



# EMPLOYMENT TRIBUNALS

**Claimants**

**Respondent**

K [redacted] and others

Tesco Stores Limited

**In the Watford Employment Tribunal**

## ORDER

1. The Employment Tribunal will make a reference to the Court of Justice of the European Union in the form annexed to this order and asking the following questions:
  - 1.1. Is Article 157 of the Treaty on the Functioning of the European Union (TFEU) directly effective in claims made on the basis that claimants are performing work of equal value to their comparators; and
  - 1.2. If the answer to question 1 is no, is the single source test for comparability in Art. 157 distinct from the question of equal value, and if so, does that test have direct effect?
2. By reason of the reference having been made, the issue of comparability for the purposes of equal value claims is stayed. All other issues will continue to determination.

Employment Judge Manley

Watford Employment Tribunal

21 AUGUST 2019

Dated

Registered at the Court of Justice under No. <u>1125/140</u>
Luxembourg, 22. 08. 2019
Fax / E-mail: <u>po.stewin</u>
Received on: <u>22/08/2019</u>
For the Registrar Cecilia Strömholm Administrator

MA

Case No. 3304495/2018 and others

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Order sent to the parties on

22/8/19



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For the Tribunal Office

**3rd Floor, Radius House, 51 Clarendon Road, Watford, Hertfordshire, WD17  
1HP**

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**NOTES: You may apply under rule 29 for this Order to be varied, suspended or set aside.**

**IN THE WATFORD EMPLOYMENT TRIBUNAL**

**CASE NUMBER 3304495/2018 & others**

**BETWEEN**

**K & OTHERS**

**CLAIMANTS**

**-AND-**

**TESCO STORES LIMITED**

**RESPONDENT**

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**REQUEST FOR PRELIMINARY RULING OF THE COURT OF JUSTICE OF THE  
EUROPEAN UNION - ANONYMISED**

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**REFERRING TRIBUNAL**

**Name:** Employment Judge Manley, Watford Employment Tribunal

**Address:** HMCTS, Radius House, 51 Clarendon Road, Watford,  
United Kingdom, WD17 1HP

**Tel:** 0044 1923 281 750

**Email:** [watfordet@justice.gov.uk](mailto:watfordet@justice.gov.uk)

## **CLAIMANTS' REPRESENTATIVES**

### **Leigh Day Claimants**

Name: Kiran Daurka, Leigh Day

Address: Leigh Day, Priory House, 25 St John's Lane, London,  
EC1M 4LB

Tel: 0044 207 650 1267

Email: [kdaurka@leighday.co.uk](mailto:kdaurka@leighday.co.uk)

### **Harcus Claimants**

Name: Edward Parkes, Harcus Sinclair UK Limited

Address: 7<sup>th</sup> Floor, Melbourne House, 44-46 Aldwych, London, WC2B  
4LL

Tel: 0044 3995 3900

Email: [eparkes@harcus-sinclair.ltd.uk](mailto:eparkes@harcus-sinclair.ltd.uk)

### **Unrepresented Claimants**

There are five unrepresented claimants whose information has not been provided for data protection reasons in this reference. Should you require this information, please let us know.

## **RESPONDENT'S REPRESENTATIVES**

Name: Andrew Taggart, Herbert Smith Freehills LLP

Address: Exchange House, Primrose Street, London, EC2A 2EG

Tel: 0207 466 2434

Email: [Andrew.Taggart@hsf.com](mailto:Andrew.Taggart@hsf.com)

### **QUESTIONS REFERRED**

1. Is Article 157 of the Treaty on the Functioning of the European Union (TFEU) directly effective in claims made on the basis that claimants are performing work of equal value to their comparators?
2. If the answer to question 1 is no, is the single source test for comparability in Art. 157 distinct from the question of equal value, and if so, does that test have direct effect?

### **BACKGROUND**

3. All the claimants in these proceedings, at the time of this Order, numbering around 6,000, bring claims that they have not received equal pay for equal work contrary to UK domestic law set out in the Equality Act 2010 and also Article 157 of the TFEU.

