Appeal No. UKEAT/0286/15/JOJ, UKEAT/0289/15/JOJ,
UKEAT/0009/16/JOJ, UKEAT/0059/16/DM &
UKEAT/0227/16/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 26 to 28 April 2017
Judgment handed down on 20 June 2017

Before

THE HONOURABLE MR JUSTICE LEWIS

(SITTING ALONE)

UKEAT/0286/15/JOJ (appeal & cross-appeal)

MRS A FARMAH & OTHERS	APPELLANTS
BIRMINGHAM CITY COUNCIL	RESPONDENT

UKEAT/0289/15/JOJ (appeal & cross-appeal)

MRS A CALLAGHAN & OTHERS	APPELLANTS
BIRMINGHAM CITY COUNCIL	RESPONDENT

UKEAT/0009/16/JOJ

(1) MR A FENTON (2) MRS D FAIRLEY (3) MISS L HARPER	APPELLANTS
ASDA STORES LTD	RESPONDENT

UKEAT/0059/16/DM (appeal & cross-appeal)

ASDA STORES LTD	APPELLANT
MS S BRIERLEY & OTHERS	RESPONDENTS

UKEAT/0227/16/JOJ

SAINSBURY'S SUPERMARKET LTD	APPELLANT
MRS A AHMED & OTHERS	RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

In EAT/0286/15/JOJ For the Appellants	MR MUGNI ISLAM-CHOUDHURY (of Counsel) Instructed by: Quality Solicitors Davisons 63-65 Beckbury Road Weoley Castle Birmingham B29 5HS
In EAT/0286/15/JOJ For the Respondent	MR PAUL EPSTEIN QC and MS LOUISE CHUDLEIGH (of Counsel) Instructed by: Birmingham City Council Legal and Democratic Services PO Box 15991 Birmingham B2 2UP
In EAT/0289/15/JOJ For the Appellants	MS NATASHA JOFFE (of Counsel) Instructed by: OH Parsons LLP Churchill House Chalvey Road East Slough Berkshire SL1 2LS
In EAT/0289/15/JOJ For the Respondent	MR PAUL EPSTEIN QC and MS LOUISE CHUDLEIGH (of Counsel) Instructed by: Birmingham City Council Legal and Democratic Services PO Box 15991 Birmingham B2 2UP

APPEARANCES (continued)

In EAT/0009/16/JOJ For the Appellants	MR ANDREW SHORT QC and MS NAOMI CUNNINGHAM (of Counsel) Instructed by: Leigh Day Solicitors Priory House 25 St John's Lane London EC1M 4LB
In EAT/0009/16/JOJ For the Respondent	MR CHRISTOPHER JEANS QC and MR PATRICK HALLIDAY (of Counsel) Instructed by: Gibson Dunn & Crutcher LLP Telephone House 2-4 Temple Avenue London EC4Y 0HB
In EAT/0059/16/DM For the Appellant	MR CHRISTOPHER JEANS QC and MR PATRICK HALLIDAY (of Counsel) Instructed by: Gibson Dunn & Crutcher LLP Telephone House 2-4 Temple Avenue London EC4Y 0HB
In EAT/0059/16/DM For the Respondents	MR ANDREW SHORT QC and MS NAOMI CUNNINGHAM (of Counsel) Instructed by: Leigh Day Solicitors Priory House 25 St John's Lane London EC1M 4LB

UKEAT/0286/15/JOJ, UKEAT/0289/15/JOJ
UKEAT/0009/16/JOJ, UKEAT/0059/16/DM &
UKEAT/0227/16/JOJ

APPEARANCES (continued)

In EAT/0227/16/JOJ For the Appellant	MS NAOMI ELLENBOGEN QC and MR DALE MARTIN (of Counsel) Instructed by: Bond Dickinson LLP St Ann's Wharf 112 Quayside Newcastle upon Tyne NE1 3DX
In EAT/0227/16/JOJ For the Respondents	MR ANDREW SHORT QC and MS NAOMI CUNNINGHAM (of Counsel) Instructed by: Leigh Day Solicitors Central Park Northampton Road Manchester M40 5BP

SUMMARY

PRACTICE AND PROCEDURE - Striking-out/dismissal

Procedure – Rule 9 of the Tribunal Procedure Rules 2013 - Equal Pay Claims - Inclusion of Claims by Two or More Claimants On the Same Claim Form – Whether Irregular – Whether Discretion to Strike out – Whether Appropriate to Exercise Discretion to Strike Out Claims or Waive Any Irregularity

These five appeals concerned claims for equal pay. Three appeals concerned claims brought, largely, by female retail staff working in different jobs in supermarkets who claimed they were performing equal work with men working in distribution centres. Women doing different jobs included their claims in the same claim forms. Some men also included claims within the same claim form contending that, if the female Claimants were successful, then they did equal work with those successful female Claimants. Two of the appeals involved claims by women undertaking different jobs in local government who claimed that their work was equal work with men performing a variety of jobs. The Respondents contended that the Claimants' claims were not based on the same set of facts within the meaning of Rule 9 of the **Tribunal Procedure Rules 2013** and their claims should be struck out.

Rule 9 required a Tribunal to identify the complaints that the Claimants were making, then identify the set of facts upon which those complaints was based or founded and then to consider if the sets of facts were the same. In the context of a claim for equal pay, that is a claim contending breach of an equality clause included in a contract of employment by virtue of the **Equality Act 2010**, claims made by female Claimants doing different work, or jobs, were not based on the same set of facts as the claims involved a comparison of different jobs with the work of the male comparators. Similarly, claims made by male Claimants were not based on

the same set of facts as they sought to compare their work with the work of female Claimants not with other male comparators. The Judgment sets out the appropriate approach to the discretion to strike out claims or waive the irregularity.

THE HONOURABLE MR JUSTICE LEWIS

INTRODUCTION

1. These are five appeals concerning claims for equal pay. Three of the appeals involve claims brought by, largely, female employees employed in different jobs in supermarkets who say that they are being paid less than men carrying out equal work in other roles in warehouses and distribution centres. Two of the appeals involve claims brought, largely, by women against Birmingham City Council contending that they are paid less than male employees doing equal work. The Claimants have brought complaints alleging that there has been a breach of the equality clause included in their contracts of employment by virtue of section 66 of the **Equality Act 2010** ("the 2010 Act"). For convenience, this Judgment refers to Claimants, i.e. the employees who brought claims in the Employment Tribunal, irrespective of whether they are Appellants or Respondents in these proceedings. Similarly, this Judgment refers to the employers who were the Respondents in the Tribunal below as Respondents irrespective of whether they are Appellants or Respondents in these proceedings.

2. A number of the female (and some male) Claimants included their claims within one single claim form. Since the introduction of fees for issuing claim forms there are financial advantages in including claims within a single claim form as the fees for issuing a claim form containing claims by multiple Claimants are lower than the fees that would be charged if each of the Claimants issued an individual claim form. Rule 9 of the **Employment Tribunal Rules of Procedure** ("the Rules") contained in Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the Regulations") provides that two or more Claimants "may make their claims on the same claim form if their claims are based

on the same set of facts". The Respondents contend that female Claimants who are doing different jobs cannot include their claims in one claim form. They contend that claims for equal pay involve a comparison of the work of a woman with a man. If the female Claimants are doing different jobs then, the Respondents say, their claims are not based on the same set of facts and their claims cannot be included in one claim form. Similarly, they say that the inclusion of claims by men seeking to claim equal pay with a female Claimant who may succeed in her claim is not permitted by Rule 9 of the Rules. They contend that the male Claimants' claims are based on a different set of facts as they involve a different comparison: the male Claimants are comparing their work with the work of a potentially successful female Claimant whereas the female Claimants are comparing their work with the work done by other men. The Claimants contend that their claims are based on the same set of facts and, in any event, it would not be appropriate to strike out any irregular claims.

3. In four of the cases, Employment Judges held that including such claims within a single claim form did amount to non-compliance with Rule 9 of the Rules. In some cases, the Employment Judges then went on to strike out the claims, or some of them, but in some cases, Employment Judges have declined to strike out irregular claims and have waived the irregularity. In one case an Employment Judge decided that the inclusion of such claims within one claim form did not involve a failure to comply with Rule 9 of the Rules.

4. The appeals raise essentially two issues. First, they raise the question of the proper interpretation of Rule 9 of the Rules and when may claims for equal pay by women (and some men) performing different work may be included within a single claim form. Secondly, they

raise the issue of the proper approach to the exercise of the discretion conferred by Rule 6 of the Rules to strike out claims or waive the irregularity.

THE FACTS

Asda Stores Ltd. v Brierley

The Claims

5. This appeal concerns claims made by 5,497 employees of Asda Stores Limited alleging a breach of the equality clause introduced into their contracts of employment. Those claims had been included within 22 claim forms issued between July 2014 and June 2015. To give one example, one claim form included claims by 1,569 women and men. The proceedings also include 23 Claimants who had brought claims in 2008 in claim forms including more than one Claimant.

6. Most of the Claimants were female hourly-paid employees undertaking a variety of different jobs in the Respondent's supermarkets. Details of the work undertaken by the Claimants were not provided but job titles were. Those titles may give some indication of the work a Claimant is undertaking although, ultimately, it is the actual work that a Claimant is performing, not the description given to it, that will be relevant to the claim for equal pay. From the job titles provided, it is relatively clear, and agreed by all parties, that the Claimants perform a number of different jobs. They include Claimants working as staff serving customers in a range of areas (for example, in in-store pharmacies, bakeries, groceries and the like). Others are checkout operators. Some are described in a way that indicates that they perform administrative functions. Others appear to undertake security roles. The female Claimants seek to compare their work with the work done by men performing different roles within the

Respondent's warehouses and distribution centres. There was a further complication in that some of the female Claimants brought claims in respect of previous work done and their current work. There are also a number of male Claimants included within the claim forms. Their claims are, in effect, contingent claims. They contend that if the female Claimants succeed in establishing that their terms and conditions should be varied to enable them to receive equal pay with the (male) comparators, then the male Claimants should be entitled to equal pay as they are performing equal work to the female Claimants.

7. Fees are now paid for the issuing of claim forms and for subsequent stages in proceedings such as hearings. The provisions governing fees are contained in the **Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013** ("the Fees Order"). The fees payable by a claim form containing a claim by a single Claimant differ from the fees payable for claim form including a number of Claimants. Since 6 April 2014, the fee for issuing a claim form in an equal pay claim is £250. The fee for issuing a claim form containing claims by 2 to 10 Claimants is £500. The fee for issuing a claim form with 11 to 200 Claimants is £1,000 and one containing over 200 Claimants is £1,500. By issuing claim forms containing large number of Claimants, the Claimants paid substantially less in issuing fees than would have been paid if the claim forms had contained single claims or been grouped into claims with smaller numbers of Claimants.

