EMPLOYMENT TRIBUNALS

Claimant: Miss M Thandi and others

Respondents: 1. Next Retail Limited
2. Next Distribution Limited

Heard at: Leeds

On: 13, 14 and 15 March 2024. 18 March 2024 and 25 April 2024 (in chambers).

Before: Employment Judge D N Jones
Mr W Roberts
Ms G M Fleming

REPRESENTATION:

Claimants: Mr A Short, KC, Ms E George, counsel
Respondents: Mr P Green, KC, Ms K Donnelly KC, Ms C Campbell, counsel and Mr T Mallon, counsel

JUDGMENT

1. The terms of the retail bonus schemes of the claimants corresponded to the terms of the warehouse bonus schemes of the comparators for the purpose of section 66(2)(a) of the Equality Act 2010.

2. The Southern Weighting Allowance was not a term of the comparators' contractual terms of employment and the term cannot be relied upon by the lead claimants.

3. The bonuses with respect to holiday and bank holidays, premium payments for public holidays and notional public holidays shall be categorised separately.

4. The Christmas bonuses which derived from a redirected Share Matching Plan of the Chief Executive Officer were *ex gratia* payments and did not derive from a contractual term. They fell outside *Chapter 3: Equality of Terms* of the Equality Act 2010.

5. The decision is one on which all members of the Tribunal agreed.

REASONS

Introduction

1. Last year this Tribunal ruled that the work of the three lead claimants was of equal value to that of the four selected comparators. A sex equality clause is implied into the contracts of employment of the claimants by section 66(1) of the Equality Act 2010 (EqA). Subject to that being disapplied if a defence of a material factor is established, by section 66(2) of the EqA, the clause 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.*

2. This hearing concerned the terms of the work of both the lead claimants and their comparators. That is necessary to establish whether there was a less favourable term, for the purpose of section 66(2)(a) of the EqA or whether there is no equivalent beneficial term for the purpose of section 66(2)(b).

3. The exercise is not to compare the overall package of remuneration between claimants and comparators. Section 66(2) of the EqA requires a term-by-term comparison and levelling up of the difference of the benefit or, if there is no comparable term, the inclusion of one to add the benefit. If there has been a breach of the clause, damages will be recoverable to reflect the losses, either the differential under a section 66(2)(a) case or the benefit of the term in its entirety, under section 66(2)(b).

4. A Schedule containing a Comparison of Terms (COT) has been prepared. In the main the parties have agreed about the terms, their categorisation and which do or do not correspond. There remain 4 matters for determination. They are:

4.1 Did the retail bonuses correspond with the warehouse bonuses?
4.2 Was a Southern Weighting Allowance a contractual term of the comparators?
4.3 Should the bonuses with respect to holiday and bank holidays, premium payments for public holidays and notional public holidays be categorised separately or under one heading?
4.4 Was the Christmas bonus which derived from a redirected Share Matching Plan (SMP) of the CEO a contractual allowance and, if not, was it within the concept of pay for equal pay purposes or would it have to be pursued as a complaint of direct discrimination?

5. Counsel described the last two as minor disputes. We consider each of these separately after identifying who gave evidence and the legal principles.

The Evidence

6. The lead claimant Helen Cherry submitted a witness statement and a reply. The respondent submitted two statements from Mr Lionel Mason and a statement from Ms Gail MacIntyre. The respondent's witnesses gave evidence and were questioned by Mr Short. It was not necessary for evidence to be given by Ms Cherry.

7. The parties produced documents running to 2,298 pages.

The Law

8. Section 65 of the EqA provides:

Equal work

(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.

(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.

9. Section 66 of the EqA provides:

(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) [Where this section applies by virtue of section 64(1),] 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.

10. By section 80(2) of the EqA:

The terms of a person's work are—

(a) if the person is employed, the terms of the person's employment that are in the person's contract of employment, contract of apprenticeship or contract to do work personally;

11. In ***Hayward v Cammell Laird Shipbuilders Ltd [1988] AC 894*** the House of Lords considered the equal pay provisions in section 1 of the Equal Pay Act 1970, which provided:

> *"(1) If the terms of a contract under which a woman is employed at an establishment in Great Britain do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one.*
>
> *(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 <u>a term of a similar kind</u> 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 benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term [*emphasis added].

