Hilary Term

[2021] UKSC 10

On appeal from: [2019] EWCA Civ 44

JUDGMENT

Asda Stores Ltd (Appellant) vBrierley and others (Respondents)

before

Lord Reed, President

Lord Hodge, Deputy President

Lord Lloyd-Jones

Lady Arden

Lord Leggatt

JUDGMENT GIVEN ON

26 March 2021

Heard on 13 and 14 July 2020

Appellant	Respondents
Lord Pannick QC	Andrew Short QC
Ben Cooper QC	Naomi Cunningham
Hollie Higgins	Paul Livingston
(Instructed by Gibson Dunn & Crutcher LLP)	(Instructed by Leigh Day)

LADY ARDEN: (with whom Lord Reed, Lord Hodge, Lord Lloyd-Jones and Lord Leggatt agree)

Overview of this judgment

1.
The appellant, Asda Stores Ltd ("Asda"), is a major supermarket retailer in this country. The respondents ("the claimants") are employed in its retail business. They are predominantly women. The claimants bring equal pay claims in the proceedings in which this appeal is brought. They seek compensation on the basis that in the six years prior to their inception of proceedings, starting with the claim of Mr A Bush in 2014, they received less pay than a valid comparator for work of equal value to that done by the comparator.

2.
Claimants who bring equal pay claims must overcome a number of hurdles. In particular, under the legislation governing equal pay (explained in more detail under Domestic legislative framework in paras 8 to 17 below), claimants have to choose a valid comparator who is a real (and not hypothetical) person employed by the same, or an associated, employer. Under the “same establishment” requirement, that comparator must be employed either at the same establishment as the claimants, or at another establishment. (We are not asked to consider whether the word “establishment” conveys anything more than a location at which employees work.) However, if the claimants choose a comparator employed at another establishment and seek thereby to make what is called a “cross-establishment comparison”, the comparator must be employed on “common terms” (not “same” terms). Parliament has not provided a definition of “common terms” and the courts have therefore had to find the meaning of this expression intended by Parliament: see Three leading cases elucidating the statutory requirement for “common terms” in different situations, paras 19 to 33.

3.
The claimants rely on a cross-establishment comparison with employees employed at Asda’s distribution depots (“the distribution employees”). These employees are predominantly men. Asda contends that they are not employed on “common terms” within the meaning of the legislation. The retail and distribution locations are separate from one another and the employees at the different types of location, retail and distribution employees respectively, have different terms and conditions of employment. For further details on Asda’s structure, see The growth of Asda’s business and the determination of the remuneration of retail and distribution employees, paras 34 to 36 below.

4.
The question whether the retail employees could use the distribution employees as comparators was tried as a preliminary issue. Asda had applied for the dismissal of the claimants’ claims on the basis that this issue should be determined against the claimants. The claimants succeeded on this issue before the employment tribunal (Employment Judge Tom Ryan). Asda unsuccessfully appealed first to the Employment Appeal Tribunal (Kerr J) (“the EAT”) and then to the Court of Appeal (Lord Sales JSC, Underhill VP and Peter Jackson LJ), and now appeals to this court.

5.
The essential question on this appeal is therefore whether the common terms requirement for the purposes of equal pay legislation was satisfied. The passage below entitled Three leading cases elucidating the statutory requirement for “common terms”, to which I have already referred, will show that what is required is simply (1) that the terms and conditions of employment of the comparators must be broadly the same at their establishment and the claimants’ establishment, and (2) that, if there are no employees of the comparator’s group at the claimants’ establishment and it is not clear on what terms they would have been employed there, the court or tribunal applies what is known as the North hypothetical and considers whether the comparator’s group would have been employed on broadly similar terms to those which they have at their own establishment if employed on the same site as the claimants.

6.
The North hypothetical provides the short and direct answer in this case. For the detailed reasons given in this judgment, I conclude that the claimants were entitled to succeed on the North hypothetical, and that accordingly this appeal should be dismissed. It is unnecessary to consider whether the claimants could succeed (as the employment tribunal held) on any other basis or on the basis of EU law, which imposes a test of “single source” where the common terms requirement is not

met. For these reasons, as amplified below, I would dismiss this appeal. That said, there was a substantial amount of evidence led in the employment tribunal which was not required. The proceedings became markedly over-complicated. This judgment therefore provides guidance on future case management of issues raised by the common terms requirement involving a cross-establishment comparison: see Implications for future case management by employment tribunals, paras 68 to 71 below.

7.
This is clearly a very substantial case for Asda. At the time of the hearing before the employment tribunal in June 2016, Asda had around 630 retail stores and employed approximately 133,000 hourly-paid retail employees. At the date of the agreed statement of facts and issues prepared for this appeal, there were some 35,000 claimants. However, my conclusion, agreed by the other Justices hearing this appeal, does not mean that the claimants' claims for equal pay 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. Asda will be able to rely on any defence open to it, including (if appropriate) the statutory defence that the difference in pay was due to a genuine material factor which was not itself discriminatory on the grounds of sex.

Domestic legislative framework

8.
The current primary legislation is the Equality Act 2010 ("the EA 2010"). The claims in issue on this appeal were brought under this Act but had also to be brought under the earlier legislation, namely the Equal Pay Act 1970 ("the EPA 1970"), as they related to periods when that Act was in force.

9.
The preamble to the EPA 1970 describes the Act as having a clear and single purpose: "to prevent discrimination, as regards terms and conditions of employment, between men and women."

