

EQUAL PAY UPDATE

In a decision that could prove a significant milestone in the story of equal pay in the UK - an Employment Tribunal has decided that the retailer Next could not rely on “market forces” to justify differences in basic pay between the predominantly female retail consultants in Next stores and their (higher earning, and mostly male) warehouse operative colleagues. The claimants’ solicitors have suggested that up to £30m may be payable in compensation to the retail consultants.

A previous Tribunal decision had found that these particular groups of Next employees were conducting work of equal value - so this decision related solely to whether the employer could rely on the “material factor defence” to justify the pay differential.

Next were able to establish the defence in relation to certain bonuses and other benefits, but when it came to the differential in basic pay, the employer could not make out the defence.

Next argued that it had a legitimate aim in paying a lower rate of basic pay (based on the market rate for such roles) to its retail consultants - namely shoring up its viability, resilience and successful business performance. But the Tribunal concluded that, when it came to the differential in basic pay, Next *could* have afforded to pay its retail staff more but instead prioritised keeping its labour costs in check - i.e. this was about costs saving (only) which is not a legitimate aim that can be relied upon to establish the defence.

The Employment Tribunals are alive to the issue that market rates for particular roles may be tainted by historical attitudes and perceptions about the value of *men’s work* versus *women’s work* - and that citing market forces will not of itself excuse the disparity between pay rates for roles that are predominantly held by men and those predominantly held by women. Employers who rely on this argument risk being criticised for perpetuating the kind of pay inequality that the legislation is intended to address.

This decision is the first in a string of similar cases expected to be heard in the Employment Tribunal in the coming months relating to the UK’s largest supermarkets and other retailers, but it has potential ramifications for employers across all sectors.

It is a first instance decision (so not binding on other Tribunals) and Next have indicated they will appeal. But if the decision is not overturned, employers will find it increasingly difficult to base a defence to an equal pay claim on the fact that they simply “paid the going rate” for a particular type of job, and did so to maintain their profitability. The focus for justifying different rates of pay may well shift therefore towards other issues that extend beyond mere cost savings linked to the particular challenges facing the business at the relevant time.

Employers will be paying close attention to the progress of the similar claims against major supermarkets, and to Next’s appeal in the coming months. This is a challenge for employers that may be compounded if the Labour government follows through with its plans to introduce an Equality (Race and Disability) Bill extending full equal pay rights to ethnic minority workers and disabled people.

If you would like to discuss this decision and how the Slaughter and May team can assist, please speak to your usual Slaughter and May contact.

Thandi and ors v (1) Next Retail Limited and (2) Next Distribution Limited (case No. 1302019/18 and others)

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