The Application to Strike-out the Claims

8. The Respondents applied to the Employment Tribunal to strike out the claims. Claims may be contained in one claim form if they are based on the same set of facts. In the context of equal pay claims, the Respondents contended that that involved consideration of the facts

necessary to establish the claim. Equality clauses would be included, and terms and conditions of employment varied, if women were undertaking equal work with men. That could arise in one of three ways: (1) if women were doing like work with men (2) if they were doing work rated as equivalent to that of the work done by men or (3) if the work was of equal value as the work undertaken by the men: see section 66 of the **2010 Act**. The Respondents contended that the set of facts upon which a claim was based involved a comparison of the work that the female Claimant was undertaking with the work that the male comparator was undertaking. Claimants could only bring claims in one claim form if they were performing the same work. Otherwise, their claims would not be based upon the same set of facts. Similarly, the claim brought by a male Claimant would be based upon a different set of facts from that upon which a female Claimant would be based. The female Claimant would be seeking to compare her work with the work of a man paid more than her but whose work was of equal value. The male Claimant would be seeking to compare his work with that of a successful female Claimant (not with a male worker).

9. The Respondent contended that the issuing of claim forms with multiple Claimants in this way had led to a substantial underpayment of the fees properly payable under the Fees Order. The precise amount could not be calculated but it was likely, given the number of Claimants and claim forms involved, to be in the region of £650,000. Furthermore, the Respondent contended that the filing of unparticularised claims in which female Claimants were bringing claims in respect of different jobs, on different legal bases, together with claims brought by male Claimants on yet different legal bases, would frustrate the purposes said to underlie Rule 9 of the Rules.

10. The Claimants contended the claims were based on the same set of facts. They contended that the factual situation was as follows. There were two groups of workers, one was dominated by women and one by men. Hourly-paid, store-based work was usually carried out by women. The employees at distribution depots were predominantly male. It was said that the predominantly male employees in the distribution depots were paid more than the predominantly female employees working in stores, even though the work was of equal value or had been rated as equivalent. The Claimants contended therefore that the legal and factual context in which the claims were brought was that retail work, which is predominantly female, had been historically undervalued as compared to the distribution depot work which was predominantly male. It was said that claims would be based upon the same set of facts if, as in this case, the employer was the same and Claimants were employed in the retail department and it did not matter that the Claimants did different jobs or that some Claimants had brought claims in respect of previous jobs.

The Judgment of the Employment Judge

11. The application to strike out was considered at a Preliminary Hearing before Employment Judge Robertson. The Judge gave a comprehensive Judgment which was sent to the parties on 11 July 2015. The Judgment should be read in its entirety. The Judge, albeit with reluctance, found that the presentation of the claims did not accord with the requirements of Rule 9 of the Rules. His key conclusions are set out at paragraphs 87 to 89 of his Judgment in the following terms:

> **"87. The difficulty, to my mind, with Mr Short's case lies with his assertion that these proceedings are not about individual jobs. It is clear to me that, in the equal pay context, they must be. Although the Bainbridge line of authorities relates to the identification of causes of action, and does not concern rule 9 or its predecessor, I find the cases of assistance in identifying the essential factual basis for an equal value claim. In such a claim, the irreducible minimum set of facts on which the claim is based consists of the work done by the claimant which is said to be equal to her comparator's. The claimant must establish (1) the work which she did, (2) the work which her comparator(s) did, and (3) that the work was of equal value. I**

agree with Mr Jeans that a Checkout Operator, seeking to establish that her work is of equal value to a Warehouse Operative, cannot be said to base her claim on the same facts as say, a Bakery Assistant in terms of the essential factual inquiry as to what work she did. It is not enough that the claims are thematically linked and essentially assert the same broad contentions. In the context of the particular characteristics of an equal value claim, the facts on which the claims are based are not the same.

88. I agree with Mr Jeans that claimants might properly group themselves together as multiple claimants within rule 9 if they in practice undertook the same work because they were, for example, Checkout Operators, but what cannot be done is to bring together in a single claim form equal value claimants whose jobs are different and who rely on different sets of facts as to the work they do. This is even more so in the case of the male contingent claimants whose claims proceed on the wholly different basis that they do like work as their female colleagues on whom they "piggy-back".

89. I do not agree that this interpretation of rule 9 will render multiple equal value claims impossible. It will not. It will require careful consideration by claimants and those advising them, before presentation of their claims, as to what work they do and whether they rely on the same factual assertions about that work. I do not accept that the incidence of fees is material to the meaning of rule 9. The result may be unfortunate (and expensive) but that flows from what rule 9 requires."

12. Having found that the claim forms were irregular, the Judge then considered whether to strike out the claims or waive the irregularity. The Judge first identified that the irregularity had resulted in a substantial underpayment of issuing fees (and would result in a substantial underpayment of hearing fees if the claims proceeded in their present form). He considered that "the underpayment of fees is a factor which I should take into account in exercising my discretion" (see paragraph 109 of the Judgment of the Tribunal).

13. The Judge then identified a series of further factors that he took into account. These are set out in paragraph 110 of the Judgment in the following terms:

"110.1. If I strike out the claims, the claimants will be faced with the exercise of re-presenting the identical claims, but organised in accordance with rule 9. Once this has happened, the Tribunal and the parties will effectively be exactly where they are now, in that the claims will be combined, organised and dealt with within the case management framework which has already been established. In seeking to apply the overriding objective, I simply do not see any sufficient utility in requiring the claimants to undertake such an exercise;

110.2. Further such an exercise will result in significant delay in the proceedings and the additional cost of further issue fees;

110.3. The respondent has suffered no prejudice in the way the claims have been presented. Mr Jeans has not suggested that there has been any prejudice;

110.4. On the other hand, it seems to me that there is a risk of prejudice to at least some claimants. It may be that some claimants will be out of time to present their claims and will be required to proceed, if at all, in the High Court. Further, some claimants will forsake part of

their claims, by virtue of the six year period over which arrears may be awarded if the claims succeed;

110.5. I appreciate that if I waive the requirement, the claimants will secure a very substantial windfall in fees. The choice, however, is between waiving the requirement, and striking out the claims. I have no intermediate course available to me. In the exercise of my discretion, I consider that the factors which I have identified above significantly outweigh loss of fees;

110.6. If there was evidence that the claimants had deliberately presented the claims knowing that it was not permitted by rule 9, in order to avoid the payment of the very large fees involved, I might have taken a different view. But there is no evidence to that effect. Although Mr Jeans faintly suggested that the claimants conduct was cynical in this way, he adduced nothing to support the contention, and I have no basis to reach that conclusion."

14. The Judge concluded that he should not strike out the claims and should waive the requirement. His conclusions are at paragraphs 111 and 112 of the Judgment in the following terms:

"111. I conclude, therefore, that I should not strike out the claims, and I should waive the requirement under rule 6(a). The claims will proceed.

112. I make clear, however, that the action which I have taken applies only to claims presented prior to promulgation of this judgment. Prospective claimants and their solicitors are now aware of my ruling on the requirements of rule 9 and despite what I accept is the additional cost and work which will be required of them, they must now present their claims in accordance with rule 9. This does not require the presentation of individual claim forms, but allows multiple claims where job roles and work done are the same or so similar that the claims can be properly said to be based on the same set of facts. I do not consider that this requires any change in the existing Case Management Orders for the further conduct of the proceedings, but if the parties disagree, they are at liberty to agree alternative Case Management Orders and submit them to the Tribunal for approval or alternatively apply in writing to the Tribunal for a case management hearing."

15. The Respondent appealed against the decision not to strike out the claims. They contend first that there is no power to waive a breach of Rule 9 where the irregularity results in the avoidance of the payment of fees payable under the Fees Order. Secondly, they contend that the Employment Judge failed to have regard to the prejudice to Asda arising from the loss of (1) the case management benefits resulting from compliance with Rule 9 and (2) the loss of Asda's ability to rely on limitation defences and an increased exposure to arrears should the claims prove successful. Thirdly, the Respondent contends that the Employment Judge erred in limiting his consideration to the question of whether the Claimants knew they were contravening Rule 9 of the Rules and should have regard to the fact that their legal advisers

chose to include Claimants within the same claim form without proper consideration of whether that was permissible. Fourthly, the Respondent contends that the decision of the Employment Judge not to strike out the claims was perverse.

16. The Claimants cross-appealed against the finding that the inclusion of the Claimants' claims within the same claim form involved a breach of Rule 9 of the Rules.

Fenton v Asda Stores Ltd.

17. On 21 October 2015, three Claimants, Mr Fenton, Mrs Fairley and Miss Harper, brought claims in a single claim form alleging breach of the equality clause introduced into their contracts of employment by the **2010 Act**. The Claimants undertook different roles within Asda. Their legal representatives accepted in correspondence that the claims did not comply with Rule 9 of the Rules as interpreted by the Employment Tribunal in *Asda v Brierley* as the claims were not based on the same set of facts. Employment Judge Roberston made a case management Order on 23 October 2015 requiring the Claimants to show cause why the claims should not be struck out. Neither the Claimants nor the Respondents sought to show cause. By a Judgment given on 11 November 2015, Employment Judge Robertson struck out the claims, referring to the observations he made at paragraph 112 of the Judgment in *Asda v Brierley*.

18. The Claimants appeal against the finding that the presentation of the three claims was irregular as it involved a breach of Rule 9 of the Rules. They contend that the Tribunal erred in finding that the claims of the three Claimants were not based upon the same set of facts because the Claimants carried out different roles within the Respondent's business and because one of the Claimants is male and two are female. They contend that the Tribunal misdirected itself as

to the meaning of the words "based on the same set of facts" in Rule 9, erred in considering that the expression meant the same as "cause of action", failed to have regard to the overriding objective, and failed to give any or sufficient weight to the practice adopted prior to the introduction of the Rules. The Claimants do not appeal against the exercise of discretion to strike out the claim if, indeed, the inclusion of the claims in one claim form was irregular.

