearing and to all those who prepared the extensive documentation in this application in such a way as to render the task of preparing this judgment somewhat easier.

Employment Judge 13 October 2016

JUDGMENT & REASONS SENT TO THE PARTIES ON

14th October 2016

FOR THE TRIBUNAL OFFICE