

Cross - establishment comparisons are generally to be permitted save in exceptional circumstances: Asda Stores Ltd v. Brierley & Ors [2019] EWCA Civ 44

By [Simon Tibbitts](#)

3PB Barristers

Background

1. This Equal Pay claim has been ongoing for some time already (since 2016) and is set to continue for some time yet. In short, the Supreme Court's Judgment handed down 3 days ago (26th March 2021) is focused upon a narrow point, which whilst of importance and interest to both parties and their advisors, in no sense has brought closure to these proceedings which are likely to continue to attract media attention as the layers of equal value litigation unfold. The factual background is pretty simple and can be briefly summarised as follows:

- A number of claimants (35,000 as at the date of this appeal) employed in Asda's 'retail business' (i.e. in store) and who are predominantly female have brought equal pay claims seeking to compare themselves to those employed in Asda's 'distribution business' (i.e. in depots which take receipt of, sort and distribute products to the store network) who are predominantly male.
- The retail and distribution locations (i.e. the stores and depots) are geographically separate from one another.
- It is not in dispute in these proceedings that 'establishment' conveys anything more than a location at which employees work.
- The fundamental issue thus far in these proceedings and upon which the Supreme Court has handed down its judgment, is effectively whether this equal pay claim can get off the starting blocks. Namely it concerns a preliminary issue as to whether the retail staff could (in principle) rely on the distribution staff as valid comparators for the purposes of this equal pay claim.

2. Practitioners conversant with the principles of Equal Pay (and particularly that of Equal Value ('EV')) will probably know the background to this specific case and will certainly appreciate that the whole principle of EV is to permit a comparison between two sets of employees who could be undertaking what may appear to be quite different jobs. Accordingly, the headlines that the Supreme Court has held that shop workers can compare themselves to depot workers for the purposes of an equal pay claim might come as no surprise and be thought to simply be an affirmation of what we all understood to be the set position for some time. However, on closer scrutiny this Judgment is important in a number of respects as set out below.

The Fundamental Issue in a nutshell

3. In light of the accepted facts set out above (points 2 and 3) pursuant to s.79(3) EA 2010 (and the corresponding provisions of the EPA 1970) the distribution employees could not be relied on as comparators by the retail staff as simply they did not 'work at the same establishment'. The issue therefore was whether a 'cross-establishment' comparison could be relied upon pursuant to s.79(4) EA 2010, which provides as follows:
 - (a) B is employed by A's employer or by an associate of A's employer;
 - (b) B works at an establishment other than the one at which A works;
 - (c) Common terms apply at the establishments (either generally or as between A and B);
4. Quite evidently the issue turned on point (c), especially given that Parliament has not defined the expression 'common terms'.

The Law

5. Lady Arden who handed down the unanimous Judgment of the Supreme Court usefully summarises the 3 leading cases in this specific area of 'cross-establishment comparisons' and what is meant by 'common terms' extracting from them some core principles (see Paras 19 to 32). To surmise:
 - 5.1 All 3 cases have progressively elucidated and applied the requirement of 'common terms' to achieve a simple and single aim, namely *'to enable claimants to treat as comparators employees at different establishments if their terms and conditions would have been substantially the same if they had been employed at the same establishment as the claimants.'*

5.2 Lord Bridge in **Leverton v Clwyd County Council [1989] AC 706** held that in determining the issue of ‘common terms’ the comparison was **not** between the claimant’s terms and those of the comparator, but rather the terms observed generally at the claimant’s establishment and those of the comparator’s establishment. Furthermore the ‘paradigm case’ of where there were common terms and conditions between establishments was where the terms and conditions at two or more establishments were governed by the same collective bargaining agreement.

5.3 In **British Coal Corporation v Smith [1996] ICR 515** it was confirmed (in summary) by Lord Slynn that:

- It was a question of fact for the tribunal as to whether the terms and conditions of employment were ‘common’;
- The fact that the terms of the claimants in one establishment and their desired comparators in another establishment were governed by different collective bargaining agreements did not necessarily mean that there were not ‘common terms’;
- If there were no comparators at the claimant’s place of work, that likewise was not determinative of the question but rather it would have to be shown that like terms and conditions would apply if men were employed there in the particular jobs concerned; and
- Adopting a purposive approach, it was sufficient to constitute ‘common terms’ that the terms were **sufficiently similar** for a fair comparison to be made (emphasis added).