12. Lord Mackay said, "*There is no definition of the word "term" in the legislation. In that situation I am of opinion that the natural meaning of the word "term" in this context is <u>a distinct provision or part of the contract which has sufficient content to make it possible to compare it from the point of view of the benefits it confers with similar provision or part in another contract</u>* [emphasis added]". Lord Goff defined the term slightly differently: *"You look at the two contracts; you ask yourself the common sense question – is there a term making a comparable provision for the same subject matter; if there is, then you compare the two, and if, on that comparison the woman's contract proves to be less favourable than the term of the man's contract, then the term of the woman's contract is to be treated as modified so as to make it not less favourable.*

13. The House of Lords rejected a comparison of the entire pay package of the woman and the man under their contractual terms, as had been favoured by the Court of Appeal. Lord Goff said, "*I feel that the Court of Appeal's attempt to introduce the element of overall comparison placed them firmly, or rather infirmly, upon a slippery slope; because, once they departed from the natural and ordinary meaning of the word "term," they in reality found it impossible to control the ambit of the comparison which they considered to be required. For almost any, indeed perhaps any, benefit will fall within "pay" in the very wide sense favoured by them, in which event it is difficult to segregate any sensible meaning of the word "term.*"

14. In ***McNeil v HMRC [2018] IRLR 298*** the Employment Appeal Tribunal considered section 66 of the EqA. Simler P, as she then was, said, "*As Lord Goff of Chieveley in the same case made clear, where the contract makes discrete provision for basic pay, bonus, and other benefits, those discrete provisions cannot be lumped*

together as one term of the contract merely because they provide for total remuneration. The emphasis must be on the reality of the contractual provisions in the circumstances of the particular case, and it will be a question of fact in each case whether a discrete term exists for these purposes. It is not permissible to seek to offset one more favourable term against another less favourable one. A term by term analysis is required, as illustrated by Brownbill v St Helens and Knowsley Teaching Hospitals NHS Trust [2012] ICR 68. … I agree with Mr Linden that section 66 of the 2010 Act dictates that, just as an employer cannot lump together or engage in an overall comparison of different terms, a claimant in an equal pay claim cannot subdivide a single term into two or more parts in order to complain about one part only. A term by term analysis is required in equal pay cases".

15. Counsel agreed that a helpful and accurate statement of the law is contained in the summary of Morgan J in ***Lloyds Banking Group Pension Trustees v Lloyds Bank PLC [2019] Pens L.R. 5***:

> ***"****(1) the position in English law is the same as the position in European law;*
>
> *(2) the court must adopt a term by term approach when carrying out a comparison in an equal pay case;*
>
> *(3) the terms to be compared should be identified on what it is natural to compare for the statutory purpose of an equal pay comparison;*
>
> *(4) the choice as to what is to be compared is a common sense question;*
>
> *(5) it may be necessary to carry out a careful analysis of the relevant provisions to assist in answering the question as to what is to be compared;*
>
> *(6) the classification of the relevant provisions should be realistic;*
>
> *(7) it may sometimes be appropriate to ask whether a provision is an element of a distinct part of the contract rather than itself being a distinct part;*
>
> *(8) just as it is wrong to lump together or engage in an overall comparison of different terms, it is also wrong to subdivide a single term into two or more parts in order to complain about one part only".*

Analysis

Did the retail bonuses correspond with the warehouse bonuses?

Facts/background

16. The claimants had 12 bonus entitlements over the material period:
    16.1 Sales Bonus Scheme (2012 to 2014) – a sales related bonus scheme linked to the store achieving sales targets. The scheme comprised three elements: a Monthly Sales Bonus, Seasonal Guarantee Bonus and Super Sales Bonus.
        16.1.1 The Sales Bonus had rules of eligibility. An employee had to have been employed for 13 weeks and be employed on the day the payment was made and not subject to a live warning. Each store had its own sales targets which had to be met. The bonus varied between 3% and 8% on earnings for qualifying hours for each % over the store target. It was paid monthly.

16.1.2 The Seasonal Guarantee Bonus was calculated in the same way as the Sales Bonus. It was calculated over a period of 6 months of store sales. It would be paid if the overall percentage figure for the 6 month period of store sales was greater than the any individual months' store sales in the period.

16.1.3 The Super Sales Bonus was a seasonal bonus. It was 1% to 7% of earnings for sales at 1% to 10% over seasonal store targets.

16.2 The Directory and Temporary Directory Card Bonuses (2012 to 2018). The employee received a fixed sum of £1.35 for each customer they signed up to a directory card linked to their directory account.

16.3 The Normal Store Surplus Bonus and Priority Surplus Stock Bonus (2013 – 2019).

16.3.1 The normal store surplus bonus, a picking bonus, applied to items transferred from stores to warehouse to meet online orders. It was paid to an individual and the team depending on the percentage of items found by the team and picked by the individual. Other temporary schemes to encourage picking were introduced during the period called the Golden Store Surplus, Full Price Xmas Promise Bonus and Platinum Promise Bonus.