10.
The long title to the EA 2010 covers equality law in many areas and reflects the development of equality law since 1970. The EA 2010 does not simply consolidate and modernise the earlier legislation on equal pay. It made some changes and introduced some new positive duties as well. The long title reads:

"An Act to make provision to require Ministers of the Crown and others when making strategic decisions about the exercise of their functions to have regard to the desirability of reducing socio-economic inequalities; to reform and harmonise equality law and restate the greater part of the enactments relating to discrimination …; to enable certain employers to be required to publish information about the differences in pay between male and female employees; … to increase equality of opportunity; … and for connected purposes."

11.
Thus, for example, in the context of equal pay there are now positive duties on government ministers and also on employers. There are steps that employers have to take to deter differences in pay on the grounds of sex discrimination. Employers who have lost equal pay claims must in certain circumstances carry out equal pay audits if ordered to do so by the employment tribunal (section 139A of the EA 2010 as amended by the Enterprise and Regulatory Reform Act 2013). From 2017, organisations employing 250 or more employees have been required to publish and report specific

figures about their gender pay gap (Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 made under sections 78 and 207 of the EA 2010). At a wider level, in the public sector there is also now the general public sector equality duty on ministers of the Crown, Scottish ministers and certain public authorities to have regard to the desirability of exercising their functions so as to reduce socio-economic disadvantage (see section 1 of the EA 2010). This case represents this Court's first opportunity to consider the equal pay legislation in the context of the EA 2010. The Court is entitled to take account of the imposition of the positive duties described in this paragraph as part of the wider context in which it must interpret and apply the equal pay legislation. They show the determination of the legislature to make equal pay legislation and litigation effective and that determination is an aid to the interpretation of the legislation. The EA 2010 is inconsistent with any notion that Parliament thought it was time to take its foot off the pedal. The EA 2010 was preceded by a very careful and thorough review of equality law and there was wide public consultation. In the circumstances, there is no longer any need (if there was) to explore the provisions cautiously as might be the case if the provisions were novel. It is time to apply the provisions with confidence and unswervingly according to their terms, with Parliament's purpose clearly in mind.

12.
Section 1(1) of the EPA 1970 provides that a woman's contract of employment shall be deemed to include an equality clause. Subsection (2) sets out the effects of the equality clause in relation to like work, work rated as equivalent and work of equal value. Section 1(2) states the effect of subsection (1):

"(2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the 'woman's contract'), and has the effect that -

...

(c) where a woman is employed on work which, not being work in relation to which paragraph (a) or (b) above applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment -

(i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefitting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term."

13.
Sections 64, 65(1) and 66(1) and (2) of the EA 2010 make like provision.

14.
The two statutory provisions that contain the same and common terms requirements are section 1(6) of the EPA 1970 and section 79(4) of the EA 2010.

15.
Section 1(6) of the EPA 1970 (as amended and set out in Schedule 1, paragraph 1 to the Sex Discrimination Act 1975) provided that:

"(6) Subject to the following subsections, for purposes of this section -

(a) ‘employed’ means employed under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly;

...

(c) two employers are to be treated as associated if one is a company of which the other (directly or indirectly) has control or if both are companies of which a third person (directly or indirectly) has control,

and men shall be treated as in the same employment with a woman if they are men employed by her employer or any associated employer at the same establishment or at establishments in Great Britain which include that one and at which common terms and conditions of employment are observed either generally or for employees of the relevant classes.”

16.
Section 1(6) of the EPA 1970 has now been replaced by section 79(4) of the EA 2010. It is convenient to set out section 79(1) to (4) and (9) as subsection (9) deals with the meaning of associated employer. I will make only one passing reference in this judgment to an associated employer as they do not arise in this case. Section 79(1) to (4) and (9) provide:

“**79. Comparators**

(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 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).

...

(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.”

17.
So, for the period from 1 October 2010, section 79 of the EA 2010 provides that a claimant, A, can compare her pay with comparator, B, who works at a different establishment if:

“common terms apply at the establishments (either generally or as between A and B).” (Section 79(4)(c))

18.

Asda no longer pursues its case, which was considered by the Court of Appeal, that the substitution of the words “or as between A and B” in section 79(4)(c) brought about a change in the meaning of the expression “or for employees of the relevant classes” at the end of section 1(6) of the EPA 1970. I incline to the view that this concession was correctly made, for the reasons explained by the Court of Appeal, but do not express a concluded view, since the Court did not in the circumstances hear argument on the point.

Three leading cases elucidating the statutory requirement for “common terms” in different situations

19.
As already mentioned, Parliament did not define the expression “common terms” and the courts have set about interpreting it to give effect to Parliament’s intention and applying it in various situations. In my judgment, a review of the three leading cases shows that the Appellate Committee of the House of Lords and this Court have progressively elucidated and applied the expression “common terms” to different sets of circumstances to ensure that the common terms requirement achieves a simple, single aim. That single aim is to enable claimants to treat as comparators employees at different establishments if their terms and conditions would have been substantially the same if they had been employed at the same establishment as the claimants. The result is to eliminate from cross-establishment comparisons comparators from different establishments whose terms and conditions of employment are not relevantly comparable with those of the claimants because those terms and conditions cannot be transposed either in fact or in theory to the claimants’ establishment. Where there are no employees of the comparator’s class at the claimants’ establishment, it boils down to asking the simple question: would the comparator have been employed on the same or substantially the same terms if he had been employed in the same role at the claimants’ establishment? This is the appropriate question because, if the claimants and the comparator had all been employed at the claimants’ establishment, there would have been no requirement to show common terms, and Parliament cannot have intended to require compliance with a requirement in cross-establishment situations that would not have been required if the parties had all worked at the same establishment.