Farmah v Birmingham City Council

19. By way of background, a large number of equal pay claims have been brought against Birmingham City Council. The Claimants in those claims were predominantly female and their jobs included cooking, cleaning, escorting pupils and teaching support. Their comparators were men employed in jobs such as refuse collection, driving refuse vehicles, gardening, grave digging and driving. Many claims were based on a claim that the Claimants' jobs had been rated as equivalent under a job evaluation scheme. There were different such schemes for different categories of jobs and the schemes came into force at different times. Consequently, some of the claims would have involved jobs rated as equivalent to other jobs from a particular date but, before that date, some female Claimants contended that their work was work of equal value to work undertaken by men. The Claimants also included a small number of men who brought claims where their comparators were the female Claimants and their claims were contingent on the female Claimants succeeding in their claim against other male employees.

20. The *Farmah* case involved 48 Claimants who had brought their claim in a single claim form. 23 of the Claimants, including a Mrs Begum, were female and had job titles which said that they were Flying Start Practitioners Grade 3. The precise nature of the work does not appear from the claim form. They brought claims alleging that they were undertaking work of

equal value to certain male comparators. Of the 25 other Claimants, 23 were female Claimants who undertook a variety of jobs with various titles such as lunchtime supervisor, teaching assistant, support manager, or work in human resources. These Claimants claimed that their work was work of equal value with other males (although one alleged that her work had also been rated as equivalent to work of other males under a job evaluation scheme). The remaining two Claimants included in the claim form were male employees. One was a building services supervisor who claimed that his work was work of equal value to, or had been rated as equivalent to, work undertaken by certain identified and unidentified females. The second male had a job entitled "leisure assistant" and he claimed that his work was like work, or work of equal value or work rated as equivalent to work done by women. The Respondent applied to strike out the claims on the grounds that including the claims within the same claim form involved a failure to comply with Rule 9 of the Rules as they were not based on the same set of facts. That application was heard by Employment Judge Woffenden.

21. The Employment Judge accepted that equal pay claims involved a comparison of the work of the Claimant with the work of a comparator of a different gender. The Judge accepted that combining the claims of persons carrying out different jobs, and seeking to claim equal pay on different bases (e.g, that the work of the Claimant was work of equal value to that of the male comparator or had been rated as equivalent to such work for particular periods), meant that the claims were not based on the same set of facts. The Judge concluded that:

> **"on the basis of that analysis the largest group of claimants whose claims could have been made on the same claim form were those claimants whose job title was that of Grade 3 [Flying Start Practitioners] (Begum and 22 others) who rely on the same comparators for their [rated as equivalent claims] and on the same comparators for their [equal value] claims."**

22. The Judge therefore held that the claims of the 23 Claimants who were flying start practitioners were not brought irregularly and so there was no power to strike them out. The Judge then considered whether she should strike out or waive the irregularity that she found affected the other 25 Claimants. In considering that matter, the Employment Judge made the following points. First, she considered that the starting point should be a consideration of how the irregularity had come about. At paragraph 83 and following of her Judgment, the Judge said this:

> **"83. In deciding what action to take my starting point is consideration of how the irregularity has come about? Is it (as Mr Epstein submitted) of the claimants' own making? I remind myself that these claimants are not acting in person. They had legal representation throughout. Although the Fees and Remissions page which accompanied the claim form does not require that claimants or their representatives to confirm that if the claims were being made on behalf of more than one person those claims were based on the same set of facts it is reasonable to expect that given the beneficial fee regime for group claimants a legal representative has turned his or her mind to the requirements of rule 9 [of the Rules] and satisfied him or herself that having regard to the claims made the claimants he or she represents fall within the ambit of that rule.**
>
> **84. There was no evidence before me that [the claimants' legal representative] had at any time prior to the respondent's application of 31 March 2015 turned his mind to the requirements of rule 9 and/or what set of facts the claimants' equal pay claims were based on and/or whether they were the same for all the claimants. There was no evidence before me about why he presented the claim form on 28 October 2013 or what steps he had taken to take instructions from the claimants prior to presenting it or why factual allegations contained in the grounds of complaint were so few and so vague. Mr Islam Choudury proffered no explanation why the information available to the claimants was so 'opaque'. He had not submitted to Employment Judge Goodier that the necessary information was only available to the respondent; rather it was more readily available to the respondent than it was to the claimants. Before me his submission also concerned the respondent's relative ease of accessibility to information in comparison to the claimants …**
>
> **85. In my judgment if claimants choose to present their claims on a single claim form then it is incumbent on them to be able to demonstrate how the requirement of rule 9 have been satisfied. The burden on the claimants is not onerous; the same irreducible minimum facts which pertain to the claims (be they [rated as equivalent, equal value, or like work]) will suffice. I share the view of Employment Goodier expressed in paragraph 8 of his order of 12 November 2014 in which he said "*Plainly, claimants can reasonably be expected to know what jobs they were doing when, and there is no exception for equal pay claims to the general principle that it is for claimants to articulate a coherent claim before the respondent is required to plead to it.***
>
> **86. If equal pay claimants are unable to demonstrate compliance with rule 9 at the time they wish to present their claims, they are not thereby deprived of access to the tribunal; they can each present single claim forms accompanied by the requisite fee or application for remission. Thereafter an application that the claims be heard together can be made and if the circumstances set out in rule 36 apply a lead case can be identified. There is no evidence that the [claimants' legal representative] included claimants on the claim form deliberately knowing that they should not have been so included or that he did so with the intention of subverting the compulsory fee regime. I conclude that on the balance of probabilities having regard to the error made in the fee actually paid and the paucity and lack of detail in the grounds of complaint …..this came about because insufficient care and attention to detail had been given in relation to both the contents of the claimant's claims and the relevant [Rules]**

and [Fees Order] in the anticipation of the settlement payments which would follow the presentation of the claims.

87. In the absence of any evidence to the contrary there is no basis on which I should make any distinction between the claimants and their legal representative."

23. Secondly, the Employment Judge considered the seriousness of the breach. There had been an underpayment of issuing fees but the amount of the underpayment was relatively small (although if the requirement were waived, the Claimants would receive the benefit of paying lower hearing fees as the claim progressed). The Judge also considered that the inclusion of claims not based on the same set of facts was likely to make the task of case management more complex and would be likely to increase the length of any substantive hearing for all parties thereby increasing cost and delay. Having identified the relevant factors, the Employment Judge decided to strike out the claims of the 25 Claimants that she considered had failed to comply with Rule 9 of the Rules. Her essential conclusions were as follows:

"91. Should all the Farmah claims be struck out under rule 37? There has been a non-compliance with rule 9 for the purposes of rule 37 (1)(c) but only in respect of the non Begum claims. It would be draconian indeed in my judgment to strike them all out. A strike out of non Begum claims is not a draconian sanction for the affected claimants as would otherwise be the case since they are not thereby denied of the opportunity to have their claims determined by a tribunal; they are within time to commence fresh claims as Mr Epstein observed and he did not in his submission indicate he sought to deprive them of the opportunity of doing so. They would be liable for higher fees and the arrears date (having regard to section 123 Equality Act 2010) would be changed to their detriment as Mr Islam-Choudhury submitted. The hearing fees for the claims going forward would be calculated on the basis the claims are Type B and would therefore also be higher. There may need to be some separate case management hearings for the claims but it is to be hoped that the claimants in the non Begum claims will now be in a position to properly particularise them and future case management would be straightforward. The effect of the strike out of the non Begum cases would be so far as is possible put the Farmah claimants in the position they would have been had Rule 9 been complied with albeit the claims will no longer proceed in tandem along the same timeline. I recognise however that if I were to make such an order I would not be able to treat all the Farmah claimants equally."

And

"… The competing arguments as to how I should exercise my discretion in relation to action under rule 6a) or b) were finely balanced but in my judgment I consider it just for the non-Begum claims to be struck out. It imposes a sanction for the irregularity but does not deprive the affected claimants of access to justice and will have the effect of putting the parties as far as possible in the position they ought to have been had rule 9 been complied with. If the non-compliance has arisen due to the failings of the non-Begum claimants' legal representatives (and I have made no such finding) then they may have recourse elsewhere for any losses they have suffered as a result. Such a strike out order will facilitate effective bespoke case management of all of the Farmah claims which is likely to reduce the costs and the length of any substantive hearing. It is hoped that in turn will reduce delay for the parties (which will be

> **of particular concern to the claimants) because the tribunal finds it easier to accommodate shorter hearings."**

24. The 25 Claimants whose claim had been struck out appealed on the ground that the Employment Tribunal had been wrong to conclude that the claims were not based on the same set of facts within the meaning of Rule 9 of the Rules. The Claimants contended, alternatively, that the Tribunal erred in the exercise of its discretion to strike out the claim.

25. The Respondent cross-appealed in respect of the 23 Claimants whose claims were not struck out on the basis that the Employment Tribunal had erred in finding that there was no irregularity in including their claims within the same claim form as the other 25 Claimants. The Respondents contended that although those 23 Claimants could have included their 23 claims within a single claim form they had in fact brought their claims within a single claim form including all 48 Claimants and so there had been a failure to comply with Rule 9 of the Rules.

Callaghan and others v Birmingham City Council

26. Mrs Callaghan and 7 other Claimants made equal pay claims and included all their claims on the same claim form. All eight Claimants were female. Two, Ms Jones and Ms Wright, described themselves as clerical assistants and claimed their work was of equal value to particular groups of male comparators. The other six Claimants had job titles which indicated that their work was different from that of the work that clerical assistants might be expected to perform. They claimed that their work was work of equal value to, or had been rated as equivalent to, work undertaken by certain men (not the men with whom Ms Jones and Ms Wright sought to compare themselves).

27. Employment Judge Woffenden found that six of the claims were irregularly included within the claim form as they were not based on the same set of facts as other claims. The Judge found that there was no irregularity in respect of the claims made Ms Jones and Ms Wright as their claims could have been included within one claim form.