4. Some of the claimants are represented by Leigh Day, solicitors, Leigh Day Priory House 25 St John's Lane London EC1M 4LB ("the Leigh Day claimants") and others by Marcus Sinclair UK Limited, 3 Lincoln's Inn Fields, Holborn, London WC2A 3AA ("the Marcus claimants").
5. The respondent is represented by Herbert Smith Freehills LLP, Exchange House, Primrose St, London EC2A 2EG.
6. Claims were first presented in the Employment Tribunal in February 2018 and continue to be presented.
7. The respondent is a UK retailer which sells amongst other things groceries, clothing and general merchandise both on-line and through approximately 3,200 retail stores, which are located throughout the United Kingdom. The respondent's retail stores vary in size from approximately 4,000 square feet in the case of smaller stores, to 185,500 square feet in the case of larger stores. Employee numbers per store range from approximately 20 in the smaller stores to approximately 700 in the larger ones.
8. The total in store workforce numbers approximately 250,000, the majority of whom are hourly paid. There are around 30 different core jobs carried out within stores, although these may vary both in terms of number and type, depending amongst other things on the size of the particular store.
9. The respondent also has a distribution division. The respondent currently relies on a distribution network of 24 distribution centres ("DCs") across England, Scotland and Wales, two of which (Washington and Newton Abbott) are operated by a third party.
10. The DCs encompass three different formats – (i) chilled and frozen foods (ii) ambient and (iii) clothing/non-food goods – and employ approximately 11,000

hourly paid employees. There are numerous different core jobs carried out in the DCs although there can also be variations in those jobs within individual DCs.

11. The claimants are hourly paid employees or former employees of the respondent who work or worked at one or more of various stores of the respondent.

12. The claims brought by the Leigh Day claimants and the Harcus claimants are the same in their material elements.

13. There are claims brought by female and by male claimants.

14. The female claimants' case is that they are entitled to compare their work to that of male comparators employed by the respondent (or by associate companies of the respondent) at one or more distribution centres ("the comparability issue"). In other words, these comparators are employed at different physical locations from the claimants, and the claimants make so-called "cross-establishment comparisons". Whether this is permissible in these cases is a principal issue.

15. On the comparability issue all claimants rely on domestic and/or EU law as permitting the comparisons to be made.

16. The Claimants' case is that they are entitled to compare themselves with comparators employed in distribution centres for the purposes of pursuing an equal pay claim because:

16.1. Under section 79(4) of the Equality Act 2010, common terms of employment apply at the stores at which the Claimants work and the distribution centres at which the comparators work, either generally or as between the Claimants and any or all of the comparators; and

- 16.2. Under Article 157 of the TFEU (and its previous incarnations), there is a single source (i.e. the Respondent) for the terms and conditions of employment of the Claimants and the comparators.
17. The Respondent denies that the Claimants can compare themselves with comparators employed at distribution centres because:
  - 17.1. Under section 79(4) of the Equality Act 2010, there are not common terms of employment; and
  - 17.2. In relation to Article 157 of the TFEU:
    - 17.2.1. The Claimants cannot rely on Article 157 because it is not directly effective in equal value claims; and
    - 17.2.2. In any event, there is not a single source for terms and conditions of employment at stores and distribution centres, as the store and distribution sides of the Respondent's business operate independently. In particular, aside from setting the overall pay budget, the Respondent has no oversight or control over setting pay at its distribution centres.
18. Both sets of female claimants claim that their work is of equal value to the work of those comparators ("the equal value issue") although the Leigh Day claimants seek to reserve their position as to whether their work has been rated as equivalent to that of their comparators under a job evaluation scheme ("JES") or is like work.
19. The male claimants bring contingent claims that depend for their success on the success of female claimants' claims in these proceedings. The male claimants claim that their work is like work, rated as equivalent or equal value to the work of those female claimants.



20. Their claims may also, though not necessarily, be cross-establishment comparisons. For example, a male claimant filling shelves may rely on a successful female claimant filling shelves in the same store where he works. This would be a like work claim. Although less likely, he may however rely on a successful female claimant working on different work in a different store. That would be an equal value cross-establishment comparison.

21. To date the Employment Tribunal has made orders for the management of these claims, in particular with a view to determining whether the female claimants' jobs are of equal value with their comparators.

22. For that purpose, the jobs to be evaluated will have to be identified, the demands of the jobs will need to be identified by producing detailed descriptions of what they involve, the Tribunal will appoint one or more independent experts to devise a JES to evaluate the roles, they will evaluate the roles, and the Tribunal will determine whether the claimants' jobs are of equal value issue following a hearing. The Tribunal rules are contained in subordinate legislation, the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"). Special rules, applicable only to EV cases, are contained in schedule 3. A full copy of the Rules is available on the government website: <http://www.legislation.gov.uk/uksi/2013/1237/contents/made> .

23. The male claimants' claims have been stayed. The comparability issue has not yet been case managed.

24. As at the date of the order for the reference, there is a real risk that the United Kingdom will exit the EU on 31 October 2019 and that from this date UK courts and tribunals will lose the power to refer questions to this Court under art. 267 TFEU.