20.
I will examine the principal cases, which are Leverton v Clwyd County Council[1989] AC 706; British Coal Corpn v Smith[1996] ICR 515 and Dumfries and Galloway Council v North[2013] ICR 993. They were all cases under the EPA 1970, and so they concerned events which took place before the EA 2010 came into effect.

21.
In Leverton, a female nursery nurse made an equal value claim using male comparators employed by the same employer in different occupations at other establishments. Both the claimant and the comparators were employed under the same collective bargaining agreement known as the “Purple Book”. The Appellate Committee of the House of Lords determined that there was jurisdiction to hear the equal value claim but that the appeal should be dismissed because the employer could show that there was a genuine material factor justifying the difference in treatment.

22.
Lord Bridge considered the common terms requirement. He rejected the view of the majority of the Court of Appeal that the comparison was between the claimants’ terms and those of the comparator. The comparison was between the terms observed at the claimants’ establishment and those of the comparator (p 745B), and applicable to all the employees at the relevant establishments ie “generally”

or as between the relevant classes of employees. “Common terms” observed generally at different establishments necessarily contemplates terms and conditions applicable to a wide range of employees whose individual terms will vary greatly inter se (p 745E-F). He held that the situation where “terms and conditions of employment observed at two or more establishments” were governed by the same collective bargaining agreement was the paradigm case where there were common terms and conditions as defined by section 1(6) of the EPA 1970 (p 745F). He held that:

“So long as industrial tribunals direct themselves correctly in law to make the appropriate broad comparison, it will always be a question of fact for them, in any particular case, to decide whether, as between two different establishments, ‘common terms and conditions of employment are observed either generally or for employees of the relevant classes.’” (p 746G)

23.
Lord Bridge further held that, even if section 1(6) was ambiguous and capable of being read as requiring the terms of the comparators and claimants to have a broad similarity, he would reject that interpretation on the grounds that such an exercise would not promote the purpose of the legislation which was aimed at eliminating discriminatory differences between terms and conditions of employment (pp 745G to 746A). Parliament could not have intended the claimant to have to show “an undefined substratum of similarity” between the terms of employment of the claimant and the comparator in the cross-establishment comparison situation. The other members of the Committee agreed with Lord Bridge, other than Lord Templeman who agreed in the result but did not deal with the common terms requirement.

24.
In the next case, British Coal Corpn v Smith, the terms of the claimants and the comparators were governed by different collective bargaining agreements. In that case, certain cleaners, canteen manageresses and canteen workers sought to compare their pay with that of surface mineworkers at their employer’s mines who (in the relevant cases) worked at separate establishments from the claimants’ place of work. The terms and conditions of employment of the surface mineworkers were derived from a collective bargaining agreement, and while it is not wholly clear it appears that those of the claimants were derived from a series of national agreements. The industrial tribunal found that the claimants and the comparators were employed on common terms. Lord Slynn, with whom the other members of the Appellate Committee agreed, held that it was a question of fact for the tribunal whether the terms and conditions of employment were common, and the Court of Appeal should not have interfered with the tribunal’s determination of that issue. Furthermore, it was agreed that the terms and conditions of employment of the claimants were common terms even though they were employed at different establishments. What had to be shown was that the terms and conditions of employment of the comparators who worked at the same establishment as the claimants and at different establishments were common terms. He added that if there were no comparators at the claimants’ place of work “then it has to be shown that like terms and conditions would apply if men were employed there in the particular jobs concerned” (p 526F-G). Moreover, adopting a purposive approach, he held that it was sufficient to constitute “common terms” that the terms were sufficiently similar for a fair comparison to be made (p 527A-D). It was not necessary that they should be identical terms and conditions (p 527E).

25.
In the North case, nursery nurses and learning assistants employed by the local authority on terms in one collective bargaining agreement claimed that other employees of the local authority, such as refuse collectors, refuse drivers and leisure pool attendants, employed under another collective

bargaining agreement, were comparators. The two groups of employees worked at different establishments, so no persons within the comparator group were employed at the claimants' establishment and so the words of Lord Slynn were engaged, namely that "like terms and conditions would apply if men were employed there in the particular jobs concerned" (see the preceding paragraph). The issue was how this was to be achieved. The EAT (Lady Smith) considered that in that situation the claimants had to show that the employment of the comparators at their establishment was a realistic possibility. In a later case, City of Edinburgh Council v Wilkinson[2010] IRLR 756, the EAT (Lady Smith) had reached a different conclusion, with which the Inner House of the Court of Session agreed on an appeal in North (2011 SLT 203). This Court agreed with the Inner House on this point. Lady Hale, with whom the other members of this Court, Lord Hope, Lord Wilson, Lord Reed and Lord Hughes, agreed, held that there was nothing in the statute to require it to be shown that the comparator had a realistic possibility of employment at the claimants' establishment or even that it was feasible that he should be located there. Likewise, it was inappropriate to consider whether the terms and conditions of employment would then be adjusted: it followed that the Inner House should not have interfered with the employment tribunal's decision that the core terms and conditions in the comparator's collective bargaining agreement would continue to apply by going on to consider any consequential variations. These steps were unnecessary because the purpose of the "common terms" requirement in section 1(6) of the EPA 1970 was merely to ensure that employees at establishments of the same employer whose terms and conditions of employment were genuinely different for geographical or historical reasons were not used as comparators. The exercise required to be performed was a purely hypothetical exercise of asking whether, assuming that the comparator was employed to do his present job in the claimants' establishment, the current core terms and conditions would apply. The exercise has since the North case become known as the "North hypothetical".