28. The Employment Judge adopted the same approach to the question of whether to strike out the six claims that she had found to be irregular that she had adopted in *Farmah*. She considered first how the irregularity came about. The Judge considered that it was reasonable to expect the Claimants' legal representative to turn his mind to the requirements of Rule 9 of the Rules. She found that there was no evidence that the representative had deliberately included claims within the same claim form with the intention of avoiding the consequences of the fee regime. She found that insufficient care and attention had been taken to ensure that the requirements of the relevant Rules had been met. Secondly, the Judge considered the seriousness of the breach. The irregularity had led to an apparent underpayment of the issuing fees in the order of £1,500. That was of crucial importance in the context of the scheme for progressing claims. The Judge considered that the irregularity was more than a mere technicality and assessed the breach as being moderately serious. The Judge noted a number of other factors. These included the fact that if claims were allowed to proceed which were not based on the same set of facts further case management would be required to consider if claims should be heard together and this would result in additional administrative and judicial burdens on Tribunals (and that would risk causing delays in hearing cases brought by others). She noted that a waiver would undermine the importance of compliance with Rule 9 of the Rules and would run counter to the intention underlying the imposition of fees. She considered that the prejudice to the Respondent if the irregularity were waived was, primarily, to expose them to

having to continue to defend undifferentiated claims. The Employment Judge's conclusions were as follows:

> **"43. As far as the serious step of strike out of all the claims is concerned I have to be satisfied that one of the grounds set out in Rule 37a) to e) exists and if so whether I should exercise my discretionary power to strike out and at this stage I must again have regard to the overriding objective. I have already concluded above that the claimants' claims (excluding Jones and Wright) were not based on the same set of facts for the purposes of rule 9 and were therefore wrongly included on the claim form presented on 7 April 2014. There has been a non-compliance with Rule 9 for the purposes of Rule 37 (1) (c) of the ET Rules but only in respect of those claims. It would in my judgment be draconian to strike out all the Callaghan claims. However, if I am wrong in my conclusion that the non compliance is only in respect of 6 claims and encompasses all the Callaghan claims, I regard as a relevant factor in considering what action to take that Jones and Wright could have presented their claims on a single claim form. If the claims of the other claimants were struck out they are not thereby deprived of the opportunity to have their claims determined by a court or tribunal; they are within time to commence fresh claims albeit limitation issues may affect those claims to their detriment. The correct amount of issue fees would be paid addressing any previous underpayment. The correct amount of hearing fees would be paid as those claims progress. I see no reason why any fresh claims could not be properly particularised. Case management would be simplified. The claims of Jones and Wright could continue. The effect a strike out of the remaining 6 claims would so far as possible put all the Callaghan claimants in the position that they would have been had Rule 9 been complied with and the fee regime correctly adhered to albeit the claims would no longer proceed in tandem along the same time line. I recognize however that if I were to make such an order I would not be able to treat all the Callaghan claimants equally.**
>
> **44. For the sake of completeness neither party addressed me on (nor can I conceive of) any other action (either set out in Rule 6 or otherwise) that it would be just for me to take.**
>
> **45. The competing arguments as to how I should exercise my discretion in relation to action under Rule 6 a) or b) are finely balanced but in my judgment I consider it just that the Callaghan claims (other than Jones and Wright) are struck out. This imposes a sanction for the irregularity but does not deprive the affected claimants of access to justice and will have the effect of putting the parties as far as possible in the position in which they would have been had Rule 9 been complied with. If the non-compliance has arisen due to the failing of their legal representative (and I have made no such finding) the affected claimants may have recourse elsewhere for any losses they have suffered as a result. A strike out order will facilitate effective bespoke case management of all of the Callaghan claims which is likely to reduce costs and the length of any substantive hearing. It is to be hoped that that in turn will reduce delay for the parties (which will be of particular concern to the claimants) because the tribunal finds it easier to accommodate shorter hearings."**

29. The six Claimants whose claims were struck out appealed. The first ground of appeal is that the Tribunal erred in finding that the Claimants had not complied with Rule 9 of the Rules. The second ground of appeal is that the Tribunal erred in exercising its discretion to strike out the claims. The Respondent cross-appealed in relation to the decision not to strike out the claims of Ms Jones and Ms Wright. They contended that the Tribunal erred in finding that there had been no irregularity in relation to the inclusion of the claims of Ms Jones and Ms

Wright in the claim form. They also contended that the alternative decision that their claims would not have been struck out even if there had been an irregularity was flawed as there was no proper basis for distinguishing these two Claimants from the other six Claimants.

Sainsbury's Supermarkets Limited v Ahmed

30. This case dealt with claim forms incorporating claims by 192 Claimants. The first claim form was that in the case of Ahmed v Sainsbury's Supermarkets Ltd. That included claims by four female Claimants. Their jobs, or work was described respectively as pharmacy dispenser, pharmacy counter assistant, bakery assistant and checkout operator. It was agreed that all four Claimants were carrying out different work (that is, their jobs were different). In addition, one of the four Claimants, Ms Hemsley, included a claim in respect of jobs that she had previously undertaken for Sainsbury's. Those jobs, too, it seems, were different from any of the four jobs that were the subject of the claim. The claim was that the four Claimants carried out (or had previously carried out) work which was of equal value to, or rated as equivalent to, work done by male warehouse operatives, warehouse labourers, warehouse assistants, order pickers, loaders and unloaders, team supervisors, operative supervisors and other, unspecified jobs (which were not administrative or managerial jobs).

31. By the time of the Tribunal decision, a total of 32 claim forms, including more than one Claimant, had been issued. 20 of these claim forms included claims made by approximately 81 females and 12 included claims made by approximately 40 male Claimants. In addition, 46 female Claimants and 25 male Claimants had issued claims in claim forms naming only one Claimant. The Tribunal did not determine whether the Claimants included in the various claim forms presented after that in Ms Ahmed's case were doing the same work (and there may,

possibly, be an issue as to whether the Claimants in each claim form were seeking to compare their work with the same comparators and on the same legal basis).

32. A Preliminary Hearing was held to determine if the claim forms in Ahmed, and the subsequent claim forms, were irregular for the purposes of Rule 9 of the Rules. The Claimants contended that claims could be based on the same set of facts if they were based on what were described as facts considered at a high level. These were said to be the fact that there were two groups of workers, one male dominated, and one female dominated. The female dominated group were hourly paid and working in store based roles. By contrast, employees employed at warehouses were predominantly male and those (predominantly male) workers received higher pay.

33. Employment Judge Pirani concluded that the inclusion of the claims in a single claim form in the case of *Ahmed,* and the subsequent claim forms, was not irregular. The Employment Judge considered that the question of whether Rule 9 of the Rules required the Claimants to show that the claims were based on what he described as the same cause of action was to be determined by ascertaining the objective intention of the legislature. That involved consideration of any relevant aspects of the pre-legislative history. He considered that the practice of many Employment Tribunals was that the larger equal pay claims would involve claim forms containing several (and sometimes several hundred) Claimants, male and female, undertaking a variety of jobs and comparing their work with the work of a variety of comparators. He considered that any change to that practice brought about by the changes made by Rule 9 of the Rule was a fundamental change which "would have been clearly signposted" (see paragraph 95 of the Judgment of the Tribunal). The Judge considered the

A background material relating to the review of the procedural Rules, the consultation process, the impact assessment and the government's response and concluded that that material did not indicate that any such change in practice was intended. He considered the material relating to the introduction of fees and concluded that that material did not indicate any dissatisfaction with what he described as the existing test for deciding whether claims were suitable to be presented together. He also considered that his interpretation was consistent with the overriding objective of the Rules set out in Rule 2 of the Rules. He concluded that:

> **"112. Taking all this into account I conclude that:**
>
> **i. It was not felt that the proposals for the 2013 Rules had any impact on the plans for charging for multiple claims, or vice versa.**
>
> **ii. There is no basis for the assertion that Rule 9 is intended to impose a new, strict standard for joining claims on a single claim form.**
>
> **iii. I am satisfied that the claims are based on the same facts as articulated by Mr Short, set out above.**
>
> **113. Accordingly, in my judgment there has been no irregular presentation of claims contrary to Rule 9 in these cases."**

34. The Respondent appealed against the finding of the Employment Tribunal. The first three grounds of appeal were that the Tribunal had erred in failing to identify the set of facts upon which the claim was based and failed to conclude that the jobs carried out by the Claimants had to be the same in order to be capable of being properly brought within one claim form and failed to address the comparator jobs. Ground 4 contended that the decision was incompatible with the objective legislative intention of Rule 9 of the Rules. Ground 5 contended that the Tribunal had erred in concluding that the position under the previous Rules was different and that Rule 9 of the Rules was therefore intended to bring about a substantial change in the Rules.

THE RELEVANT LEGAL FRAMEWORK

The Statutory Rights

35. Various statutes confer rights upon employees and confer jurisdiction upon Employment Tribunals to hear claims alleging that a breach of the rights conferred by statute has occurred. By way of example, statute confers a right upon an employee not to be unfairly dismissed and provides that a "complaint may be presented to an employment tribunal against an employer that he was unfairly dismissed" (see sections 94 and 111(1) of the **Employment Rights Act 1996**).

36. In the present case, the claims concern provisions contained in Part 5 of the **2010 Act**. That Part deals with discrimination in relation to employment. Chapter 3 of Part 5 of the **2010 Act** is headed "Equality of Terms" and deals with discrimination in relation to differing terms of employment. Sections 64 to 66 of the **2010 Act** provide that:

> ***"64 Relevant types of work***
>
> **(1) Sections 66 to 70 apply where—**
>
> > **(a) a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does;**
> >
> > **(b) a person (A) holding a personal or public office does work that is equal to the work that a comparator of the opposite sex (B) does.**
>
> **(2) The references in subsection (1) to the work that B does are not restricted to work done contemporaneously with the work done by A."**
>
> ***"65 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.

(4) A's work is rated as equivalent to B's work if a job evaluation study—

(a) gives an equal value to A's job and B's job in terms of the demands made on a worker, or

(b) would give an equal value to A's job and B's job in those terms were the evaluation not made on a sex-specific system.

(5) A system is sex-specific if, for the purposes of one or more of the demands made on a worker, it sets values for men different from those it sets for women.

(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."

"66 Sex equality clause

(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) 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.

(3) Subsection (2)(a) applies to a term of A's relating to membership of or rights under an occupational pension scheme only in so far as a sex equality rule would have effect in relation to the term.

(4) In the case of work within section 65(1)(b), a reference in subsection (2) above to a term includes a reference to such terms (if any) as have not been determined by the rating of the work (as well as those that have)."

37. Section 69 of the **2010 Act** is headed "Defence of material factor" and provides that the sex equality clause in a person's contract has no effect in relation to a difference in terms of employment which the employer can show is because of a material factor reliance on which does not involve treating the person less favourably because of the person's gender and (if the

A factor puts the person and others of the same gender to a particular disadvantage) the factor is a proportionate means of achieving a legitimate aim.

B 38. Section 120 of the **2010 Act** is headed "Jurisdiction" and provides, so far as material, that:

> **"(1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to**
>
> **(a) a contravention of Part 5 (work) …"**

C

39. Section 132 of the **2010 Act** deals with remedies "on a complaint relating to a breach of an equality clause". It provides that the Tribunal make a declaration as to the rights of the

D parties and may order an award of arrears of pay or damages. Arrears may only be awarded for the period of 6 years before the day on which the proceedings were instituted (save in cases of concealment or incapacity).