16.3.2 The Priority Surplus Bonus applied in similar terms but was for an order which had been placed.

16.4 The Directory Parcel Incentive Bonus (2013 to 2018). This was based upon speed of locating parcels for customers who had ordered online for store collection. If the customer's order was delivered within 2 minutes an individual bonus of 15p was paid.

16.5 The Shoe Incentive (2014). A 10p payment was made if the sales consultant managed to provide to the customer the corresponding shoe to that which was on display for sale within 30 minutes.

16.6 The Customer Experience/Service Bonus (2014 to 2018). This accrued fixed payment of 25p or 50p per hour based on customer experience. This was dependent on the feedback of a mystery shopper visit once or twice a month respectively. The amount varied over the period and for different stores. All sales consultants received the bonus but it would be reduced if the employee had any live warnings.

16.7 The Delivery Bonus (2016 – 2018). This applies to those who worked in the delivery process station and was paid individually. A payment from 30p to £1.06 was payable from meeting 96% to 116% of a target figure for preparing items for the shop floor.

16.8 The Replen Bonus (2017-2018). This was a similar scheme payable to individuals for their performance in replenishing items on the shop floor. The rates were from 20p to £1.87 for 100 to 170 items.

16.9 The Service and Sales Bonus (2018 – 2020). This was a combination of elements of the previous schemes, combining customer satisfaction and sales targets being met in each store. The mystery shopper was replaced by customer feedback form replies to questionnaires in store, accessed by QR codes, in a scheme known as Next Loves to Listen (NLTL). It was by way of an additional hourly payment of up to a maximum of 80p.

16.10 The Delivery and Sales Bonus (2018 – 2020). This operated during the same time period as the Service and Sales Bonus above. It was similar

to the previous delivery bonus and was paid to individuals who worked on delivery. It was calculated by a combination of individual performance and store sales, against respective targets. It varied from 5p to 94.5p calculated on a matrix. The stores each had a rating of exceptional, good or base sales, which had been calculated against the store target. The individual's performance was measured as a percentage of delivery targets measured between 95% and 117% of targets.

16.11 Store Collection Bonus (2018 – 2020). This was payable to an individual who processed an online order for store collection within 40 minutes. It was initially 20p but then reduced to 10p.

16.12 Next Reward Scheme (2020 – 2021). Staff would obtain points for service (NLTL), sales and delivery efficiency based on targets. 100 points would equate to a pound in an online voucher scheme if the employee signed up to an outside group which organised the scheme.

17. It was agreed by the claimants that Delivery Bonus between 2016 and 2018, paragraph 16.7 and Replen Bonus, 2017 to 2018, paragraph 16.8, corresponded to the terms of the four comparators. The remainder have been described as retail bonuses.

18. It was agreed by the respondents that the Next Reward Scheme, 2020 – 2021, paragraph 16.12, did not correspond to a term of the comparators.

19. The comparators had 3 bonus schemes, described as warehouse bonuses:

19.1 The Direct Bonus Scheme. This was an individual bonus, payable by reference to individual performance and team performance. Output was measured by a specified time to undertake the process called standard minute values (SMV's). The formula for the bonus was the number of units processed multiplied by the SMV divided by the time on the task. The sums varied over time from between 50p to £5.

19.2 Indirect Bonus Scheme. This was paid to those who had been working on tasks which did not generate the direct bonus. It was calculated on site level or specific area performance, generally at 65% of direct bonus payment. It was for those who spent 50% or more on indirect work.

19.3 Average bonus. This applied to those who did not qualify for indirect bonuses but catered for shorter periods when employees could not undertake tasks which generated another bonus. It was a rolling average over four qualifying weeks.

Submissions

20. Mr Short said that the claimants' retail bonuses did not correspond with the bonuses of the comparators within the meaning of section 66(2)(a) of the EqA; the warehouse bonuses should fall within section 66(2)(b) EqA. The fact that they were called bonuses was not determinative. It was necessary to consider the substance of the scheme rather than the form. They rewarded different things in different ways and were not sufficiently similar to allow the retail terms to be modified to match the warehouse terms. That is because the warehouse bonuses were a productivity scheme, defined as "*an additional payment on top of the normal hourly rate for achieving a measured output to a specified standard*", see *Introduction to the Next Bonus Agreement*. They were largely based upon the individual's efforts. In contrast

the retail schemes were in substance collective; that is tied to the performance of the store or the views of third parties such as the customers, not the individual's efforts.