26.
Lady Hale summarised the principles to be drawn from the Leverton and British Coal cases as follows:

"12. The principles to be derived from these two cases are therefore plain. First, the 'common terms and conditions' referred to in section 1(6) are not those of, on the one hand, the women applicants and, on the other hand, their claimed comparators. They are, on the one hand, the terms and conditions under which the male comparators are employed at different establishments from the women and, on the other hand, the terms and conditions under which those male comparators are or would be employed if they were employed at the same establishment as the women. Second, by 'common terms and conditions' the subsection is not looking for complete correspondence between what those terms are, or would be, in the woman's place of work. It is enough that they are, or would be, broadly similar.

13. It is also plain from the reasoning of both Lord Bridge in the Leverton case [1989] ICR 33 and Lord Slynn in the British Coal Corpn case [1996] ICR 515 that it is no answer to say that no such male comparators ever would be employed, on those or any other terms, at the same establishment as the women. Otherwise, it would be far too easy for an employer so to arrange things that only men worked in one place and only women in another. This point is of particular importance, now that women are entitled to claim equality with men who are doing completely different jobs, provided that the women are doing jobs of equal value. Those completely different jobs may well be done in completely different places from the jobs which the women are doing."

27.
At paras 30 and 34 of her judgment, Lady Hale explained that the fact that male and female workers had to work at different establishments did not bar an equal pay claim. Thus at para 30, she held:

“As Lord Slynn had recognised in British Coal Corpn v Smith[1996] ICR 515, the object of the legislation was to allow comparisons to be made between workers who did not and never would work in the same workplace. An example might be a manufacturing company, where the (female) clerical workers worked in an office block, whereas the (male) manufacturers worked in a factory.”

28.
Lady Hale explained the limited purpose of the same employment test in section 1(6) of the EPA 1970:

“35. In the fourth place, it is not the function of the ‘same employment’ test to establish comparability between the jobs done. That comparability is established by the ‘like work’, ‘work rated as equivalent’ and ‘work of equal value’ tests. Furthermore, the effect of the deemed equality clause is to modify the relevant term of the woman’s contract so as not to be less favourable than a term of a similar kind in the contract under which the man is employed or to include a beneficial term in her contract if she has none (section 1(2)(a), (b) or (c) as the case may be). That modification is clearly capable of taking account of differences in the working hours or holiday entitlement in calculating what would be equally favourable treatment for them both. Moreover, the equality clause does not operate if a difference in treatment is genuinely due to a material factor other than sex (section 1(3)). The ‘same employment’ test should not be used as a proxy for those tests or as a way of avoiding the often difficult and complex issues which they raise (tempting though this may be for large employers faced with multiple claims such as these). Its function is to establish the terms and conditions with which the comparison is to be made. The object is simply to weed out those cases in which geography plays a significant part in determining what those terms and conditions are.”

29.
The present case is the first case involving a cross-establishment comparison where the claimants and the comparators’ terms and conditions were not fixed on both sides by collective bargaining agreements: the claimants’ terms and conditions of employment are not governed by a collective bargaining agreement. Lord Bridge envisaged that the presence of a collective bargaining agreement would be a paradigm but not the sole situation in which a cross-establishment comparison could be made. It follows from North that the same tests apply, and that, where the North hypothetical test is applied, it needs to be shown that, on the hypothesis that the comparators’ employment is at the claimants’ establishment and vice versa, the terms which would be observed at the comparators’ and claimants’ establishments are broadly similar, but not necessarily identical. Moreover, Asda does not suggest that the North test is not engaged in this way.

30.
In each of these three cases, the Appellate Committee and this Court adopted a robust, purposive approach. These cases further show that there can be “common terms” not only where the claimants and the comparators are employed under the same collective bargaining agreement but also where they are employed under different collective bargaining agreements.

31.
In the Court of Appeal in this case, Underhill LJ, who gave the leading judgment with which Lord Sales and Peter Jackson LJ agreed, envisaged that it was not always necessary to apply the North hypothetical in a cross-establishment comparison. The employment tribunal may be satisfied that there are common terms without the need to apply the North hypothetical but it can be applied where it is helpful to do so:

“68. Third, common terms apply at X and Y not only where they apply to actual employees in the relevant classes working there but where they would apply, even if a manual worker would never in

practice be employed at X or a cleaner at Y. That is, as I have said, implicit in Leverton but it is explicitly confirmed in Smith and North: see paras 42 and 49 above. This was described in the ET and the EAT as 'the North hypothetical': that is not really accurate, because the point pre-dates North, but I will adopt the label for present purposes. It is important to understand the role of the North hypothetical. The fact that if a manual worker were employed at X he would enjoy the same terms as B is a consequence of the fact (if established) that the same terms apply for manual workers irrespective of where they work: it is not the test as such. Considering the North hypothetical is a potentially useful thought-experiment, but it will often be possible to answer the question whether common terms apply, even if no-one in B's class is employed at X, without resort to it: it was not considered in Leverton, because it was enough to point to the fact that the Purple Book applied to all the council's employees wherever they might be employed."

32.
I agree. It is not necessary for an employment tribunal to apply the North hypothetical if on the facts it is satisfied that there were common terms applying either "generally" or as between the relevant classes of employees (see section 1(6)). The North hypothetical is then unnecessary.

33.
It is convenient next to explain briefly the growth of Asda's business and the way in which it fixed the remuneration of retail and distribution employees. I will then turn to the way in which (so far as relevant) the tribunals and the Court of Appeal considered the common terms requirement in this case.