## **LEGAL FRAMEWORK**

## National Legislation

25. The domestic legislation is the Equality Act 2010.

26. S.66, which is concerned with sex discrimination as regards contractual terms, provides as follows:

*(1) If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.*

*(2) A sex equality clause is a provision that has the following effect—*

*(a) if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;*

*(b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term.*

*(3) Subsection (2)(a) applies to a term of A's relating to membership of or rights under an occupational pension scheme only in so far as a sex equality rule would have effect in relation to the term.*

*4) In the case of work within section 65(1)(b), a reference in subsection (2) above to a term includes a reference to such terms (if any) as have not been determined by the rating of the work (as well as those that have).*

27. "Equal work" is defined by s.65 as follows:

*(1) For the purposes of this Chapter, A's work is equal to that of B if it is—*

*(a) like B's work*

*(b) rated as equivalent to B's work, or*

*(c) of equal value to B's work.*

*(2) A's work is like B's work if—*

- (a) A's work and B's work are the same or broadly similar, and*
- (b) such differences as there are between their work are not of practical importance in relation to the terms of their work.*

*(3) So on a comparison of one person's work with another's for the purposes of subsection (2), it is necessary to have regard to—*

- (a) the frequency with which differences between their work occur in practice, and*
- (b) the nature and extent of the differences.*

*(4) A's work is rated as equivalent to B's work if a job evaluation study—*

- (a) gives an equal value to A's job and B's job in terms of the demands made on a worker, or*
- (b) would give an equal value to A's job and B's job in those terms were the evaluation not made on a sex-specific system.*

*(5) A system is sex-specific if, for the purposes of one or more of the demands made on a worker, it sets values for men different from those it sets for women.*

*(6) A's work is of equal value to B's work if it is—*

- (a) neither like B's work nor rated as equivalent to B's work, but*
- (b) nevertheless equal to B's work in terms of the demands made on A by reference to factors such as effort, skill and decision-making.*

28. The domestic provisions as to comparability are contained in s.79, as follows:

- (1) This section applies for the purposes of this Chapter.*
- (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 or by an associate of 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).*

(5) *If A holds a personal or public office, B is a comparator if—*

- (a) *B holds a personal or public office, and*
- (b) *the person responsible for paying A is also responsible for paying B.*

(6) *If A is a relevant member of the House of Commons staff, B is a comparator if—*

- (a) *B is employed by the person who is A's employer under subsection (6) of section 195 of the Employment Rights Act 1996, or*
- (b) *if subsection (7) of that section applies in A's case, B is employed by the person who is A's employer under that subsection.*

(7) *If A is a relevant member of the House of Lords staff, B is a comparator if B is also a relevant member of the House of Lords staff.*

(8) *Section 42 does not apply to this Chapter; accordingly, for the purposes of this Chapter only, holding the office of constable is to be treated as holding a personal office.*

(9) *For the purposes of this section, employers are associated if—*

- (a) *one is a company of which the other (directly or indirectly) has control,*  
*or*
- (b) *both are companies of which a third person (directly or indirectly) has control.*

## **National Case Law on Section 79**

29. The interpretation of section 79 of the Equality Act 2010 was recently considered by the Court of Appeal in *Asda Stores Ltd v Brierley* [2019] 2 CMLR 18, [2019] IRLR 335. Underhill LJ (with whom Lord Sales and Peter Jackson LJ agreed) explained (in paragraphs 63 to 80) the operation of section 79(4). Asda Stores Ltd has appealed to the Supreme Court against the decision of the Court of Appeal. Permission to appeal has been granted but a hearing date for the appeal has not yet been set.
30. While the Claimant's case is that they fall within section 79(4) of the Equality Act 2010, the Respondent disputes this. Accordingly, the Claimants rely, in addition, on Article 157 of the TFEU.

## **Article 157 and Decisions of the European Court**

31. The EU legislation is art. 157 TFEU, which provides as follows:

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.*
  
2. *For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.*

*Equal pay without discrimination based on sex means:*

- (a) *that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;*
- (b) *that pay for work at time rates shall be the same for the same job.*

3. *The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.*

4. *With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.*

32. In *Lawrence v Regent Office Care Ltd* (Case C-320-00) [2003] ICR 1092, the ECJ held that, in considering whether a claimant was entitled to compare herself with a comparator, the focus should be on whether there was a single source for the terms and conditions of employment, so that there was a body responsible for the inequality and which could restore equal treatment: see paragraphs 15 to 18. The ECJ followed the same approach in *Allonby v Accrington & Rossendale College* (Case C-256/01) [2004] ICR 1327, at paragraphs 45 to 46.