21. In support of this Mr Short drew attention to papers prepared for the Board which described the nature of each respective bonus type. For 2020, "*Retail Bonus*" is described as "*based on store sales performance, individual productivity (e.g. delivery put away or parcel collections) and customer feedback*". "*Warehouse & Distribution – Bonus*" is described as "*based on individual productivity (eg picking and packing rates)*". Mr Short said that in seeking to amalgamate different bonus entitlements the respondents were trying to overturn 35 years of established case law. The differences in bonus were so fundamental that they could not be overwritten as the respondent seeks.

22. Mr Green argued that the claimants are attempting to atomise the bonus schemes. He submitted these were cash bonuses to incentivise performance and the substance was the same. It was not permissible to disaggregate a similar term for statutory purposes. The claimants' approach is to find a distinction in how the renumeration is calculated so as to leave out of account pay which is, in reality, of a similar nature. He submitted that is narrowly and incorrectly to alight upon the respective clauses of the contracts contrary to the statutory definition of 'terms' in section 66 EqA which is to consider the same subject matter for the purpose of a comparison. He said there was no dispute that commission and cars, in the example given by Mr Short in his written submission, were different. He said that was consistent with ***Haywood***. That was not the situation with respect to these bonuses. It was sensible and realistic to compare basic pay with basic pay and similarly bonuses with bonuses.

Conclusions

23. There was agreement that the law was settled.

24. It is impermissible to aggregate all elements of remuneration into one and compare the overall pay package. The proper approach is to make a term-by-term comparison. Term, for these purposes, does not mean each separate clause of a contract. Section 66 involves categorisation of contractual terms: "*a comparable provision for the same subject matter*" or a "*distinct provision or part of the contract which has sufficient content to make it possible to compare it from the point of the benefits it confers with similar provision or part in another contract*" [emphasis added], paragraphs 12 above. The Tribunal must '*realistically*' and with '*common sense'* draw together the respective contractual provisions which address the '*same subject matter*' and '*content with respect to the benefits conferred*'.

25. The consequence of there being a comparable term matters to the value of these cases. If there is a comparable term, the damages for breach of the equality clause are the difference between the pay received for the retail bonuses and the pay for the warehouse bonuses. If they are not comparable, the damages for breach of the equality clause are for the value of the warehouse bonuses alone. The claimants will retain the value of their bonuses and also receive damages for whatever values the warehouse bonuses would have been had they been entitled to them.

26. The House of Lords recognised that as a potential outcome in those cases where the terms were not comparable. They also foresaw a situation they described

as leapfrogging or mutual enhancement, see p 908E, per Lord Goff. That meant the comparators could claim gender pay disparity on the basis that they had not benefitted from the bonus received by the claimants for which there is no comparable term under section 66(2)(a) EqA.

27. Analysis in subsequent case law emphasises the need to ensure that historic discrimination is not obscured by amalgamating discrete components of remuneration. The legislation is designed to ensure transparency in the provision of non-discriminatory pay structures, see ***Jämställdhetsombudsmannen v Örebro Läns Landsting (C-236/98)[2000] 2 CMLR 708, ECJ*** and ***Brownbill v St Helens Knowsley Hospitals NHS Trust [2010] ICR 1383, EAT, [2012] ICR 68 CA***.

28. Ultimately, we must decide whether there is a sufficient common aspect to the terms of the bonus schemes of the claimants and the comparators to justify comparability within the meaning of section 6(2)(a) or have such differences that they fall within section 66(2)(b).

29. Mr Short agrees that there is an overlap when the work is individually measured by reference to items processed in picking and replenishing the store, which is why it is accepted that the first period of the Delivery Bonus and the Replen Bonus are comparable. They have a similarity in what the two job holders do and are measured in a similar way. It is a suitable comparison for the purpose of section 66(2)(a).

30. The first distinction Mr Short draws with the retail bonuses is that the nature of the tasks in question are substantively different. Sales consultants provide a personal service to the customer, face to face. That enhances the prospect of a sale or future sales if the sales assistants make it an agreeable experience. That is not a service which warehouse workers could ever provide. Therefore, Mr Short says, the content and subject matter are irreconcilable.

31. The second distinction Mr Short draws is the way in which the bonus is calculated. There is an individual analysis of each warehouse worker's performance. In contrast there is an analysis of collective store performance for sales consultants. There are some situations in which group performance feeds into computation of bonus in the case of warehouse workers in direct bonuses and more obviously indirect bonuses. There were some combinations of individual performance which fed into the computation of sales consultants, such as Delivery and Sales Bonus between 2018 and 2020. There were also some individual performance related bonuses such as the shoe incentive bonus. Although not clear cut, we accept the generalisation in respect of this different assessment of performance.