E

Procedures for Complaints

40. Section 7 of the **Employment Tribunals Act 1996** ("the 1996 Act") provides power for the Secretary of State to make such provision by regulation as appears to him to be necessary or

F expedient with respect to proceedings before Employment Tribunals. The present Rules are contained in Schedule 1 to the **Regulations**: see Regulation 1 of the Regulations.

G *General Provisions*

41. Rules 1 to 7 of the Rules deal with what are described as introductory and general matters. Material provisions for present purposes include the following. First, Rule 1 of the Rules contains definitions of terms in the Rules. They include the following:

H

> **""claim" means any claim before an Employment Tribunal making a complaint**

"claimant" means the person bringing the claim

…

"complaint" means anything that is referred to as a claim, complaint, reference, application or appeal in any enactment which confers jurisdiction on the Tribunal."

42. Rule 2 of the Rules sets out the overriding objective of the Rules in the following terms:

> ***"2. Overriding objective***
>
> **The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—**
>
> **(a) ensuring that the parties are on an equal footing;**
>
> **(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;**
>
> **(c) avoiding unnecessary formality and seeking flexibility in the proceedings;**
>
> **(d) avoiding delay, so far as compatible with proper consideration of the issues; and**
>
> **(e) saving expense.**
>
> **A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."**

43. Rule 6 of the Rules deals with irregularities and non-compliance with the Rules and Orders of the Tribunal and provides that:

> ***"Irregularities and non-compliance***
>
> **6. A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23, or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following –**
>
> **(a) waiving or varying the requirement;**
>
> **(b) striking out the claim or response, in whole or in part, in accordance with rule 37;**
>
> **(c) barring or restricting a party's participation in proceedings;**
>
> **(d) awarding costs in accordance with rules 74 to 78."**

Starting a Claim

44. The Rules contain provisions setting how a person may start, or respond, to a claim. Rule 8 of the Rules provides, so far as material, that:

> ***"8 Presenting the Claim***
>
> **(1) A claim shall be started by presenting a completed claim form (using a prescribed form) in accordance with any practice direction made under regulation 11 which supplements this rule."**

45. Rule 9 of the Rules provides that:

> ***"9. Multiple Claimants***
>
> **Two or more claimants may make their claims on the same claim form if their claims are based on the same set of facts. Where two or more claimants wrongly include claims on the same claim form, this shall be treated as an irregularity falling under rule 6".**

46. Rule 11 of the Rules deals with the rejection of claims where the relevant fee is not paid, or is not paid in full. It provides that:

> ***"11. Rejection: absence of Tribunal fee or remission application***
>
> **(1) The Tribunal shall reject a claim if it is not accompanied by a Tribunal fee or a remission application.**
>
> **(2) Where a claim is accompanied by a Tribunal fee but the amount paid is lower than the amount payable for the presentation of that claim, the Tribunal shall send the claimant a notice specifying a date for payment of the additional amount due and the claim, or part of it in respect of which the relevant Tribunal fee has not been paid, shall be rejected by the Tribunal if the amount due is not paid by the date specified.**
>
> **(3) If a remission application is refused in part or in full, the Tribunal shall send the claimant a notice specifying a date for payment of the Tribunal fee and the claim shall be rejected by the Tribunal if the Tribunal fee is not paid by the date specified.**
>
> **(4) If a claim, or part of it, is rejected, the form shall be returned to the claimant with a notice of rejection explaining why it has been rejected."**

Responding to a claim

47. Unless the claim is rejected, a copy is sent to each Respondent together with a prescribed response form explaining, among other things, how to submit a response to a claim: see Rule 15 of the Rules. Rule 16 provides that:

> ***"16. Response***
>
> **(1) The response shall be on a prescribed form and presented to the tribunal office within 28 days of the date that the copy of the claim form was sent by the Tribunal.**
>
> **(2) A response form may include the response of more than one respondent if they are responding to a single claim and either they all resist the claim on the same grounds or they do not resist the claim.**
>
> **(3) A response form may include the response to more than one claim if the claims are based on the same set of facts and either the respondent resists all of the claims on the same grounds or the respondent does not resist the claims."**

Case Management

48. Rules 29 to 40 of the Rules deal with specific aspects of case management Orders and other powers. Material Rules for present purposes provide, so far as material as follows:

> ***"36. Lead cases***
>
> **(1) Where a Tribunal considers that two or more claims give rise to common or related issues of fact or law, the Tribunal or the President may make an order specifying one or more of those claims as a lead case and staying, or in Scotland sisting, the other claims ("the related cases").**
>
> ***37. Striking out***
>
> **(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—**
>
> > **(a) that it is scandalous or vexatious or has no reasonable prospect of success;**
> >
> > **(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;**
> >
> > **(c) for non-compliance with any of these Rules or with an order of the Tribunal;**
> >
> > **(d) that it has not been actively pursued;**
> >
> > **(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).**
>
> **(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.**
>
> **(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above."**

And

> ***"40. Non-payment of fees***
>
> **(1) Subject to rule 11, where a party has not paid a relevant Tribunal fee or presented a remission application in respect of that fee the Tribunal will send the party a notice specifying a date for payment of the Tribunal fee or presentation of a remission application.**

> **(2) If at the date specified in a notice sent under paragraph (1) the party has not paid the Tribunal fee and no remission application in respect of that fee has been presented—**
>
> > **(a) where the Tribunal fee is payable in relation to a claim, the claim shall be dismissed without further order…"**

The Fees Order

49. The Fees Order makes provision for the payment of fees. Article 3 of the Fees Order provides that:

> **"Fees are payable in respect of any claim presented to an employment tribunal, or an appeal to the Employment Appeal Tribunal, as provided for in this Order."**

50. Article 4 of the Fees Order provides that a fee is payable by a single Claimant or a fee group (defined as the group of persons named as Claimants in the claim form at the time it was presented) (a) when a claim is presented, referred to as the issue fee and (b) on the date specified in the notification of hearing, referred to as the hearing fee.

51. The issue fee payable by a single Claimant is different from that payable by a fee group. Since 6 April 2014, the issue fee for a single Claimant for an equal pay claim (referred to in the Fees Order as type B claim) is at present £250 and the hearing fee is £950. The fees for a fee group are at present as follows:

> Issue fee for 2-10 Claimants - £500; for 11 to 200 Claimants - £1,000; and over 200 Claimants - £1,500
>
> Hearing fee for 2-10 Claimants - £1,900; for 11 to 200 Claimants - £3,800; and over 200 Claimants £5,700.

52. There is provision for remission of fees in certain circumstances: see Article 17 and Schedule 3 to the Fees Order.

THE ISSUES

53. In the light of the grounds of appeal and the written and oral submissions, the following issues arises in these appeals:

(1) What is the correct interpretation of Rule 9 of the Rules and, in particular, when may two or more Claimants making claims alleging a breach of an equality clause include the claims in the same claim form?

(2) Did the Employment Tribunal err:

(a) In the *Asda v Brierley* and *Fenton,* cases, by holding that claims would not be based on the same set of facts where female Claimants were performing different work from each other, or where the claim form included male Claimants bringing claims contingent on the female Claimants succeeding in their claims, or in the *Sainsbury's* case by holding that such claims were based on the same set of facts?

(b) In *Farmah* and *Callaghan,* by holding that where claims could have been included within the same claim form, those claims were not irregularly brought when they were in fact included with other Claimants' claims which were not based on the same set of facts?

(c) Does the Tribunal have any discretion about striking out claims which are brought irregularly in that the Claimants' claims are included in one claim form but not are not based on the same set of facts?

(3) What is the correct approach to the exercise of the power to strike out a claim irregularly brought, or alternatively to waive the irregularity, under Rule 6 of the Rules?

(4) Did the Tribunal err:

(a) In *Asda* by deciding not to strike out the claim;

(b) In *Farmah* and *Callaghan* by striking out claims not based on the same set of facts and/or in not striking out claims that could have been included in one claim form.

THE FIRST ISSUE – THE PROPER INTERPRETATION OF RULE 9 OF THE RULES

54. The first issue concerns the proper interpretation of Rule 9 of the Rules. Mr Short QC, for the Claimants in the *Asda v Brierley, Fenton,* and *Sainsbury's* appeals, submits that where cases are sufficiently similar for it to be appropriate for them to be dealt with together they can be described as being based upon the same set of facts for the purposes of Rule 9 of the Rules. In the present cases, he submits that (1) the Claimants were employed in Asda (or Sainsbury's, in the Sainsbury appeal) (2) that most of the retail staff are women whereas almost all of the employees working in depots are men (3) there is a single source and common terms and conditions of employment enabling a comparison to be made between retail staff and male depot staff (4) that the predominantly female retail staff are employed on work of equal value to the comparators who are male (5) that the female retail staff are paid less than the male depot staff and (6) there is no good reason for the disparity. In those circumstances, he submits, the cases are sufficiently similar so as to be based upon the same set of facts. He submits that the claims by male Claimants are also based on the same set of facts as they rely on the female Claimants proving their claim against the male comparators and then the male Claimants need to prove additional facts, namely those needed to establish that they are doing equal work to a successful female Claimant.

55. Mr Islam-Choudhury on behalf of the Claimants whose claims were struck out in the *Farmah* appeal contends that the claims of those Claimants were based on the same set of facts as they were founded upon common facts (notwithstanding that there were factual differences between the claims). Ms Joffe on behalf of the Claimants whose claims were struck out in the *Callaghan* appeal submits that Rule 9 of the Rules permits inclusion of claims on the same claim form when the claims are based on the same set of facts when considered at a high level of generality or when the claims are based on the same essential facts. In the present case, disparities in pay between male and female dominated roles, she submits, grew out of a history which embedded inequality and assumptions about the value of women's work and men's work in the pay structure. Ms Joffe submits therefore that the claims in the *Callaghan* appeal are based on the same essential facts.

56. The Claimants in all the appeals contend that the interpretation of Rule 9 of the Rules for which they contend is supported by, or consistent with, the language of the Rule, its purpose, the overriding objective, and the prior practice and the legislative history of the procedural Rules relating to claims for equal pay.