5.4 In **Dumfries and Galloway Council v North [2013] ICR 993**, it was confirmed that there was no requirement that it be shown that a comparator at one establishment had a realistic possibility (or even for it to be logically feasible) for them to be located at the claimant’s separate establishment. Lady Hale in that case confirmed:

‘The exercise required to be performed was a purely hypothetical exercise of asking whether, assuming that the comparator was employed to do his present job in the claimant’s establishment, the current terms and conditions would apply.’

5.5 This exercise has since been known as the ‘North Hypothetical’ (See Para 25). The North case also clearly clarified (drawing from the principles in **Leverton** and **British Coal**) that:

- The ‘common terms and conditions’ requirement is **not** a comparison between the terms and conditions of the claimants and their desired comparators, but rather a comparison exercise between the terms and conditions of the comparators in their **current establishment** and what those terms and conditions **would have been (hypothetically at least) in the establishment in which the claimants worked**.
- On proper comparison for the purpose of ‘common terms and conditions’, complete correspondence is not required, those terms just need to be ‘broadly similar’.

5.6 Lady Hale in **North** also set down, pursuant to an overall purposive interpretation of the equal pay legislation, a cautionary warning to enforce her primary point set out above which Lady Arden in the Supreme Court in this case certainly appears to endorse, namely:

*‘It is not the function of the ‘same employment’ test to establish comparability between the jobs done. That comparability is established at the ‘like work’, ‘work rated as equivalent’ and ‘work of equal value’ tests...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...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.**’ (emphasis added).*

6. Finally, it is worth noting that Lady Arden agreed with Underhill LJ (who have Judgment in the CA stage of this case) that it would not always be necessary to apply the ‘North Hypothetical’ in a cross-establishment comparison as the ET may simply be satisfied that there are common terms without the need to apply such a test. However, if the question cannot be so simply resolved then Lady Arden does clearly endorse the North Hypothetical approach.

The Decisions of ET and CA

7. At the ET, the tribunal was found (by the CA) to have erred in their approach to the ‘common terms’ question in that the ET had performed an elaborate exercise of comparing on a line by line basis the specific terms and conditions of employment of the distribution employees with that of the retail employees. The CA went on to find that since none of the distribution employees were employed at the retail employee’s location(s), the ET should have simply applied the ‘North Hypothetical’. However, pertinently the ET had also separately addressed the North Hypothetical question properly at first instance

and had drawn inferences and conclusions from the evidence it had heard to find that had the distribution employees been employed at the Claimants' establishment, they would have been on substantially the same terms as those that they were on in the depots and would not have received the retail employees' terms. In short, the CA upheld the ET's findings on this basis.

The Grounds of Appeal before Supreme Court

8. Asda challenged the factual findings of the ET as it contended it was against the weight of the evidence that was before the ET. Asda raised a number of arguments which related to the ET's initial approach and finding in respect of 'common terms' i.e. in respect of the ET's considerations of similarity between the terms and conditions of the distribution staff as compared to that of the retail staff. Ultimately those appeal grounds were of limited relevance as Lady Arden accepted (as did the CA) that the ET had indeed erred in their approach as regards that comparative exercise, but that did not undermine the ET's other (legally correct) approach to the comparative exercise, namely the North Hypothetical. There is accordingly little point considering those appeal grounds in any great detail, save for one which may be of some interest and was as follows:

- Asda relied on a statement by Lord Bridge in Leverton that *'there may be perfectly good geographical or historical reasons why a single employer should operate essentially different employment regimes at different establishments'*. Asda submitted that they had presented evidence before the ET that their distribution and retail operations were fundamentally different by their nature: (customer / non-customer facing), how they had evolved over time, their different objectives, skill sets and such forth. Accordingly, it was submitted that the ET had erred in finding 'common terms' because the presence of fundamentally different employment regimes should have been the end of the matter.
- Lady Arden did not accept this argument as she did not consider that Lord Bridge had gone as far as Asda were suggesting. Furthermore Lady Arden went on to confirm that *"the common terms requirement was only a threshold test"...* and... *"is intended to operate only within a very narrow compass where the differences in terms and conditions are wholly or mainly derived from the physical separation of the comparator's establishment, and that is not intended to prevent claims merely because as events have turned out there are different employment regimes."* (see Para 45 / 46).