32. We do not find that these differences, the nature of what was done and how they were measured with a view to generating payment, are sufficient to eliminate a meaningful comparison under section 66(2)(a) EqA. Lord Mackay's explanation of what the comparable term requires is particularly helpful. The focus is upon the benefits which are to be conferred under the respective contracts of employment. Is there sufficient content in the contractual terms of both claimant and comparator to warrant a comparison of the benefit conferred? The benefit is a payment for the purpose of rewarding performance. These are incentive payments. That is a common feature. It is that which makes the content and subject matter comparable. It is more than simply a label.

33. In any equal value case, there have to be differences of significance in the work undertaken between claimants and comparators. The definition of equal work in section 65 follows a process of elimination. Work may be of *equal value* only if it is not *like work* nor *work rated as equivalent*, by section 65(6) of the EqA. Equal value work will not be the same or broadly similar between complainant and comparator because, if it were, it would have fallen within the definition of *like work* in section 65(2)(a) of the EqA. Such differences must be of practical importance given the qualifying requirement for *like work* in section 65(2)(b). That should not however be taken to mean that comparisons of terms will inevitably fail in all equal value cases under section 66(2)(a) EqA. We recognise the nature of the work for which performance is measured is not the same for the retail bonuses but that is to take the focus away from the subject matter for which the benefit is conferred. That is incentivising performance.

34. In ***Hayward***, an equal value case, Lord Goff captured different aspects of reward to which he applied categorisations: "*If a contract contains provisions relating to (1) basic pay, (2) benefits in kind such as the use of a car, (3) cash bonuses, and (4) sickness benefits, it would never occur to me to lump these together as one "term" of the contract, simply because they can all together be considered as providing for the total "remuneration" for the services to be performed under the contract*". Lord Goff continued, *"In truth, these would include a number of <u>different terms</u>; and in my view it does unacceptable violence to the words of the statute to construe the word "term" in sub-paragraph (ii) as embracing collectively all <u>these different terms</u>* [emphasis added]*".* The distinction he drew was between the four different categories of term. Mr Short says we should not draw from this the conclusion that the reference of Lord Goff to cash bonuses means these are an indisputable category for comparison. Each case turns on its own facts. A term by term analysis is always required to determine the question of comparable terms under section 66(2)(a). The concession made by both parties in respect of the bonus schemes, at paragraphs 17 and 18 above, recognises that. Nevertheless, the attempt by Lord Goff to identify different categories of remuneration indicates they have a commonality which distinguishes them from the other three types of terms which he says are plainly not comparable.

35. A term the House of Lords found to be comparable in ***Hayward*** was basic pay. The claimants were paid an hourly rate and the comparators were paid a salary. That demonstrates that there may well be differences between contractual clauses but they do not defeat a comparison of the terms. The method of calculating basic pay was different, but that was not sufficient to distinguish the essential subject matter or the benefit which was being conferred.

36. We accept Mr Short's submission that the fact Lord Goff drew together cash bonuses in his explanation for not lumping them together with some other form of pay does not mean that cash bonuses will inevitably be comparable, for the purpose of section 66(2)(a). In the end it will be a question of degree. That much is clear from the parties' respective concessions. That said, basic pay will usually be comparable with basic pay. Each series of bonuses requires consideration with a view to ascertaining whether the underlying content and subject matter are sufficient to draw a comparison of the contractual terms but cash bonuses, like basic pay, will often justify common classification under section 66(2)(a).

37. In summary, the fundamental purpose and aspect of the pay to incentivise performance vests these respective bonus schemes with the necessary character of benefit to fall within section 66(2)(a). The distinctions drawn in respect of the nature of the tasks, or the difference in metrics used to calculate the bonuses do not defeat the comparison of the contractual terms. They are a distraction from what Lord MacKay described as the benefits conferred in the claimants' contracts on the one hand and the comparators' contracts on the other.

Southern Weighting Allowance

Facts/background

38. In January 2003 the second respondent took over the distribution operation which had formerly been undertaken for them by the Lane Group. Employees of the Lane Group, which included warehouse operatives, drivers, and managers, became employees of the second respondent and the provisions of TUPE applied. The transfer related to four Retail Services Centres (RSC) at Motherwell, Bristol, Hemel Hempstead and Hayes.

