The test for equal pay comparisons: going back to the source

In what might be the last ruling of the European Court of Justice (ECJ) in a UK equal pay case, the ECJ has confirmed that female staff working in Tesco stores can rely directly on the EU "single source" test in order to compare themselves to men working in distribution centres (*K and others v Tesco Stores Ltd C-624/19*). This decision will make it more straightforward for equal pay claimants to rely on comparators at different workplaces.

This development comes hot on the heels of *Asda Stores Ltd v Brierley and others*, in which the Supreme Court ruled that female staff in Asda retail stores could meet the "common terms" test under the Equality Act 2010 and rely on comparator groups at distribution centres if the distribution employees would retain substantially the same terms if they hypothetically transferred to a retail store (the so-called "*North* hypothetical") (*see box "The common terms test"*) (*[2021] UKSC 10; see News brief "Equal pay: comparator can be in a different establishment", www.practicallaw.com/w-030-7097*).

However, the common terms test has caused confusion and led to considerable litigation, initially in the wave of public sector equal pay claims and more recently in claims against supermarkets. In *Tesco*, the ECJ has now clarified that claimants do not necessarily need to make the common terms argument and can rely instead on the single source test.

The single source test

The *Tesco* case is similar to the *Asda* litigation in that it also involved female store workers seeking to compare themselves to male warehouse employees on the basis that they were undertaking work of equal value. The claimants argued that they could rely on Article 157 of the Treaty on the Functioning of the European Union (Article 157), which lays down the principle of equal pay for equal work, even though the comparators worked at a different establishment. In *Defrenne v Sabena*, the ECJ established that Article 119 of the Treaty of Rome (Article 119), now replaced by Article 157, has direct effect and can be relied on by employees in the public and private sectors to make comparisons with other employees where terms and conditions are attributable to a single source that can rectify unequal treatment (the single source test) (*[1976] ICR 547*).

The common terms test

The Equality Act 2010 provides that men and women should receive equal pay for equal work. Employees can compare themselves with someone of the opposite sex who is performing either the same work or work of equal value. The claimants and their comparators must be:

- In the same employment (employed by the same employer or by associated employers).
- At the same establishment, or at different establishments at which common terms apply (the common terms test).

There has since been uncertainty over whether Article 157 does in fact have direct effect in a claim where the comparators are doing work of equal value rather than the same work. Tesco argued before the ECJ that Article 157 did not have direct effect in equal value cases, but the ECJ gave this argument short shrift in its brief judgment, pointing out that the wording of Article 157 cannot support that interpretation. Article 157 expressly states that EU member states must ensure the application of the principle for equal pay for male and female workers for equal work or work of equal value.

Article 119 referred to the principle that men and women should receive equal pay for equal work, without referring to equal value. While the ECJ did not specifically address this in *Tesco*, it had previously established in *Brunnhofer v Bank der Osterreichischen Postparkasse AG* that the phrase "equal work" implicitly includes work of equal value (*C-381/99*). In *Tesco*, the ECJ took the view that "equal work", "same job" and "equal value" are part of the factual assessment of the work undertaken, and so are distinct from the fundamental obligation in Article 157 to ensure equal pay between men and women.

Accordingly, the ECJ concluded that Article 157 does have direct effect in equal value cases and can be relied on where terms relating to pay are attributable to a single source, even if the claimant and comparator work at different establishments. The ECJ went on to observe that Tesco, as the employer of both groups of employees, appeared to be a single source that could be responsible for any unlawful pay discrimination. This would, however, be for the UK courts to decide.

Status of the ECJ's decision

Under the UK-EU withdrawal agreement, the ECJ has jurisdiction in requests for preliminary rulings made before the end of the Brexit transition period (*see News brief "Withdrawal Agreement Act: legislating for departure and transition", www.practicallaw.com/w-023-7750*). It had therefore accepted jurisdiction to determine the questions referred by the employment tribunal in *Tesco* in August 2019.

The European Union (Withdrawal) Act 2018 (2018 Act) provides that directly effective rights under EU treaties are retained in domestic law post-Brexit, with Article 157 being expressly listed as an example of those rights in the explanatory notes. Unlike rights deriving from EU directives, it is not necessary for a treaty right to have been declared as directly effective before the end of the transition period.

The 2018 Act provides that UK courts and tribunals are generally not bound to follow ECJ decisions given after the end of the transition period, but that they can take them into account if relevant. However, Article 89 of the UK-EU withdrawal agreement expressly provides that ECJ judgments delivered after the end of the transition period, in cases that were referred by the UK and pending before the end of the transition period, will be binding in full. The upshot is that there will be limited scope, if any, to argue that the UK courts should depart from the decision in *Tesco*, although in each case there will need to be a factual assessment as to whether there is a single source to be relied on.

Practical implications

It was straightforward for the ECJ to conclude that there was a single source in the *Tesco* case. The claimants and comparators were all employed by the same legal employer, Tesco Stores Ltd, and the ECJ declared that the existence of a single source followed from this.

The position may be more difficult to determine when the claimants and comparators have different employers within a large and complex group structure. There may be individual companies or smaller sub-groups, which operate autonomously and where it could still be argued that a parent or holding company cannot realistically determine pay or rectify differences. It is perhaps unlikely, however, certainly outside unionised environments, that employees would have sufficiently detailed knowledge about the workforce and pay in other group companies to identify any specific comparators. If these arguments arise in future cases, the UK courts will need to decide for themselves whether there is a single source because references to the ECJ will no longer be possible.

Given the financial consequences at stake, retail organisations may well continue to pursue any credible arguments that comparisons cannot validly be made between workers at different establishments. In *Asda*, the Supreme Court described the "common terms" test as a fail-safe against attempted comparisons that clearly could not realistically be made. Cases that could not meet this threshold test were likely to be exceptional. The ECJ has now made it even more straightforward for claimants to rely on Article 157. The combined effect of *Asda* and *Tesco* is to close the relatively narrow gap in the law through which employers can seek to prevent comparisons between jobs at different establishments.

UK courts are now unlikely to want to entertain technical arguments by employers that prevent or delay the assessment of arguably more important issues; that is, the questions of whether the jobs are in fact of equal value and whether the reasons for pay differentials are discriminatory.

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