57. Mr Jeans QC for Asda, Mr Epstein QC for Birmingham City Council, and Ms Ellenbogen QC for Sainsbury's, submit that for claims to be based on the same set of facts they must be based on a comparison of the set of facts necessary to establish the claim. In the context of a claim for a breach of an equality clause, those facts are the facts which (1) constitute the Claimants' own work (2) constitute the comparator's work (3) establish that the Claimant and the comparator are of different genders (i.e. one female and one male). They submit that the factual core of an equal pay claim is a comparison of a female Claimant's job

with a male comparator's job. If the Claimants are performing different jobs, their claims are not based on the same set of facts. If claims are put on different legal bases – like work or work of equal value or work rated as equivalent – the factual comparisons will be different and the different claims will not be based on the same set of facts. They submit that that is the meaning of Rule 9 of the Rules and nothing in the legislative history, the purpose of Rule 9 of the Rules, the overriding objective, or previous practice or judicial understanding of the previous procedural Rules supports a different interpretation.

Discussion

58. By way of preliminary observation, the parties accept that this is an issue of the proper interpretation of Rule 9 of the Rules. The task is to identify the meaning of the words in Rule 9 of the Rules in the particular context in which they are used having regard to other permissible aids to interpretation such as any relevant presumption, the legislative history of the provision and other background material in so far as that assists in identifying the defect that the provision is intended to cure or the purpose that the provision is intended to achieve: see generally, the observations of Lord Nicholls of Birkenhead in **R v Secretary for Environment ex p. Spath Holme Ltd** [2001] 2 AC 349 at pages 396F to 398F.

The Language of the Rules

59. The starting point is the words used read in context. Rule 8 of the Rules provide that a claim shall be started by presenting a completed claim form using a prescribed form. Rule 9 of the Rules provides that "two or more Claimants" may make "their claims" on the same claim form "if their claims are based on the same set of facts". A claim means "any proceedings before an Employment Tribunal making a complaint". A complaint is "anything referred to as

A a claim, complaint, reference, application or appeal in any enactment which confers jurisdiction on a Tribunal": see Rule 1 of the Rules.

B 60. The first stage, therefore, is to identify the complaints that are being made by two or more Claimants. Secondly, the Rule contemplates that those complaints will be "based on" a "set of facts". The natural meaning of "based on" means the set of facts upon which the complaint is based or founded, that is the set of facts necessary to establish the complaint. A C "set" of facts, means a collection, or group, of facts. That interpretation of "based on" and "set" is also consistent with the dictionary definition of those words. See the definitions in the Shorter Oxford English Dictionary 1989 of "basis" and "base" (the foundation or support for a D thing) and "set" (a collection or number of things). Thirdly, it is then necessary to compare the set of facts upon which the Claimants' claims are based (or founded) to determine if they are the same. On a natural reading of the words used, therefore, Rule 9 of the Rules involves (1) identifying the claims (or complaints) being made by the Claimants (2) considering the set of E facts upon which "their claims are based" or founded and (3) determining whether those claims are based on the "same set of facts", in which case the Claimants' claims may be included in the same claim form.

F

61. Applying that meaning in the present case, the position is as follows. Each complaint in the present case is a complaint relating to a contravention of Part 5 of the **2010 Act**: see section G 120 of the **2010 Act**. That involves, here, a complaint relating to an alleged breach of the sex equality clause included in a Claimant's contract of employment by section 66 of the **2010 Act**. That section applies, and a sex equality clause will be introduced into a person's contract of employment, if a person of one gender is employed on work that is equal to work done by a H

person of a different gender. Further, for these purposes, a person's work is equal to the work done by a person of a different gender if (1) the work is like work (that is the work of the man and the woman are the same or broadly similar) (2) the work of the woman is rated as equivalent to a man's work in a job evaluation study or (3) a woman's work does not fall into either of those categories but is of equal value to the work of a man having regard to factors such as effort, skill and decision-making.

62. A complaint by a female Claimant will be based upon a set of facts involving comparing her work with the work done by a male comparator to assess whether the work is the same or broadly similar, or has been rated as equivalent, or is of equal value (in terms of skills, demands and efforts), to work done by a person of a different gender. To give a simple example, if a supermarket checkout operator wishes to make a complaint of a breach of a sex equality clause introduced into her contract by section 66 of the **2010 Act** because a warehouse worker is paid more, there will need to be a comparison of the work done by the female checkout operator and the work done by a male warehouse worker to determine if it is equal work in one of the three ways identified in section 65 of the **2010 Act**. That is the set of facts upon which her complaint of a contravention of Part 5 of the **2010 Act** is based. If another Claimant wishes to bring a claim for breach of a sex equality clause, and she is doing different work from a checkout operator, then her complaint will not be based on the same set of facts as that of the checkout operator. The set of facts in her case will include a comparison of the (different) work that she does with the male comparator to assess whether her work is of equal value to that of her male comparator. Thus, if the female employee is a baker her work will have to be compared with the work of a male warehouse operative to see if her work is equal work to that of the male

comparator's. But her claim will be based upon a different set of facts from a female Claimant whose work or job is different.

63. That analysis of the factual elements of a complaint of a breach of a sex equality clause is consistent with existing case law. That case law analyses an equal pay claim, or more accurately a complaint of a breach of a sex equality clause, as involving a comparison of the work carried out by the Claimants with the work carried out by male comparators. Thus, in **Prest v Mouchel Business Services Ltd** [2011] ICR 1345, Underhill J, as he then was, sitting as President of the Employment Appeal Tribunal, was considering the effect of an amendment to a claim for equal pay whereby the Claimants sought to compare their work with the work done by additional male comparators. The period for claiming arrears was six years prior to the date when the proceedings were instituted. The question was whether the six years was measured by reference to the date of the claim as originally presented or from the date of the amendment to the claim. The President considered that that depended upon whether the claim as amended was the same in substance as the claim as originally pleaded (in which case the six year period for claiming arrears was measured by reference to the date of the claim as originally pleaded) or whether the amended claim was in substance a different claim (in which case, the six year period was measured by reference to the date of the amendment). The President considered that an equal pay claim involved a comparison of the work done by the Claimants with the work being done by the comparators. If the claim was amended to include additional male comparators who were doing different work from that undertaken by the male comparators identified in the original claim, then the claim as amended would be a substantially different claim from the original claim. If the work being done by the additional male comparators was the same as that done by the comparators identified in the original claim, then

A the claim would in substance be the same: see paragraphs 22 to 26 of the judgment of the Employment Appeal Tribunal. A similar approach was also taken in **Potter v North Cumbria Acute Hospitals NHS Trust** [2009] IRLR 900, see especially paragraphs 37 to 40 of the judgment.

B

64. The nature of claims for breach of a sex quality clause was also considered by the Court of Appeal in **Redcar and Cleveland Borough Council v Bainbridge (No.2)** [2009] ICR 133. There the Court was considering whether Claimants who had succeeded in claims that their work was rated as equivalent to the work of particular male comparators could bring a claim for the same period on the basis that their work was work of equal value. The Court of Appeal held that this question was to be answered by considering if the cause of action was the same, in which case the doctrine of *res judicata* applied and the claim for equal value could not be brought, or whether the cause of action was different. The Court of Appeal noted that a cause of action (one could say a complaint or claim) is "a factual situation the existence of which entitles one person to obtain a remedy" (see paragraph 217 of the judgment). The Court held that the claim for breach of an equality clause introduced by statute involved three different legal bases of claim. There were three different ways of alleging a breach, namely a claim that the work of the Claimant was like work, or work rated as equivalent, or work of equal value to that of a man. The Claimants were not precluded from bringing claims for a particular period based on a claim that their work was of equal value by the fact that they had succeeded in a claim that the work had been rated as equivalent in respect of that period as the claims were different. See also **Brett v Hampshire County Council** UKEAT/0500/08 especially at para. 11.

C

D

E

F

G

H

65. The Claimants contend that it is not appropriate to use concepts such as *res judicata* or cause of action when considering the interpretation of Rule 9 of the Rules or its application in the context of claims relating to breach of an equality clause. The relevance of these authorities is, however, that they assist in understanding the legal basis of a complaint alleging breach of an equality clause and, also, the set of facts which will need to be established in order to succeed in such a claim. A breach of an equality clause may involve distinct complaints (based on like work, work rated as equivalent or work of equal value). The factual exercise that has to be undertaken is a comparison of the work carried out by a person of one gender with the work carried out by a person of a different gender. The core of a complaint alleging that a woman is receiving unequal pay in breach of an equality clause is a comparison of that woman's work with a man's work to establish if it is equal work in one of the three ways described. If female Claimants are doing different jobs, or if they seek to compare themselves with different male comparators, or if they bring their claims on a different basis (e.g. one Claimant claims that her job is of equal value to a man's whilst a different Claimant contends her job is rated as equivalent to a man's job), the claims will be based upon different sets of facts.

Prior Practice, the Earlier Rules and the Object of the Changes in the Rules

66. The Claimants submit that prior to the introduction of the Rules, the practice in equal pay claims had been to permit the inclusion of large number of claims involving Claimants undertaking different work or jobs in the same claim form. They submit that this was consistent with the procedural Rules previously in place, and that there was nothing in the material leading to the introduction of the Rules which indicated that the change in wording in Rule 9 of the Rules was intended to bring about a change of this nature.

A

The Previous Rules

67. Prior to 2001, each Claimant needed to present a separate claim form. There was no provision enabling two or more Claimants to include their claims within one claim form (described then as an originating application): see Rule 1 of the Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 1993**. In 2001, Rule 1(2) of Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001** provided that:

> **"Two or more originating applications may be presented in a single document by applicants who claim relief in respect of or arising out of the same set of facts."**

68. There was no specific sanction provided if two or more Claimants included claims in a claim form in circumstances which did not comply with the Rule although there was a power to strike out claims for non-compliance with an Order of the Tribunal. Rule 1(7) of Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004** ("the 2004 Rules") provided that:

> **"Two or more claimants may present their claims in the same document if their claims arise out of the same set of facts."**

69. Again no specific sanction was provided for if claims were included in a single claim form in breach of the requirement in Rule 1(7) of the 2004 Rules. There was a provision empowering a Tribunal to strike out a claim for non-compliance with an Order or Practice Direction but not specifically for non-compliance with a Rule: see Rule 18(7)(e) of the 2004 Rules.

B

C

D

E

F

G

H

A

The Review and Background Material

70. The Claimants drew attention to a number of documents which they said were relevant to the interpretation of Rule 9 of the Rules. They drew attention to the terms of reference under which Underhill J, then President of the Employment Appeal Tribunal, undertook a review of the 2004 Rules. The terms required him to develop and recommend a revised procedural code and to recommend reforms. The terms of reference noted that the overriding objective of the system remained as set out in the 2004 Rules, including ensuring that cases were managed proportionately and saving expense, and that Rules should be simple and expressed simply. The terms of reference required Underhill J to have specific regard to the cost-effectiveness and proportionality of the system.

