



# EMPLOYMENT TRIBUNALS

Brierley and others v. Asda Stores Ltd

## PRESS SUMMARY

### Status of this summary

1. This document is intended to assist the media and the public to understand the tribunal's judgment. It does not form any part of the reasons for the tribunal's decision. Written reasons accompany the reserved judgment, which is published separately. That is the only authoritative record of the reasons.

### The claims

2. This judgment is part of a long-running dispute about equal pay. Workers in Asda's stores, who are mostly women, claim to be entitled to be paid the same as workers in Asda's depots, who are mainly men. Most of the store workers are represented by the law firm Leigh Day. The men who work in the depots are called "comparators". The Supreme Court has already decided they are appropriate comparators in principle.
3. A woman is not entitled to the same terms and conditions as a comparator unless her work is equal to his work. One of the ways in which work can be equal is if the work is of equal value.
4. Section 65(6) of the Equality Act 2010 provides that,  
"A's work is of equal value to B's work if it is...(b) equal to B's work in terms of the demands made on A by reference to factors such as effort, skill and decision-making."
5. Where there is a dispute about equal value, the tribunal must follow the Equal Value Rules of Procedure. These rules set out three stages. At Stage 1, the tribunal ordered the instruction of independent experts. Stage 2 involved finding the facts that were relevant to the equal value question. The Stage 2 judgments were sent to the parties in 2020 and 2021.

### Lead claimants, comparators and iterations

6. There are many different roles in an Asda store. The comparator roles in the depots had the same job title as each other (Warehouse Colleague), but, in reality, did a wide variety of different activities. The working environments were different.
7. At an early stage in the litigation, the claimants and Asda cooperated to select "lead claimants" and comparators. The purpose was to identify a sample of roles that were representative of the work of the claimant and comparator population as

a whole. The tribunal's findings on equal value for the lead claimants and comparators will now be rolled out across the wider population.

8. There are 14 lead claimants, all with different roles, working at different stores. They include Ms Susan Ashton (Checkout), Ms Judith Forrester (Edible Grocery), Ms Ellen Hills (Personal Shopper), Miss Suzanne Gibbins (Section Leader), and Ms Adrienne Hutcheson (Warehouse).
9. There are 17 comparators. They worked in three depots: Skelmersdale Chilled Distribution Centre, Didcot Ambient Distribution Centre and Lutterworth Integrated Distribution Centre. At Lutterworth were Mr Malcolm Opelt, who picked cases, and Mr Andrew Haigh, who supervised a team. They were respectively found to have the least demanding and the most demanding work of all the comparators. In between were roles that involved operating the larger and more complicated machinery. One of these roles was held by Mr Peter Ballard, who drove a Counter-Balance Truck at Didcot.
10. Some of the roles were assessed in different "iterations" to reflect additional features of their work that affected how demanding their roles were.

### **The final equal value hearing**

11. The purpose of the final equal value hearing was to determine the equal value question in the light of the facts found at Stage 2. All the lead claimants (in different iterations) were compared to all the comparators in their iterations.
12. The tribunal consisted of Employment Judge Horne and two non-legal members.
13. The tribunal was assisted by three independent experts, three experts instructed by Leigh Day, and three experts instructed by Asda. Of these, six gave oral evidence. The hearing lasted 58 days, and mostly consisted of the tribunal hearing evidence from the experts.
14. The issues in the case included,
  - (a) How to design a fair scheme for assessing the demands of the roles;
  - (b) What factors should be used to capture those demands;
  - (c) How the different levels of demand should be defined for each factor;
  - (d) Whether it was appropriate to use a "modifier" to shade small differences in demand;
  - (e) What the relative demands were of each role iteration under each factor; and
  - (f) How the output of the scheme should be converted into a determination of the equal value question.

### **The judgment**

15. Ms Forrester and Ms Hills failed to establish that their work was of equal value to any of the comparators' work.
16. Miss Gibbins' work was found to have been of equal value to all the comparators.
17. For all the remaining lead claimants, the result was a mixed picture. They all successfully showed that their work was of equal value to Mr Opelt's work. In Ms Ashton's case, Mr Opelt was the only comparator against whom she succeeded. As the claimant roles increased in demand, they established equal value against

more comparators. Ms Hutcheson's work was found to have been of equal value to Mr Ballard's work.

18. In broad terms, the tribunal arrived at these conclusions using the structure of the Asda experts' scheme. The independent experts' scheme was difficult to apply in practice. The Asda experts were largely transparent in their opinions about the relative demands of the roles. The tribunal disagreed with many of these opinions, but were able to restore fairness under most factors by making amendments to the Asda scheme. Some demands had not been reliably assessed by any of the experts. Where this occurred, the tribunal either created its own factor scheme, as best it could, using the basic architecture of the Asda experts' scheme, or compared relevant roles directly by reference to the unassessed demand.

**Next steps**

19. The tribunal's findings must now be translated across the wider population. Asda has an opportunity to defeat the claims by relying on the "material factor defence" in section 69 of the Equality Act 2010. This will be the subject of a further hearing.

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