9. In respect of the ET's findings on the North Hypothetical, Asda sought to suggest that the ET had erred in their factual finding on the evidence before them. It was not suggested that the ET had misdirected itself in law. Asda sought to rely on evidence that similar warehouse staff in the retail stores were paid on retail terms and evidence from Asda staff in cross examination before the ET was that an employee who permanently transfers from distribution to retail (or vice versa) would take the rate of pay in the depot or store that they permanently go to work in. However, there was also evidence before the ET from Asda staff in cross examination that if a distribution employee was working in the car park next to a retail store or if a retail employee was working a till at the edge of the distribution depot then they would retain their original terms. In effect this appeared to be because Asda considered the terms were role specific. Ultimately Lady Arden held that as there had been no misdirection of law and given the numerous warnings issued about the higher courts interfering with the findings of fact reached by the ETs, that the ET's findings on the North Hypothetical should stand. She further rejected the submission that the North Hypothetical has to be asked on the basis that the distribution worker will perform his role *physically* within the Claimant's workplace.

Rationale for Supreme Court Judgment

10. Lady Arden succinctly and simply summarised the fundamental question for the ET in this case (and indeed in future cases) when faced with the question under s.79(4)(c) EA 2010, namely whether common terms apply across different establishments:

“All the employment tribunal needed to do in this case was to make the assumption that the distribution employees could carry out their role at a location appropriate for this purpose at the claimants' establishment, even if this was contrary to the fact. It could have achieved that by envisioning a depot next to the retail store at the claimants' establishment. It then had to ask whether, on this assumption, the distribution employees would continue to be employed on the same or substantially the same terms as they were employed at their own establishment.” (Para 56)

Useful Future Guidance / Commentary

11. Lady Arden at the conclusion of her Judgment provided a short and useful summary of the legal principles relating to the 'common terms' requirement (Paras 59 to 67) and thereafter provides guidance for how tribunals should appropriately handle and case manage such claims when such issues arise (Paras 68 to 71). I strongly suspect that in future cases where the issue of the cross-establishment common terms requirement

arises that these paragraphs will be the authoritative 'go-to' for practitioners and tribunals alike.

12. The Supreme Court was clearly cognisant throughout of the overall purposive aim of the equal pay legislation, namely to protect and rectify pay disparities for those entitled to equal pay. In this context the Court emphasised that the 'common terms requirement' was a threshold test with a limited function and was purely designed to weed out comparators who cannot be used because the differences between them and the claimants are based on factors which are geographical (or possibly historical). In sum the cases where the threshold test cannot be met are likely to be exceptional.
13. Indeed, the Court cautioned tribunals to not allow this threshold test to be elevated into a major hurdle akin to other elements of an equal pay claim as that would be contrary to the proper investigation, comparison and (where appropriate) rectification of pay disparity. Indeed, practitioners in this field will be acutely aware of the already lengthy process that equal pay (particularly equal value) claims have to go through in order to reach a conclusion.
14. Ultimately it does not appear to me that the Supreme Court's Judgment has altered the pre-existing state of the law and I consider that the press reports that this is a 'watershed moment' are perhaps a bit overexaggerated. Clearly given the number of Claimants the value of the potential back pay is very significant and newsworthy, but in essence the claim itself is still in its infancy and whether this claim will ultimately succeed remains very much an open question.
15. I do however consider that this Judgment is nonetheless important. It has certainly provided authoritative clarity on this particular issue such that claimants are likely to be less concerned as regards s.79(4)(c) EA 2010 arguments and will feel confident in looking for comparators across any of their employer's establishments. Likewise, large employers are likely to review their pay structures in ensuring equality in a broader sense and are likely to think twice before attempting to defend an equal pay claim on the basis of s.79(4)(c) EA 2010.
16. If a Respondent employer has staff engaged in wholly separate establishments and where genuinely the rationale for a disparity of pay between those staff at those establishments fundamentally comes down to the different geographical location, then those employers can still legitimately rely upon s.79(4) EA 2010 to dispose of such an equal pay claim. In that instance having terms outlining that pay is reflective of geographical working location

and will vary if employees are moved from one location to another expressly set out within agreements with those employees might be one way in which employers may be able to strengthen such an argument and look to protect themselves from costly equal pay litigation. Ultimately however the tribunal and higher courts will no doubt be wary of sham terms and disposing of such claims by virtue of s.79(4) EA 2010 appears likely to remain, in light of this Judgment, to be the exception rather than the rule.

This document is not intended to constitute and should not be used as a substitute for legal advice on any specific matter. No liability for the accuracy of the content of this document, or the consequences of relying on it, is assumed by the author. If you seek further information, please contact the [3PB clerking team](#).

29th March 2021



Simon Tibbitts

Barrister
3PB Barristers

0330 332 2633
simon.tibbitts@3pb.co.uk
3pb.co.uk