

On International Equal Pay Day, we highlight a very recent decision of the Employment Tribunal: Thandi & Others v Next Retail Limited (22 August 2024).

International Equal Pay Day, celebrated on 18 September 2024, represents the longstanding efforts towards the achievement of equal pay for work of equal value between women and men, recognising that the gender pay gap is estimated at 20% globally. It further builds on the United Nations' commitment to human rights and against all forms of discrimination, including discrimination against women and girls.

In the UK, we've had equal pay legislation since 1970 but there remains a gender pay gap of 7.7% for full-time employees across the UK. This does not necessarily mean that employers are not paying men and women equally for doing the same job, although that is one factor. Other factors which contribute to the gender pay gap are the lack of representation of women in the most senior (and therefore highly paid) roles in organisations and the prevalence of gender segregation in certain types of roles and sectors with what is traditionally considered "women's work" being historically undervalued.

An interesting development in the UK in recent years has been the number of claims being brought by large groups of claimants in the retail sector who work as sales assistants on

the shopfloor (mainly women) who have argued that their work is of equal value to warehouse workers (mainly men).

In *Thandi & Others v Next Retail Limited*, the Employment Tribunal held that it was a breach of equal pay law for Next to pay warehouse staff a higher rate of basic pay than shopfloor staff. The Tribunal had already found at an earlier hearing that the work of both groups was of equal value. The recent hearing addressed Next's argument that the difference in pay between the two roles was a material factor "*other than the difference in sex*" – what is known as the "*material factor defence*."

The material factors Next had relied upon were market forces and market price, difficulty recruiting and retaining warehouse staff and the viability, resilience and performance of Next and its group of companies. The Tribunal considered whether the material factors Next had relied upon were directly or indirectly discriminatory on the grounds of sex.

It found there was no direct discrimination. Next had not decided to pay men more than women. There were men and women working in the warehouse and they received the same rate of pay regardless of their sex as did the shopfloor staff.

However, the Tribunal did find that there was indirect discrimination. Under equal pay law, if claimants can produce statistics which demonstrate "*an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men*" an employer must then provide an objective justification for the difference. In Next's case, 77.5% of its sales staff were female whereas warehouse staff were 52.8% male. In

addition, Next benchmarked its pay against the market and the higher paid warehouse labour market was predominantly male.

The Tribunal found that the only reason for the difference in pay was cost-cutting. Next could have afforded to pay a higher rate of basic pay to the sales staff but had decided to keep labour costs to a minimum and maximise profitability. Next was therefore unable to justify the difference in pay as a proportionate means of achieving a legitimate aim because cost alone can never be a legitimate aim.

Interestingly, the Tribunal also said that if market forces were allowed to be a “trump card” in cases like this, it would defeat the purpose of the equal pay legislation and allow lower pay for certain types of work due to indirect discrimination to be continued in perpetuity. This case addresses head on the fact that women’s work has historically been undervalued which is the precise issue that the equal value aspect of the equal pay legislation was designed to address.

The implications of the Tribunal’s decision are very significant. The back pay and compensation claimed is said to be more than £30m – divided between 3,540 claimants. Next has said it is appealing the judgment. Tesco and Asda (among other large retailers) who are defending similar claims will be analysing the judgment carefully. All these cases are likely to be hard fought by the employers concerned because of significant compensation sought for backpay and also the cost of equalising pay for their staff going forwards, meaning the issue is unlikely to be settled by the time International Equal Pay Day 2025 comes around.

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact BDBF Partner Claire Dawson (ClaireDawson@bdbf.co.uk) or your usual BDBF contact.

LUNCHTIME WEBINAR – Complying with the new duty to prevent sexual harassment at work

LUNCHTIME WEBINAR – 8 October 2024

From 26 October 2024, all employers must be able to demonstrate compliance with a new legal duty to prevent sexual harassment at work. Our expert team will unpack this new duty and explain the steps employers should take to be confident about compliance.

We will consider the following issues:

- What is the scope of the new duty? How does it differ from the existing “reasonable steps defence”?
- Does the duty extend to sexual harassment of staff by third parties such as clients and contractors?
- When will a preventative step be viewed as “reasonable”?
- What types of steps will most employers need to take?
- What are the consequences of breaching the duty?
- How might the duty impact the settlement of sexual harassment claims?

Date: Tuesday, 8 October 2024

Time: 12.00pm-1.00pm

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