39. In respect of Hemel Hempstead, the operatives who transferred were paid a weighting allowance of 16%. A partial harmonisation of terms was undertaken in August 2003 but the RSC operatives continued to work a 5 day in 7 rota and a 45 hour week. Two Bank Holidays were included in their salaries. This reflected previous terms under the Lane Group from which they had transferred, even after partial harmonisation, and differed from the workers in warehouses at South Elmsall, Doncaster, Dearne Valley and Bradford. From September 2003 new starters at Hemel Hempstead received a weighting allowance of 11%.

40. In 2006 the second respondent opened a RSC at Ockenden. It was similarly situated to Hemel Hempstead and, because of its geographical location, operatives received an 11% weighting allowance.

41. In 2007 USDAW, which had become the recognised trade union, negotiated revised terms for the RSC workers. These continued to differ from those employed at the warehouses.

42. In 2008 an unquantified but small number of employees of the first respondent were transferred to the second respondent. They had been in pre-retail roles. Their new contracts were for 45 hours during Monday to Fridays, in contrast to the comparators who worked 40 hours.

43. In January 2016 an agreement had been made between USDAW and the second respondent to the effect that from 1 February 2017 all new starters in the RSC's would be on the same contractual terms and conditions as those in the warehouse insofar as the 5/7 rota shifts would be fixed shifts and for 40 hours per week.

44. In 2022 an agreement was reached between USDAW and the second respondent to introduce an 11% allowance on basic pay in the Bristol RSC from 1 November 2022 because of difficulties in recruiting locally. This was stated not to apply to operatives on historic rates of pay.

45. The contracts of employment of three of the comparators Mr Hazelhurst, Mr Parker and Mr Zale included the following:

> ***Place of Work***
> *You are employed to provide a service to all of the Company's sites. You will normally be based at ….. The Company reserves the right to transfer you permanently, or temporarily within a reasonable distance from your current location to any of its other sites after consultation with you.*
> ***Trade Union Membership***
> *Next Distribution recognises USDAW as the sole Trade Union for collective bargaining purposes. This means that USDAW will negotiate with Next on your behalf with regard to pay, hours of work and holiday entitlement.*
> ***Staff Handbook and Contract of Employment***
> *… The Staff Handbook includes the terms and conditions relating to notice period, sick pay, the Company's disciplinary rules. Appeals procedure and grievance procedure. Amended or new policies may arise from time to time to supplement the handbook and these will be notified to you after consultation with USDAW and the SCM (employee representative body) and published on the Intranet and copies on the notice board and will afterwards form part of your contract of employment.*

46. The contract of employment of Mr Oliver stated his place of work was principally West and South Yorkshire.

Submissions

47. Mr Short stated that none of the lead claimants were seeking a monetary award in respect of the Southern Weighting Allowance given their location of work and dates of employment. However, he said this would affect the claims of others and so should be considered as a contractual term in respect of which the comparators benefited.

48. The respondent countered that argument by saying that none of the chosen comparators would benefit from the Southern Weighting Allowance. Mr Short disputed that. He said that the comparators were employed on terms which expressly incorporated a national collective agreement. Because that included a weighting allowance for those who were in several of the RSC's located in the south of England, he said that it was immaterial that the comparator did not, as a matter of fact, enjoy the financial benefit of the allowance because they were in Doncaster. He said that if a person's contract included a term for enhanced overtime or adoption leave, it would not be fatal to an equal pay claim which selected them as a comparator, simply because they had not worked the overtime or taken the leave. It was the entitlement which mattered. This was practical in a collective case because it meant a different comparator who benefitted for each term of the collective agreement need not be selected.

49. Mr Green and Ms Donnelly disagreed. They say that Mr Short's argument would mean that any term of an RSC contract negotiated by USDAW would be a term of the comparators' contracts even though they worked at warehouses where significantly different terms and conditions applied.

Conclusions

50. The provision in the contracts of employment of the comparators in respect of collective negotiation of terms by USDAW had the effect of incorporating such collectively agreed terms. Although they did not expressly state that the terms collectively negotiated were incorporated, that was the inevitable inference of the inclusion of this paragraph in their contracts of employment.

51. The question is how that affected the terms of the comparator's contracts. Different terms and conditions applied to the RSC's on the one hand and warehouses on the other. This was the case in respect of shifts patterns, hours to be worked and some public holiday payments. That continued up until February 2017. Although Mr Short suggested that the small group who had transferred from the first respondent to the second, in 2008, had the same terms as the warehouse operatives, that was not the case in respect of their weekly hours which were 45 and higher than that of the comparators.