The growth of Asda's business and the determination of the remuneration of retail and distribution employees

34.
In the present case, Asda was formed in 1965 as a result of the merger of two small retail undertakings in Yorkshire. Since 1999, Asda has been a wholly-owned subsidiary of Walmart Inc, a US retailer. Asda's main business is its retail operation. Until the late 1980s, suppliers would typically deliver stock directly to retail stores. However, beginning in 1988, Asda began to establish its own centralised distribution operation. In the early years, the operation of most of Asda's distribution depots was outsourced to third party specialists, though, over time, it has gradually taken over the operation of most of its depots itself. As at the date of the hearing before the employment tribunal, Asda owned and operated 24 distribution depots and employed approximately 11,600 hourly-paid distribution employees. The distribution centres are on separate sites from those on which Asda's retail operation takes place.

35.
The terms and conditions of Asda's employees depend on the type of establishment at which they work. Retail employees are employed on retail terms. It is necessary to achieve consistency between employees on the same type of site. Distribution employees are employed on distribution terms: these were originally inherited from the contractors who provided supply services to Asda before it took the supply function in-house. Thereafter those terms are set by different processes. It is common ground that the pay is less favourable in retail than in distribution and that some other terms are less favourable in retail than in some depots.

36.
Asda's executive board oversaw the separate processes by which terms of employment were set for retail and distribution functions respectively. The remuneration of the two groups of employees is

arrived at in different ways. The retail employees are, like other employees, treated as one of the groups with claims on the pot available for increases in wages. The remuneration of the distribution employees, however, is arrived at by collective bargaining. Asda has entered into collective bargaining agreements with the GMB to deal with their remuneration in this way. This process was therefore conducted separately and independently of the systems for fixing the wages of other employees, though in all cases the amount arrived at had to be within the due proportion of the overall pot allocated for their wage increases. It appears that each distribution depot was treated separately for wage negotiations. From 2012 Asda had a national collective bargaining agreement with the GMB for all distribution depots except Didcot. However, as a result of a concession made at trial before the Employment Tribunal (and recorded at para 82 of the judgment of Underhill LJ) no variations in terms and conditions between different depots at the time when each depot negotiated its own terms would affect the outcome of the cross-establishment comparison if that simply requires a broad comparison to be made. Lord Pannick made a brief suggestion that the fact that there were differences as between depots might possibly be of some practical importance but with respect it is too late for that point to be taken on this preliminary issue.

Resolution of the common terms requirement by the employment tribunal and the Court of Appeal in this case

37.
The parties asked the employment tribunal to determine all issues relevant to the preliminary issue. The employment tribunal accordingly reached conclusions on the common terms requirement including the North hypothetical. It held that both were satisfied. As regards common terms, the Court of Appeal held that the employment tribunal asked the wrong question. Instead of making findings about whether the terms enjoyed by the distribution employees were the same at the depots and at the claimants' establishments, the employment tribunal performed an elaborate exercise of comparing on a line by line basis the specific terms and conditions of employment of the distribution employees on the one hand and the retail employees on the other hand (decision, para 99). Furthermore, since none of the distribution employees were employed at the retail employees' site, the employment tribunal should have simply applied the North hypothetical. The Court of Appeal held that this was the dispositive question (per Underhill LJ at para 88).

38.
Applying the North hypothetical, the employment tribunal found that the distribution employees would have been employed on substantially the same terms if they had been employed at the claimants' site, and that they would not have received the retail employees' terms (decision, para 241).

39.
The employment tribunal decided the North hypothetical in favour of the claimants. To do this, they had to resolve a conflict of evidence. The evidence filed on behalf of Asda drew a distinction between the position if the transferred employees were doing their usual work and if they were doing the work of the other group:

"117. Both Mr Stansfield [the Vice-President of Asda responsible for the distribution operations] and Mrs Tatum [Executive People Director of Asda] were asked in evidence what would be the position in the event of Distribution employees, however unlikely that might be, performing Distribution work in stores. Both clearly answered that if the Distribution employees were carrying out Distribution work they would be paid the rate for the job they were actually doing. (Mr Stansfield, TD2/128/6-17; Mrs

Tatum, TD3/72/21-73/120). Both witnesses also maintained their primary position that Retail terms would apply to Distribution employees deployed to work in stores and Distribution terms to Retail employees deployed to work in depots."

40.
The employment tribunal proceeded on the basis that there was no reason to make any assumption about the distribution employees working in the retail areas of the stores' sites. It gave the following reasons for preferring the claimants' case on the issue whether the distribution employees would continue to be employed on the same terms as those on which they were employed at the distribution depots:

"225. The respondent's reason for having standardised employment terms in Retail is because homogeneity is a critical characteristic of the stores and customers must see the different stores as part of the same brand so operations are simplified and coordinated centrally. …

239. Neither am I persuaded that the homogeneity argument is of great weight here. Recognising that this is a hypothetical comparison it is a postulation that a depot worker is carrying out his depot work although located at a store. It does not seem to me that that necessarily means that it has to be postulated that he is carrying out that work in the customer facing part of the store. Indeed, recognising the factual hypothesis is inherently unrealistic, it seems to be much more likely that depot workers doing Distribution work would not be in physical proximity to Retail staff and customers. I therefore conclude that homogeneity is unlikely to be a safe basis for concluding that terms would change particularly in view of the evidence of Mrs Tatum and Mr Stansfield that Asda would pay the rate for the job that was being done.