71. On 29 June 2012, Underhill J sent a recommended draft of new Rules to the relevant minister. He explained in the accompanying letter that the Rules had been re-drafted from scratch as that was considered necessary to make the drafting more accessible and simpler but that the changes in style did not mean a change in substance in relation to each provision. In terms of drafting style, Underhill J stated that the review had tried to use language which was as simple as possible. There was no specific comment on the wording of draft Rule 9 (which would have replaced Rule 1(7) of the 2004 Rules). I was told that the text of the draft Rule was as follows:

> **"Two or more claimants can make their claims on the same claim form if their claims are based on the same set of facts, or if it is otherwise reasonable for their claims to be made on a single claim form."**

72. The relevant government department, the Department for Business, Innovation and Skills ("the Department") consulted on proposed changes to the Rules. The consultation paper referred to the terms of reference of the review. It referred specifically to the draft Rule which

became Rule 36 of the Rules (dealing with cases which raised the same issues of law or fact). It made no specific mention of the reasons for the proposed change in wording of Rule 1(7) of the 2004 Rules. The Claimants also referred to the Department's impact assessment published in 2012, including the reference to ensuring that employment cases were dealt with more swiftly, efficiently and proportionately to reduce costs. They also referred to a footnote dealing with how an assumption was arrived at in relation to multiple Claimants and which indicated that the rationale underlying the assumption was to reflect more accurately how the Department expected Claimants to behave if the fees regime had been in place, i.e. they expected that the fee structure would encourage multiple Claimants. The impact assessment did not make specific reference to the proposed Rule 9.

73. The Department published a response to the review by Underhill J. That response did not make express reference to the proposed Rule 9. At some stage, it appears that the Department removed the words "or if it is otherwise reasonable for their claims to be made on a single form" but again there is no document before this Tribunal indicating what the reasons for that change were. The Department published a final impact assessment in 2013 which largely reflected the contents, so far as material for present purposes, of the earlier assessment. An explanatory memorandum prepared by the Department indicated that in some areas the policy remained and the new Rules simplified the previous Rules to aid understanding. In others it was said that the review had sought to improve speed, efficiency and proportionality whilst promoting consistency in the way that cases were managed. The explanatory note to the Rules does not make specific reference to Rule 9 of the Rules.

74. From this material, the Claimants deduce that the practice under the previous Rules was, or was understood, to permit the inclusion in one claim form of claims by Claimants undertaking different jobs. They infer that the purpose of the change between the wording of Rule 1(7) of the 2004 Rules and Rule 9 of the Rules, interpreted in the way contended for by the Respondents, would involve a change to that practice and would involve a substantially different test from that previously understood to apply. The Claimants submit that such a change was not identified as being one of the objects or purposes of the change in the wording of Rule 9 of the Rules. They infer, therefore, that the meaning of Rule 9 of the Rules, and its application in cases involving breaches of equality clauses, remains the same as its predecessor and permits the inclusion of Claimants in accordance with previous practice.

75. First, there is, as a minimum, no settled judicial understanding of the meaning of Rule 1(7) of the 2004 Rules. No authority was referred to dealing with the meaning and application of that Rule in the context of claims relating to breaches of sex equality clauses. It would not be correct, therefore, to treat Rule 9 of the Rules as interpreted at paragraphs 61 to 62 above as involving a departure from a settled judicial interpretation of Rule 1(7) of the 2004 Rules.

76. The one authority to which I was referred dealing with the interpretation of Rule 1(7) of the 2004 Rules is **Hamilton v NHS Grampian** UKEATS/0067/10. That case concerned claims for payments in respect of overtime. A single claim form had included claims by two Claimants concerning payment of overtime. On analysis, it transpired that one Claimant had been claiming that he was entitled to be paid for 4 hours overtime (irrespective of whether the hours had been worked because of, for example, illness or holiday leave). The second Claimant was contending that he should have been provided with the opportunity to work extra hours and

therefore be able to earn overtime pay. The Employment Appeal Tribunal rejected the submission that it was sufficient to satisfy the requirements of Rule 1(7) of the 2004 Rules if both claims arose from a factual allegation that they were both entitled to be paid overtime and they had not been. The Employment Appeal Tribunal considered that the claims did not arise from the same set of facts as one Claimant was alleging that he was entitled to be paid in respect of overtime, and the other that he was entitled to be provided with work in order to earn overtime. That approach supports the view that Rule 1(7) of the 2004 Rules involved considering the Claimants' claims and assessing whether the facts upon which the Claimants relied to establish their claims were the same. On that basis, "claims" which "arise out of the same set of facts" would not be interpreted to mean that it was sufficient if the claims arose out of the same factual background. Rather, the requirement looked to whether the facts necessary to establish the claims included in the claim form were the same. If that understanding of the case law is correct, then interpreted in that way, "claims" which "arise out of the same set of facts" would have a similar meaning to the interpretation set out at paragraphs 61 to 62 above of the phrase "based on the same set of facts" in Rule 9 of the Rules. On that basis, that interpretation of Rule 9 of the Rules would involve little, if any, change from the meaning of the previous Rule.

77. Secondly, it would not be appropriate in my judgment to place any, or any significant, weight on any practice or understanding that may have been followed in seeking to interpret the 2004 Rules or its predecessor. There may be circumstances in which the fact that people have operated on the basis of a particular understanding of the meaning of a provision for a substantial period of time is something to take into account when considering the interpretation of a statutory provisions: see the discussion in **Isle of Anglesey County Council v Welsh**

Ministers [2010] QB 163 at paragraphs 40 to 45. In the present case, however, any practice operated at a time when the significance of Rule 1(7) of the 2004 Rules and the consequences of a failure to comply with the requirements of that Rule (or its predecessor) was unclear. Fees were not payable prior to 2013 and it was not necessary for that purpose to consider whether claims were properly included within one claim form. There was no specific provision indicating that failure to comply with Rule 1(7) of the 2004 Rules amounted to an irregularity giving rise to the possibility of the claims being struck out.

78. The importance of deciding whether Claimants may include their claims within one single claim form is now brought into sharp focus by the fact that fees are payable for issuing a claim and, further, that different fees are payable depending on the number of Claimants included within the claim form. Furthermore, the second sentence of Rule 9 of the Rules makes it clear that including claims within the same claim when it is not permissible to do so constitutes an irregularity which may lead to a strike out.

79. Given the changed landscape in which Claimants may include claims within the same claim form, and given the fact that that question was previously not of much, if any, practical significance, it would not, in my judgment, be appropriate to give much, if any, weight to the practice under the Rule 1(7) of the 2004 Rules in seeking to interpret either that Rule or its predecessor.

80. In all the circumstances, therefore, there was no clear, settled judicial understanding of the meaning of the predecessor to Rule 9 of the Rules in its application to equal pay claims and it cannot be said that Rule 9 of the Rules is effecting a fundamental change to the position under

A the former Rules as previously interpreted. Any previous practice took place in a different context and cannot safely be regarded as a guide to the meaning of the predecessor to Rule 9 of the Rules or its application in cases involving a breach of an equality clause. In the circumstances, therefore, reference to a presumption that the law should not be changed casually, or that later legislation (the Rules) should be interpreted consistently with earlier legislation does not assist. Nor does the fact that courts may look at extrinsic material to identify the purpose or object of the provision or to identify the 'mischief' or defect in the previous law which the later is intended to address assist. In this case, what the Claimants seek to do is to argue that the interpretation of Rule 9 of the Rules in the way set out at paragraphs 61 to 62 above would involve a significant change from the previous practice. They then seek to infer from the absence of any reference in the background material to the change in wording bringing about such a change that the Rules did not intend to achieve that result and should not be interpreted in that way. I doubt that silence, or the absence of a reference to the purpose of a provision, is of much, if any, significance, in interpreting a provision, certainly where, as here, the meaning of the relevant Rule is clear from its terms. In the present context, however, given the absence of any settled judicial understanding of the previous Rule, and given the circumstances in which any previous practice developed, I do not regard the absence of any reference to Rule 9 of the Rules bringing about a significant change to the meaning of the previous Rules, or any previous practice in relation to those Rules, to be of much, if any, assistance in interpreting Rule 9 of the Rules.

81. Finally, for completeness, the Respondents submit that I should place weight on the fact that the draft of the Rules included provision for Claimants to include claims in circumstances where it was otherwise reasonable to do so and those words were removed. I do not find that

factor of assistance. The presence (or absence) of those words does not, in my judgment, assist in the interpretation of the Rule as adopted and the interpretation of the phrase "claims based on the same set of facts".

The Purpose of the Rules and the Overriding Objective

82. The Claimants also rely upon what they say is the purpose of the Rule and the need to seek to give effect to the overriding objective. The purpose of Rule 9 of the Rules, they say, is to enable two or more claims to be included in the same claim form if they have enough in common for it to be sensible for the Tribunal to deal with them together and where it would be cumbersome and administratively inefficient for the parties to have to file large numbers of separate claims.

83. In terms of purpose, the language of Rule 9 of the Rules is not expressed by reference to including claims in claim forms which have "enough in common" for it "to be sensible to deal with them together". Nor does that test yield any coherent approach to determining which Claimants can, and which cannot, include their claims within the same claim form. The question of administrative efficiency is better considered in the context of the overriding objective.

84. In terms of the overriding objective, Rule 2 of the Rules provides that a Tribunal shall "seek to give effect to the overriding objective in interpreting, or exercising any power given to it, by these Rules". The Claimants draw attention, in particular, to the following aspects of the overriding objective: dealing with cases in ways which are proportionate to their complexity, avoiding unnecessary formality, seeking flexibility, avoiding delay and saving expense. They

contend that requiring what they describe as hundreds or thousands of additional claim forms to be issued would be disproportionate, and amount to unnecessary inflexibility and would cause substantial delay to parties and other Tribunal users.