52. USDAW negotiated terms of different categories of employees such as drivers and warehouse workers. There are two Handbooks issued in 2006 and one issued in 2010 which differentiate between different groups of employees. For example overtime for those at the warehouses would take effect after 40 hours (although in some cases the individual's contract would state 39, 37.5 or 40.25) whereas the basic working week in the RSC's was consistently 45 hours and so higher overtime payments would only be generated over that number. The collectively negotiated terms affected different categories of employees and did not comprehensively apply to everybody. As an example the Handbooks signalled if a particular provision only applied to a specific group, such as drivers.

53. The terms for the RSCs and the warehouses came together after 1 February 2017, pursuant to a collective agreement with respect to basic hours and shift patterns, but this did not extend to those employed at the RSCs prior to that date. The comparators' contracts did not incorporate every conceivable benefit of any collectively agreed term, but only those which applied to them. They all remained on pre-2017 terms.

54. It is not possible for the comparators to claim the benefit of a Southern Weighting Allowance because their contracts specified their place of work which did not attract such an allowance. One reading of the contract was that they could be required to work at any site but that is immediately qualified in three of the comparators' cases as the mobility clause restricted relocation within a reasonable distance of their current workplace. That would not allow a transfer to any of the RSCs attracting a SWA. In the case of the fourth comparator, Mr Oliver, there was no mobility clause. The SWA simply did not apply to any of them. This was not like a case where there was an entitlement to adoption leave or overtime payments which are never made because, as a matter of fact, there was no adoption or overtime worked. The difference here is there was never any entitlement to work in a place where the SWA applied.

55. In cross examination of Ms MacIntyre, Mr Short posed an example of a comparator who requested to be moved to Hemel Hempstead which would then generate a 11% weighting allowance under the terms of the collective agreement. There was dispute as to her answer in closing submissions, but it did not overcome the fundamental obstacle that any such move was not governed by the contracts of employment of the comparators. The comparators had no entitlement to move to

Hemel Hempstead under the contracts of employment. Any such situation would involve a change to the terms of the contract by mutual agreement.

56. Section 80(2) of the EqA defines the terms of work as the terms of the person's contract of employment. The comparators could not enjoy the benefit of the SWA under their contracts. Mr Short implied in closing that we might adopt a similar approach to the *North* hypothetical. The particular development of the law to evaluating whether common terms applied under section 79(4) of the EqA is not one which can be read across to the comparison of terms under section 66. That was to address a situation in which there were no workers of the description of the comparator at the location where the claimant worked. In this case there are potential comparators at the location which attract the SWA, but they have not been chosen.

57. Furthermore, we accept the submission of the respondents that this is an invitation to allow claimants to cherry pick those terms of different employees, comparators or others who are not selected as comparators. In the hypothetical scenario put in cross examination it was not suggested that the comparator lose the benefit of a 40-hour working week if he moved to an RSC as well as enjoying the 11% SWA. Any other employee who had been employed before 1 February 2017 would be working on a 45-hour contract. Such selective combination of favourable terms is an artifice and not permissible.

58. Nor did the more recent collective agreement in respect of the Bristol RSC assist. It did not apply to those who were on historic contracts such as the comparators.

59. Finally, Mr Short suggested in his written submission that identification of individual comparators for equal pay was a matter of practice rather than a requirement of the legislation drawing upon dicta of Underhill J, as he then was, in ***Prest v Mouchel Business Services [2011] ICR 1345.*** His observation was qualified by a suggestion that a description of the comparator worker might be made in straightforward cases, as opposed to a name. Here the complexities of the respective terms and conditions of different comparators and claimants illustrate that this is far from a straightforward case and one which is quite unsuitable for a generic description of a comparator worker. Furthermore, the observations were made about the Equal Pay Act 1970 which uses slightly different statutory language to that of section 79 of the EqA. In the Equal Pay Act the requirement is for a comparison with a man in the same employment. In the EqA, "*A person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does*" see section 65(1) EqA. This description of B as a person does not sit easily with a generic description.

Public holidays/bank holidays

60. Under the COT there are 4 types of holiday payments: term 9, holiday bonus (the bonus paid for a period of annual leave); term 10 Bank Holiday Bonus (the bonus paid for leave taken on Bank Holidays); term 11 Public Holiday Hourly Premium (an enhanced rate of pay for working on public holidays) and term 12 Notional Public Holiday Premium (notional payment when shifts on Public Holidays were reduced by the respondent).