240. I agree that the temporary redeployment of depot workers into stores, or hypothetically vice versa is not properly comparable. It provides some slight support for the claimants' case. I do not consider that Mr Short's attempt to construct a hypothetical depot in a Retail car park is fatal to the claimants' argument.

241. In my judgment greater support is derived from the fact that the respondent operates what appear to be more favourable terms for the depot workers and it is inherently unlikely that depot workers would be willing to see those extended to Retail employees if hypothetical relocation of Retail employees occurred in that direction and equally unlikely that depot workers would be willing to give up their terms if there were hypothetical relocation of them into stores."

41.
On this appeal, Asda challenges these factual findings as being against the weight of the evidence.

Asda's submissions on this appeal and my reasons for rejecting them

42.
Having set out the background to the arguments on this appeal, I can now set out the principal arguments on this appeal succinctly with my answers to them.

43.
On behalf of Asda, Lord Pannick submits that the same employment test was a restriction imposed by Parliament to protect the interests of employers from costly equal pay claims. In Leverton, discussed above at paras 20 to 23, Lord Bridge held: "There may be perfectly good geographical or historical reasons why a single employer should operate essentially different employment regimes at different establishments." (p 746C). Lord Bridge gave the example of an employer with two establishments, one

in London and one in Newcastle, which provided different rates of pay, presumably because of the difference in cost of living. This Court noted but did not enlarge on this example in North.

44.
Mr Stansfield explained in his evidence that Asda's distribution and retail operations are fundamentally different. For instance, the distribution operations are not consumer-facing. They "evolved differently over time; operate in separate industries; have different objectives; are located in markedly different physical environments; demand different skill-sets; are subject to varied regulation and, most importantly, have distinctly different functions" (witness statement para 24). Asda sees its distribution operations as ancillary to its retail stores. The operation of those stores constitutes its principal business.

45.
On Lord Pannick's submission, the presence of different employment regimes was the end of the matter so far as common terms was concerned. I can deal with this point relatively shortly. It is clear that Lord Bridge did not go that far: he continued after the sentence already cited at para 43 above by saying that "In such cases", ie if there were good reasons for having different employment regimes, then the common terms requirement would defeat the equal pay claims. The common terms requirement is only a threshold test and thus not a test to be used to exclude the possibility of a case where despite the presence of different establishments there is sufficient commonality of terms to mean that the claim should go to the next stage. As explained, the North hypothetical is now one way in which a sufficient degree of commonality can be achieved.

46.
Moreover, it would be surprising if equal pay claims could be stopped in limine simply because the comparators were employees of predominantly one sex who were located in a separate establishment and had had the benefit of a collective bargaining agreement, negotiated on behalf of that particular group of employees alone. It is obvious that it may have come about with their interests in mind and without reference to the position of other employees of the other sex at a different establishment. As Mr Short QC, for the claimants, points out, the need to find common terms only applies if there are different establishments and that shows that the concern is with geography rather than employment regimes. Even a single collective bargaining agreement can introduce different employment regimes at the same location. Mr Short's submissions, backed up as they are by the judgment of Lady Hale in North, to my mind make it very clear that the common terms requirement is intended to operate only within a very narrow compass where the differences in terms and conditions are wholly or mainly derived from the physical separation of the comparator's establishment, and that it is not intended to prevent claims merely because as events have turned out there are different employment regimes.

47.
Lord Pannick then proceeds to challenge the conclusion of the employment tribunal on the basis that common terms applied "generally" in the context of section 1(6). This, he submits, clearly means "generally as regards all employees" at both the comparators' and the claimants' establishment. I can also deal with this shortly. As the Court of Appeal recognised, it was not correct for the employment tribunal to direct itself that it had to find "common terms generally as between claimants and comparators" (Judgment, para 88). Therefore, this error invalidates the conclusion of the employment tribunal at para 210 of its decision that there were common terms "generally". However, the employment tribunal did ask the relevant question at a later stage in its judgment. In my judgment, the employment tribunal asked the question on what terms would the distribution employees be employed if they were located at the claimants' establishment and rejected the argument that they

would be so employed on retail terms (see para 241, set out at para 40 above). This particular point does not therefore advance Asda's case.

48.
Lord Pannick then criticises the employment tribunal's fact-finding process. True, it found that there was broad similarity between the terms of the distribution employees and those of the retail employees, but it did so on his submission by disregarding a number of specific terms where there were differences: see paras 101 and 102 of the employment tribunal's decision. On Lord Pannick's submission, this undermined the conclusion that there were common terms. Paras 101 and 102 read:

"101. The remaining areas of the analysis show more substantial differences. Whilst they have included tables showing the hourly rates of pay which finally were substantially different, I do not consider that these are relevant in deciding whether on a broad comparison there are common terms. The differences in pay are the very subject matter of the principal dispute. At this stage of the legal analysis of the claims I do not see how the employer can rely upon the differences in rates of pay as demonstrating that there are not common terms. By the same token I do not consider that the fact that there are different rates adds to the claimants' argument for common terms. They are relying on the factor of all being hourly paid employees. If that is a relevant fact the actual hourly rate paid does not make it any more persuasive.

102. The other areas of difference are: Shift Pay, Bank Holidays, Overtime and Company Sick Pay …"

49.
For example, distribution employees received not simply a night premium but a late shift premium for evening and night working whereas retail employees did not receive the extra late shift premium.