### **National Case Law on Direct Effect of Article 157**

33. In paragraphs 114 to 116 of *Asda Stores Limited v Brierley*, Underhill LJ stated:

“(B) Direct Effect

114. It is of course well-established that article 157 of the TFEU and its predecessors, articles 119 and 141, afford employees a directly enforceable right to equal pay in cases where their comparators are doing

the same or similar work or work which has been rated as equivalent: that has been clear since *Defrenne*. But the authorities do not establish definitively whether the same is true in a case where the claimant's work is different from the comparator's and has not been rated as equivalent but where she claims that it is of equal value. There is a question as to the effect of the distinction articulated at para. 18 of the judgment in *Defrenne* between "discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by [article 119]", in respect of which the article has direct effect, and "discrimination which can only be identified by reference to more explicit implementing provisions of a community or national character", in respect of which it does not: some authorities, both domestic and EU, appear to say that equal value claims fall into the latter category. The authorities, and the arguments both ways, are carefully and lucidly reviewed by Kerr J at paras. 13-35 of his judgment in the EAT. He regarded the issue as difficult and held (at para. 16) that the point was not *acte clair*, observing (at para. 36) that he would have referred it to the CJEU if the parties had asked him to do so. Since they did not, however, he held (at para. 37) that the better view was that article 157 does have direct effect in an equal value case. That conclusion is in line with Lady Hale's obiter view in *North* though Kerr J does not in fact rely on it.

115. It is not necessary for us to decide this issue in order to determine the appeal, and on balance I prefer not to do so. If the point were in truth determinative my provisional view is that the right course would be to refer it to the CJEU: we are not bound to do so, since we are not the final court, but I agree with Kerr J that it is hard to say that the issue is *acte clair*, and it would simply cause delay to leave it to the Supreme Court to refer. But it would not be right to make a reference where the point is not determinative; and it will achieve little of value for us to embark on a further elaborate analysis with a view to deciding the point at this level where only a reference will achieve certainty.

116. I do not think that our declining to pick up this particular baton will cause any practical problems for tribunals. Although it is possible to conceive of cases where the issue will be crucial – essentially, where the requirements of section 79 (4) (c), even as I have construed it, are not satisfied on the facts of the particular case – it remains to be seen whether such cases arise in practice; and if they do the issue of direct effect is determined at EAT level by Kerr J's decision (and reinforced by Lady Hale's judgment in *North*). I am prepared to say, however, that despite the undoubted difficulties presented by some of the authorities, my provisional view at the end of the argument was that Kerr J's conclusion was right.”

34. In the Employment Appeal Tribunal (EAT) in *Asda Stores Limited v Brierley* [2018] ICR 384 Kerr J concluded (in paragraph 36) that “[t]he better view is that article 157 TFEU is directly effective in this case, and the claimants can rely on it.” However he acknowledged that the “analysis is not perfect”, that this issue was not “act éclair” and that he “would willingly have referred the point to the CJEU if the parties had enthusiastically invited me to do so.”

35. Accordingly the current position is that:

35.1. The EAT has held that Article 157 of the TFEU is directly effective in equal value cases. This conclusion is binding on Employment Tribunals, but not on any more senior court or Tribunal in the United Kingdom.

35.2. However, both the EAT and Court of Appeal have stated that this issue is not straightforward and would be suitable for a reference to the CJEU.

### **UK Withdrawal from the European Union**

36. S.6(1) of the European Union (Withdrawal) Act 2018 provides, on a date to be appointed, as follows:

(1) A court or tribunal—



*(a) is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court, and*

*(b) cannot refer any matter to the European Court on or after exit day.*

37. The EU Withdrawal Agreement provides by art. 86 as follows:

*Pending cases before the Court of Justice of the European Union*

*1. The Court of Justice of the European Union shall continue to have jurisdiction in any proceedings brought by or against the United Kingdom before the end of the transition period. Such jurisdiction shall apply to all stages of proceedings, including appeal proceedings before the Court of Justice and proceedings before the General Court where the case is referred back to the General Court.*

*2. The Court of Justice of the European Union shall continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom made before the end of the transition period.*

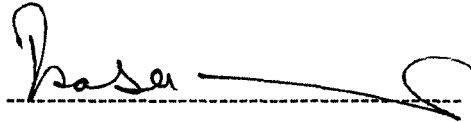
### **REASONS FOR THE REFERENCE TO THE EUROPEAN COURT**

38. A reference is necessary in this case because there is uncertainty as to whether Article 157 has direct effect in equal value cases. While this issue will only arise in cases where claimants are unable to rely on section 79 of the Equality Act 2010, there are currently tens of thousands of equal pay claims in the United Kingdom in the supermarket sector where:

38.1. Claimants and comparators are employed by the same employer but at different establishments;

38.2. The employers are relying on the argument that the claimants and comparators do not fall within section 79(4) of the Equality Act 2010;

- 38.3. The claimants are relying, in the alternative to section 79(4) of the Equality Act 2010, on the direct effect of Article 157; and
- 38.4. UK courts and Tribunals will lose the right to refer questions to the CJEU on the date that the UK leaves the European Union.

A handwritten signature in black ink, appearing to read 'Manley', written over a horizontal dashed line.

Employment Judge Manley  
Watford Employment Tribunal

21 August 2019.

Dated