Lowering the bar to equal pay

By Georgie Miller - 31 March 2021

On 26 March 2021, the Supreme Court delivered an emphatic dismissal of Asda's final appeal on a preliminary issue in *Asda Stores Ltd (Appellant) v Brierley* and others (Respondents) [2021] UKSC 10, (*cue groans of despair throughout the retail industry*). Here, the hopes of thousands of women employed in the retail stores of Asda to bring equal pay claims on the basis that they earned less than their chosen comparators, - distribution employees (predominantly men) employed at Asda's depots, which are different establishments. The Supreme Court ruling has finally confirmed that these women CAN compare their terms and conditions to those of men working in a different place, i.e. distribution centres.

Why does this judgment matter and what impact could it have on businesses?

Equal pay law is notoriously complex - riddled with many hurdles to overcome before the main question is even considered. For instance, this claim has managed to clear its first hurdle a mere seven years after it began. Further, it only allows the claimants to proceed with their case for equal pay. They may yet fail to prove that their work is of equal value; even if they can prove that, Asda may then be successful in demonstrating that there is reason unconnected (directly or indirectly) to sex for the pay disparity, known as a "material factor defence". However, for any future claims where claimants and comparators reside at different "establishments", hurdle one can now be considered a hop as opposed to a world-beating high jump. The most controversial component of comparability (point (c) below – the “common terms” test) is satisfied for the Asda claims, allowing their equal pay claim to proceed.

A reminder of this complex area: section 79(4) of the Equality Act 2010 provides that cross-establishment comparisons are permitted where:

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, and

c) common terms apply at the establishments (either generally or as between A and B).

Asda had argued that the comparison was not permitted as common terms did not apply as between the claimant and the comparator, or indeed as between the establishments (i.e. common terms did not apply as between retail sites and distribution centres). Both the Court of Appeal and the Supreme Court concluded that the Employment Tribunal asked the wrong question from the outset (despite arriving at the correct conclusion). Instead of asking whether the terms of distribution employees were the same at both depots and retail sites before then applying the hypothetical question as to whether the terms would be the same *if* depot employers were employed at retail sites, the Tribunal engaged in a detailed comparison of the terms of retail and depot employees.

Lady Arden has confirmed that what is required to establish common terms is a low threshold test "*that the terms and conditions of employment of the comparators must be broadly the same at their establishment and the claimants' establishment.*" If this is the case, that there are no employees of the comparator's group employed at any establishments where the claimant group is employed, then the court or tribunal must be satisfied that if employees from the comparator group were hypothetically employed at the claimants' establishment (however unlikely that may be), they would retain broadly similar terms and conditions as they enjoy at their own establishment. This is a very low bar.

This judgment opens the door to an increased number of cross-establishment equal pay claims as historically such claims have been mired in lengthy litigation in the initial comparability stage and largely confined to the public sector (as stated above, the Asda case has taken seven years to reach this stage). This is not to say that such claims will succeed as there are many more hurdles for the claimants to overcome in the litigation. However, this is certainly a note of caution as clearly separate regimes for setting pay at different establishments is not a barrier to a claim for equal pay.

If you would like to discuss this case or equal pay more generally, please contact Georgie Miller or your usual GQ|Littler lawyer.