50.
In my judgment the answer to this point is that, as I have already explained and the Court of Appeal held, the employment tribunal was wrong to entertain a detailed, line by line comparison of terms. What the tribunal had to do was to make a broad comparison: see Lady Hale's second principle in North, which draws on Leverton and Smith. The employment tribunal went on to apply that test as between the retail and distribution employees (see paras 212 to 217 of its decision). Mr Short submits that it would be too late for Asda to challenge this conclusion. The employment tribunal had left out of account rates of pay but these were the very terms alleged to be discriminatory and so they were properly left out of account. The other areas of difference in para 102 of the decision of the employment tribunal would not appear to be core terms and the employment tribunal clearly considered that they were not. In my judgment, however, the fact remains that the employment tribunal applied the test of broad similarity to the wrong groups. In any event the claimants succeed on the North hypothetical.

51.
I therefore turn to the North hypothetical. The North hypothetical is important because otherwise an employer could avoid equal pay claims by allocating certain groups of employees to separate sites so that they can have different terms even where this is discriminatory (and it is hard to find any reported case where the common terms requirement has not been met in one way or another). To prevent equal pay claims being unduly stopped at the preliminary stage (that is, in limine), the North hypothetical test, explained in more detail below, may be applied and the question is then whether the classes of employees in question would remain on substantially the same terms if (hypothetically) they were transferred in their current roles to the other site. If their terms are tied to their location for some reason so that they would acquire the other group's terms on transfer, they are not common

terms. But, if their core terms are unaltered by the hypothetical relocation, then the common terms requirement is satisfied and the one group may be a comparator for the other, the reason being that any difference due to difference of location can be eliminated.

52.
Lord Pannick expressly accepts that the North hypothetical applies even where there is no possibility of employees being transferred to the other establishment. I agree. We are not invited to depart from any aspect of the three cases explained above. Lord Pannick submits that the claimants had to prove that the terms and conditions of employment of the two groups of employees would not change on transfer and that they failed to do so. This result was, on Lord Pannick's submission, not proven. Lord Pannick seeks to reinforce the argument that the distribution employees would on transfer have received retail terms by pointing out that there were in fact warehouse staff (mainly male) in the retail stores unloading lorries and they were paid on retail terms. Moreover, he contends that, contrary to the finding of the employment tribunal at para 117 of its decision (set out at para 39 above), the oral evidence of Asda's senior officers, Mr Stansfield and Ms Tatum, was that on transfer to the other establishment the distribution employees would have to accept retail terms and vice versa. He relied on transcripts of the oral evidence of these witnesses referenced by the employment judge in para 117. Mr Stansfield had stated in cross-examination that an employee "who permanently transfers from distribution into retail or retail into distribution takes the rate of pay in the depot or store that they go permanently and work in." Ms Tatum's evidence was that if the distribution employee was working in the car park next to the store or a retail employee was asked to operate a till at the edge of a distribution depot, they would retain their original terms. However, Lord Pannick submits that this was not evidence on the North hypothetical since it did not address the right hypothesis. The right hypothesis was that the transferred worker would actually be working in the store or, as the case may be, distribution centre.

53.
Asda's commercial point is that in its numerous retail stores it is necessary to have a situation in which all the employees are on the same terms. The tribunal took this into account, and recorded Asda's argument at para 33 of its decision:

"Retail terms apply to all employees based in stores. Subject to some variations all Retail employees are on the same package of terms. Asda maintains consistency and operational simplicity is critical in running a multi-site operation of approximately 630 stores, some of which operate 24 hours a day, seven days a week."

54.
This Court, and the Appellate Committee before it, has warned against appellate courts interfering with the findings of employment tribunals where there has been no misdirection of law. I have already cited a passage from Lord Bridge to this effect (see para 22 above). Employment tribunals have considerable experience. Lord Pannick does not here contend that there was any misdirection of law on the part of the employment tribunal. In those circumstances in my judgment their findings on the North hypothetical should stand. The employment tribunal had to decide what weight to give to the answers in cross-examination. It decided to reject them on the basis that it was contrary to the inherent probability to expect that distribution employees would accept less pay than they were entitled to at their establishment. Underhill LJ, with his considerable experience in this field, confirmed his own inclination to do so. Furthermore, despite Lord Pannick's submission I would hold that this is not mere speculation but the employment tribunal's informed assessment of the proper inferences to be drawn from the totality of the evidence before it. Lord Pannick relies on the fact that

the collective bargaining agreement did not govern pay wherever the distribution employers were employed. The fact that there was no agreement with the distribution employees about rates of pay on relocation does not provide an answer to the inherent probability on which the employment tribunal relies. It might have obviated the need to utilise the North hypothetical at all (see per Underhill LJ at para 68 of his judgment, set out in para 31 above), but that is a separate matter.

55.
I would reject Lord Pannick's submission that the North hypothetical has to be asked on the basis that the distribution worker will perform his role physically within the claimants' workplace. If that had been a good point, it would surely have been an answer in North where, as the President Lord Reed pointed out in argument, the nursery nurses and learning assistants were employed in schools and sought to treat male manual workers of the Dumfries and Galloway Council as their comparators. In fact, this Court there specifically held that it did not have to be "feasible" for the hypothetically relocated employees to be able to carry out their role at the other group's establishment. Just as there was no statutory requirement that the transfer should be a realistic possibility so there was no statutory requirement that it should be feasible. Thus, Lady Hale held:

"32. Mr Truscott, for the local authority, agrees that there is no need to show a 'real possibility' that the comparators could be transferred to do their current jobs in the claimants' workplace. But, he argues, how does the British Coal Corporation test work in a factual situation such as this, which goes well beyond what was envisaged in that case? That case was premised on the fact that the comparators could be based at the same place as the claimants, even though some of them were not. So, while he agrees that there is no need to show a real possibility that the workers could be co-located, he argues that it should at least be feasible that they might be. The evidence of Mr Archibald was clear that it was not.