61. The respondents argue that terms 9 and 10 are about bonus rates for annual leave and public holidays. The claimants say they are separate because they are

distinct terms of the contract. A similar argument is raised for the purpose of terms 11 and 12. No detailed submissions were made.

62. Insofar as there is no difference in the computation of the less favourable effect it is not necessary for the Tribunal to prefer one basis of comparison to another. If a claimant seeks to explain her losses under a particular heading it is practical to apply that analysis. The Tribunal would not seek to redefine the heads of compensation in a schedule of loss presented by a claimant. We therefore are content for the terms to remain separate as nothing turns on an analysis by reference to the different meaning of terms within section 66(2) in respect of these parts of the claim.

CEO Bonus

63. In July 2013 a one-off bonus of 1% on contractual annual basic pay was awarded to all employees of the respondents who had been employed since June 2010. This was communicated by email from the CEO, Lord Wolfson.

64. In May 2014 a bonus of 1.5% was made on similar terms to those employees who had worked during the three-year period from April 2011 to April 2014.

65. For those two years the CEO was entitled to a significant award under a Share Matching Plan because of the success of the respondents. He decided to forego that payment and asked the Board to redirect the sums by way of one-off bonuses to staff. In his emails to the staff, he stated it was an additional bonus as a gesture of thanks and appreciation from the company for the hard work they had given.

66. Mr Short submitted this could be regarded as contractual, similarly to the concession of the respondents that the discretionary non-contractual bonuses were governed by the Equality of Terms provisions in the EqA. He said the Courts had been increasingly permissive in respect of what benefits would fall into this category and did not necessitate pursuit of a discrimination claim under section 39 of the EqA. There were historical reasons for the two regimes, equal pay and discrimination, and he relied on ***Hoyland v Asda Stores [2005] ICR 1235*** as an example of recognition of a discretionary bonus as falling within the former.

67. Mr Green said that this was a truly ex gratia payment and so could not be brought under the Equality of Terms sections of the EqA. It was a benefit which fell within section 39 of the EqA and could only be pursued as a discrimination claim. He distinguished this from the discretionary bonus schemes, because under those the rules for payment were spelled out in advance and the workers knew they would receive payment if they met the criteria. There was consideration for the payments. No such consideration was provided for the CEO bonus which was not governed by any contractual provision. It was ex gratia.

68. The approach of the ECJ is that under Article 157 on the Functioning of the European Union any benefit which is referrable to the employment relationship is regarded as falling within the definition of pay whether it is contractual or not. That would embrace an ex gratia payment. The domestic law developed differently and treated contractual benefits as falling within the Equal Pay provisions but non contractual benefits as falling within the discrimination provisions of the Sex Discrimination Act 1975. Section 6(2) of the SDA expressly excluded contractual

benefits from its remit. The separate provisions are sufficient to give effect to European law when taken together.

69. The EqA created a provision for Equality of Terms under Chapter 3. It is not limited to pay but is concerned with contractual terms, see section 80(2) EqA, cited above. Section 70 excludes the sex discrimination provisions with respect to claims to which a sex equality clause would apply and that would be with respect to contractual terms. So, the distinction is maintained under the EqA. An exception is introduced by section 71 of the EqA in relation to direct discrimination relating to pay where a sex equality clause would not apply. This would concern a situation in which there was no actual comparator within section 79 but there was evidence of direct sex discrimination concerning pay. It does not take matters further with respect to the CEO bonus.

70. We accept the submission of the respondents that the CEO bonus was an ex gratia payment. That was not the case in respect of the other bonus schemes. Although they were given the label of discretionary and non-contractual terms those descriptions were not reflective of the common intention of the parties. Any court or tribunal would be likely to find they were contractual and enforceable as such. Mr Mason explained that the use of the terms discretionary and non-contractual was to enable them to be withdrawn by the respondents without having to vary the contracts. That did not mean that the intention was that, if whilst they were operative and the employees had complied with the rules of the bonus scheme, the employer could choose not to pay it. If the employer had acted in that capricious way a claim for such payments would be recognised as a valid claim for breach of a contractual term. Had the employers withdrawn the scheme, as they did in changing the various retail bonus schemes, then no contractual entitlement would arise.

71. In contrast the CEO bonus was a reward made to all employees. They had not had to do anything to become entitled to the payment other than have been in employment at a particular date. We find it was not paid pursuant to any contractual term. It cannot fall within the Equality of Terms provisions in Section 3. The case of ***Hoyland*** does not assist the claimants as that reinforces the principle that the respective discrimination provisions on the one hand and the equal pay provision on the other are mutually exclusive.

Employment Judge D N Jones

Date: 25 April 2024