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Analysis

Asda Ruling Paves Way For Wave Of UK Equal Pay Suits

By [Paige Long](#)

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Law360, London (March 26, 2021, 7:25 PM GMT) -- The U.K. Supreme Court's decision on Friday allowing tens of thousands of Asda retail workers to compare themselves to warehouse staff in their equal pay claims paves the way for a wave of similar suits in other industries, lawyers say.

The justices [found that the claimants](#) — who are mostly women and work in the company's retail stores — passed the threshold required for comparing their roles to the mainly male employees who work in Asda Stores Ltd.'s distribution centers.

The decision set out guidance for future employment proceedings where claimants are similarly seeking to compare themselves to another group of workers who are not based in the same location, called "cross-establishment comparison."

Lawyers say the ruling has lowered the bar for employees to show they can compare themselves to other groups of workers. The top court made it clear that the threshold test should not be a major hurdle for an equal pay claim, saying appeals over the issue "are to be discouraged."

In particular, the U.K. Supreme Court said that the tribunal was "wrong to entertain a detailed, line by line comparison" of the terms in its initial fact-finding exercise on the preliminary issue.

Sacha Sokhi, solicitor at [Irwin Mitchell](#), said that while there is still a long road ahead for the Asda employees, the Supreme Court's ruling will no doubt lead to more employees challenging their right to equality in the workplace.

"This is not just limited to the retail sector but will also impact on such diverse areas as financial services, medical and healthcare and professional services," she said.

The U.K.'s equality legislation says that claimants can only choose a comparator who is employed at their organization on "common terms." But Parliament left that phrase to the courts to define.

Asda's was the first case involving a cross-establishment comparison where the claimants were not covered by collective bargaining agreements but the distribution workers were. And because no warehouse employee had ever worked at the same site as the retail staff, the court had to weigh a hypothetical scenario to consider on what terms the two types of workers would have been employed if they were in the same location.

The test is known as the "North hypothetical." Justice Mary Arden said on Friday that the test provides the "short and direct answer in this case."

The justice said it was irrelevant that warehouse workers had not been employed at the retail sites, or that it wouldn't be feasible to do so.

The test prevents equal pay claims from being dismissed too early and is also designed to stop employers from avoiding equal pay claims by allocating groups of employees to separate sites on different terms, according to the ruling.

Although the tribunal had ruled in the claimants' favor, the Supreme Court said it would have come to the same answer "more readily" by inference, rather than by carrying out a prolonged document-intensive exercise that took into account opinions and evidence on the hypothetical facts of the case.

Justice Arden pointed out that employers have "ample opportunity" to justify the pay disparities at later stages in the proceedings. All the tribunal needed to do at that first stage was to imagine a depot next to the retail store where the claimants worked, and then decide whether the distribution workers would have been able to continue their employment on "the same or substantially the same terms" as in their existing contract, the ruling says.

The most significant part of the decision was the Supreme Court's confirmation that a comparator's employment terms and conditions only need to be "broadly the same" as the claimants', not identical.

"This arguably lowers the bar for employees to bring equal pay claims and tribunals may be required to adopt a more lenient approach in light of this decision, meaning more cases may arise," said Jeremy Coy, a solicitor at Russel-Cooke LLP.

The decision is likely to leave major supermarkets and retail chains nervous about facing thousands more claims from shop floor workers who believe they have been underpaid.

Similar equal pay claims have also been brought against four other supermarket giants: Sainsbury's, Morrisons, Tesco and Co-op. Together, all five retail chains could have to pay eligible staff a total of £8 billion (\$11 billion) if the actions succeed, according to the workers' attorneys at Leigh Day.

Emma Bartlett, partner at [CM Murray LLP](#), said that the U.K.'s equal pay legislation was drawn up when employers routinely offered different rates of pay for men and women doing the same role, or reserved certain roles for one gender over the other.

"Hangovers of this still persist in society today," Bartlett said.

And those jobs could still be considered work of equal value, even if they are not the same and have not been rated as equivalent by the employers in their evaluations, Bartlett said. The result, she said, could be more equal pay claims.

"Other industries which may have distribution centers populated mainly by one gender and another area of the business servicing the client base populated by the other will need to relook at the risk of equal value roles," she said.

While handing down Friday's ruling, Justice Arden acknowledged the significance of the case. Asda had around 630 retail stores and employed about 133,000 hourly paid retail employees when it appeared at the employment tribunal in June 2016.

At the time [of the appeal in July](#), Leigh Day had confirmed it was representing about 35,000 claimants. The law firm said on Friday that the case has now expanded to 44,000 workers.

"This unanimous decision of the Supreme Court may eventually have substantial financial implications for Asda, given the number of retail workers it employs across the country, as well as for many other retailers," Coy said.

Employers should now be very careful in making sure they are not paying some employees less than others when their roles are comparable, even when they work at different sites in different jobs, he said. But there are the usual caveats to consider.

"As with most cases, this case was also fact specific and depended in large part on Asda's management and pay structure," Coy explained, adding that equal pay claims are relatively rare because it is a fairly complex area of law.

The court also made clear that while it may have made the comparison for equal pay between different sites much easier, its decision does not mean the claims against Asda will succeed.

"At this stage, all that has been determined is that they can use terms and conditions of employment enjoyed by the distribution employees as a valid comparison. The claimants must still show that they performed work of equal value," Justice Arden said.

Still, while the Supreme Court provided much-needed clarity on the threshold test to get claims in the door, it won't water down the potential of an employer's defense later on, according to [Ashurst LLP's](#) European employment practice head Crowley Woodford.

"This will not necessarily make a claimant's case any easier, as they will still need to prove the fundamentals of an equal pay case, but it may reduce drawn out arguments in the employment tribunal over minute differences between relevant employment terms," Woodford said.

--Editing by Joe Millis.

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