33. I have no hesitation in preferring the arguments presented by Ms Rose. In the first place, it is by no means clear from the facts reported in the British Coal Corporation case that all the women claimants were based in collieries where there might also be surface mine-workers employed. In the second place, there is no hint of a 'real possibility' or 'feasibility' test in that case and I find it difficult to discern a genuine difference in principle between them. Both add an unwarranted gloss to the wording of the subsection as interpreted in the British Coal Corporation case."

56.
It follows that all the employment tribunal needed to do in this case was to make the assumption that the distribution employees could carry out their role at a location appropriate for this purpose at the claimants' establishment, even if this was contrary to the fact. It could have achieved that by envisioning a depot next to the retail store at the claimants' establishment. It then had to ask whether, on this assumption, the distribution employees would continue to be employed on the same or substantially the same terms as they were employed at their own establishment. That is also all that the employment tribunal would need to be invited to do in a future case of this kind.

57.
For all these reasons I would also hold that the claimants succeed on the North hypothetical.

58.
For clarity, the next two sections of this judgment summarise the law on the common terms requirement and draw out the implications for future case management by employment tribunals.

Common terms requirement: summary of the law

59.
Claimants in equal pay cases must meet the common terms requirement when their chosen comparator is employed at a different establishment of the employer.

60.
I incline to the view that the requirement is the same whether the case is brought under the EPA 1970 or the EA 2010, but I express no final view on the latter.

61.
The statutory test is whether there are common terms as between the comparators at their establishment and the comparators if they were working at the claimant's establishment.

62.
The common terms requirement is a threshold test with a limited function. The test is designed to provide a fail-safe to the employer that a case will not proceed if it relies on a comparison which can clearly be shown at the outset to be one that cannot realistically be made. Thus, the limited function of the threshold test is to "weed out" (Lady Hale's phrase in North at para 35: see para 28 above) comparators who cannot be used because the differences between them and the claimants are based on geographical factors, and possibly also historical factors. There may also be an issue as to who the employer would be if the comparators were employees of an associated company and were to be assumed to carry out their role at the claimants' establishment (the submissions on this appeal did not address the case of associated companies). Cases where the threshold test cannot be met are likely to be exceptional. The factors would have to be established to be the real reason for the comparators' terms and conditions.

63.
Thus, on examination, the threshold test is relatively incidental to the principal stages in an equal pay claim.

64.
The "weeding out" goal can be achieved by asking whether the comparators would be employed on the same or substantially the same terms if they were employed at the claimants' establishment.

65.
For this purpose, as regards location, it must be assumed that the comparators would continue to perform their existing role and that they would do so on an appropriate part of the claimants' establishment. It would be wrong to assume some change in the way they discharge their role, so they should be assumed to work in separate premises if that is what their work requires. This may be visualised in the present case by the installation of a depot adjacent to the retail store. This assumption has to be made even if it is contrary to the fact that they can work in part of the establishment to carry out their roles.

66.
There will be cases where it will be clear, without need to apply the North hypothetical, that common terms apply because the comparators' terms and conditions are the same or substantially similar irrespective of where they work (see above, para 32).

67.

When no comparator works at the claimants' establishment and it is not clear that the comparators' terms actually apply to work at that establishment, the employment tribunal will need to apply the North hypothetical and decide the issue as a hypothetical issue.

Implications for future case management by employment tribunals

68.
Even when evidence is led and the employment tribunal must make factual findings on the issue whether the comparators would be employed on the same or substantially the same terms at the claimants' establishment as at their own establishment, the fact-finding exercise can and should be kept within tight bounds. The employment tribunal should not countenance a prolonged enquiry into this threshold test. The employer will have ample opportunity to show that pay disparities are justified when the value of the claimants' work is evaluated or if it raises a defence of genuine material factor under section 1(3) of the EPA 1970 or section 69 of the EA 2010. For the same reason, appeals are to be discouraged.

69.
Employment tribunals should also bear in mind that as in this case the answer may well be more readily found by inference from the relevant facts and circumstances rather than from the opinions on hypothetical facts of individuals employed in the business.

70.
Employment tribunals are not required by the common terms requirement to perform any form of line by line comparison of different sets of terms and conditions. In the present case, the tribunal became entangled in a document-intensive line by line comparison between the terms and conditions of the claimants and those of the distribution employees (see paras 88, 89 and 106 of the judgment of Underhill LJ). As explained above, this was the wrong comparison in any event, but it is helpful to contrast it with the North hypothetical when the ultimate issue is simply whether the terms would be the same or substantially the same as those of the comparators in their own establishment.

71.
The aim of the equal pay legislation is to remove pay disparities that are endemic in some pay awards and which do not properly reflect the value of the work for which they are paid. If in the absence of firm case management the threshold test is elevated into a major hurdle mirroring other elements of an equal pay claim, the purpose of equal pay legislation will be thwarted, and the pay disparities will not be investigated. This outcome would be contrary to the object of the equal pay legislation as recognised by Lord Slynn in British Coal, which was to allow comparisons between employees who did not and never could work in the same workplace (see para 24 above). Furthermore, as Lady Hale explained in North at para 35 (set out at para 28 above), the common terms requirement is not to be used as a proxy for other elements in equal pay claims, such as the evaluation of the comparability of the work done by the claimants and the comparators. To use the common terms requirement in this way would permit the fail-safe to triumph over its limited function and substance.

Conclusion

72.
I would dismiss this appeal.