85. It is by no means clear that the interpretation of Rule 9 of the Rules, or its application to claims relating to a breach of an equality clause, set out at paragraphs 61 to 62 above would necessarily, or even frequently, involve the consequences described by the Claimants. The starting point is that Claimants, generally women, will want to bring a claim because they are paid less for their work than men. Claimants will know what their job involves. It is not imposing a great burden on Claimants, or their advisers, to identify the job, or work, that the Claimants are doing and then considering whether other Claimants are doing the same work. If they are doing the same work, then their claims can be included within the same claim form. If not, they will need to be included in separate claim forms. Thereafter, if there are common issues that arise, that can be dealt with by the use of other case management powers of the Tribunal, including, where appropriate, the power to identify lead cases where claims give rise to common or related issues of fact or law under Rule 36 of the Rules. It is also right to note that there are arguments that the identification of the work being done and the work with which it is being compared at the stage of making the claim can, in fact, assist in the efficient management of cases. Indeed, in the *Farmah* and *Callaghan* cases, the Employment Judge considered that including claims within one claim form which were not based on the same set of facts was likely to make the task of case management more difficult and add to the costs and create delay for the parties, and place additional administrative and judicial burden on the Tribunals which would be likely to delay the determination of other claims. All this indicates that it would not be appropriate to assume that giving a different meaning to Rule 9 of the Rules

than it would naturally appear to have would be more consistent with seeking to give effect to the overriding objective.

86. The Claimants have also referred to the costs of issuing claims and the benefits that can flow to Claimants if they can include large numbers of claims within the same claim form and obtain the benefit of the discount for claims with multiple Claimants provided for in the Fees Order. The Fees Order is meant to reflect the fees appropriate for bringing particular claims. The fees payable reflect the number of Claimants that have included their claims within one claim form on a proper interpretation and application of the Rules relating to joinder of claims. The fact that groups of Claimants might be able to obtain greater discounts if they could include other claims (not, on this hypothesis, based on the same set of facts) in a claim form is not a reason for giving a different interpretation to the Rules. In referring to saving expense, the overriding objective is not seeking to achieve a reduction in the fees properly payable.

Conclusion on the first issue

87. Rule 9 of the Rules provides that two or more Claimants may include claims within a claim form if their claims are based on the same set of facts. On a straightforward reading of that Rule, that involves identifying the complaints that the Claimants are making and considering whether the set of facts on which those complaints are based are the same. That involves comparing the sets of facts necessary to establish the complaint to see if they are the same.

88. In the context of a claim for a breach of an equality clause introduced by section 66 of the **2010 Act**, the set of facts on which the complaint is based is that a person of one gender is

undertaking work which is equal work to that done by a person of a different gender. The set of facts on which the complaint is based must include the work that the Claimant is doing, the work which the comparator is doing and the fact that the Claimant and the comparator have different genders. If the Claimants are undertaking different work from each other, that is, they are doing different jobs, their complaints will not be based on the same set of facts. If some female Claimants are seeking to compare their work with the work done by some men and other Claimants with the work done by other men, or if Claimants are seeking compare their work with men on different bases (for example, one Claimant is claiming her work is of equal value to a man's but another Claimant is contending that her work is rated as equivalent to a man's) their claims will not be based on the same set of facts. If a man wishes to make a contingent claim, that is he wishes to compare his work with that of a female Claimant if she succeeds in her equal pay claim against a man, his claim is not based on the same set of facts as the female Claimant. The set of facts on which her claim is based involves a comparison of her work and the comparator; the set of facts on which his claim is based involves a comparison between his job and the job of the female Claimant.

89. The Claimants are therefore not correct in their submission that claims will be based on the same set of facts for the purposes of Rule 9 of the Rules if the facts are sufficiently similar to make it sensible for the cases to be dealt with together or if there are common facts in their claims. Nor is it sufficient that the disparities of pay may have grown out of assumptions made about the value of certain types of work (for example, retail staff and warehouse workers, or administrative staff and drivers and gardeners). That may provide the factual context within which the claims arise: they are not the set of facts upon which the claims are based.

THE SECOND ISSUE – THE APPLICATION OF RULE 9 IN THE INDIVIDUAL APPEALS

The Asda v Brierley and the Fenton Appeals

90. In the light of the above, Employment Judge Robertson in the *Asda v Brierly* case, and in *Fenton v Asda*, was correct to conclude that the Claimants' claims in those cases were not based on the same set of facts for the purposes of Rule 9 of the Rules. As the Judge held at paragraph 87 of the Judgment in the *Asda v Brierley* case, a claim for breach of an equality clause is about a comparison of the work done by the Claimant and that done by the comparator. In the present case, the Claimants involved women who were doing different work. The essential factual inquiry relating to their work, and whether it involved equal work to a man's, would be different if the Claimants were carrying out different work. It was not sufficient that the claims were thematically linked and asserted the same broad contentions. Similarly, the claim forms included claims by men seeking to compare themselves with female Claimants in the event that those Claimants succeeded. Those claims were not based on the same set of facts as the female Claimants. The Claimants' cross-appeal in *Asda v Brierley* and their appeal in *Fenton* will therefore be dismissed.

91. For completeness, the claim forms in the *Asda v Brierley* case included some female Claimants claiming in respect of two jobs for different periods and other female Claimants who did one of those jobs. It is possible that a question may arise as to whether two such Claimants could include their claims within one claim form. It may be that their claims were not based on the same set of facts as, whilst one Claimant's claim was based on a job which formed part of the other Claimant's claim, the others Claimant's claims also raised other matters. The issue did not arise for decision in these appeals as the claim forms included female Claimants who

were undertaking different work and male Claimants (as well as a number of female Claimants where there was a partial overlap in respect of the work done). The issue was not the subject of full argument. It is therefore neither necessary nor sensible to decide the issue.

The Sainsbury's Appeal

92. Employment Judge Pirani erred, in my judgment, in concluding that the claim form was not irregular in the case of *Ahmed v Sainsbury's.* The claim form including Ms Ahmed included claims by four Claimants who were doing different jobs: see paragraphs 14 and 15 of the Judgment of the Tribunal. The Judge erred in considering that it was sufficient to approach the facts at a high level of generality and in considering that, if the claims could be described as ones involving predominantly female retail staff claiming equal pay with predominantly male warehouse staff, then they were based on the same set of facts. The Judge erred in approaching the interpretation of Rule 9 of the Rules on the basis that there was a previous practice in relation to the earlier Rules permitting the inclusion of such claims in one claim form and that there was nothing in the background material to indicate that Rule 9 of the Rule was intended to depart from that practice. The relevance of the previous Rules, and any previous practice, has been considered above. The Judge should have held, on the facts as found by him, that the inclusion of the four Claimant's claims in the claim form in *Ahmed v Sainbury's* was irregular as the claims were not based on the same set of facts. The Respondent's appeal will be allowed. For completeness, one of the Claimants whose claim was included in the claim form (Ms Hemsley) appeared to have done different jobs at different times. As indicated above in relation to the *Asda v Brierley* and *Fenton* appeals, the issue does not need to be decided in relation to this claim form as all four Claimants were doing different jobs in any event. As the issue does not arise for decision, and there was not full argument on the issue, it is not

necessary or sensible to decide the issue. The Tribunal has not yet determined the factual position in relation to the claim forms submitted subsequent to that including the claim of Mrs Ahmed. The Tribunal will need to consider whether the inclusion of more than one Claimant in any of those claim forms is irregular in the light of this Judgment.

Farmah v Birmingham City Council and Callaghan v Birmingham City Council

93. Employment Judge Woffenden was correct in the *Farmah* case in concluding that Claimants could only include claims in the same claim if they were based on the same set of facts and it was not sufficient if they could identify some facts which the claims had in common. The Judge was correct to conclude that claims made by Claimants who were performing different jobs were not based on the same set of facts. The Judge was correct to conclude, therefore, that the inclusion within one claim form of claims by 25 Claimants who were performing different jobs was irregular within the meaning of Rule 9 of the Rules.

94. The Judge erred, however, in considering that the inclusion within the same claim form of claims by the other 23 Claimants was not irregular because those Claimants could have included their claims in one claim form as those 23 Claimants were, it seems, undertaking the same work. The fact is that these 23 claims were included in one claim form together with claims by 25 Claimants who were doing different work. The inclusion within one claim form of claims by 48 Claimants who were doing different work and whose claims were not based on the same set of facts means that the claims were brought irregularly. The fact that the 23 claims could have been included in one claim form does not alter the fact that they were not the only claims included in that claim form. Twenty five other Claimants, undertaking different work,

A also included their claims in that one claim form. There was therefore an irregularity in the way in which all 48 Claimants presented their claims.

B 95. Similarly, in the *Callaghan* case, the Judge was correct to conclude that Claimants had to be undertaking the same work and making their claim on the same basis (that is, that the work was rated as equivalent or was work of equal value, or both) if their claims were to be based on the same set of facts. The Judge was correct to conclude that six Claimants, who were C doing different jobs, did not base their claims on the same set of facts. The Employment Judge erred however, in finding that there was no irregularity in respect of two Claimants (Ms Jones and Ms Wright) who were doing the same work and who could have included their claims D within one claim form. The fact is that those two Claimants included their claim in one claim form with six others who were doing different jobs and were not basing their claim on the same set of facts. The irregularity affected all Claimants. All eight Claimants had included their E claims in a single claim form when the claims were not based on the same set of facts.

THE THIRD ISSUE – DOES THE TRIBUNAL HAVE A DISCRETION IN RELATION TO STRIKING OUT CLAIMS PRESENTED IRREGULARLY?

F 96. The Respondents in *Asda v Brierley* (but not in the Birmingham City Council appeals) contend that a breach of Rule 9 of the Rules cannot be waived where that would result in the avoidance of fees. In my Judgment, an Employment Tribunal has a discretion either to strike G out a claim or waive an irregularity which is comprised of a failure to comply with Rule 9 of the Rules. That follows from the clear language of Rules 6 and 9 of the Rules. Rule 9 provides that wrongly including claims by two more Claimants in the same claim is an irregularity H within the meaning of Rule 6 of the Rules. That Rule provides that such an irregularity does

not render the proceedings void but the Tribunal "may take such action as it considers just" which "may include" waiving the requirement or striking out the claim. That wording is consistent, and only consistent, with the Tribunal retaining a discretion even in cases where the inclusion of claims by Claimants within one claim form is an irregularity which results in the avoidance of fees which would otherwise be payable.

97. There is a clear connection between the Rules and the Fees Order. The Tribunal must reject a claim if it is not accompanied by the fee or an application for fee remission: see Rule 11 of the Rules. There are further powers dealing with the non-payment relevant fees: see Rule 40 of the Rules. The fact that a claim form includes claims made by Claimants which are wrongly included, with the result that there has been an underpayment of fees for presenting a claim will, therefore, be a highly material factor in considering how the discretion should be exercised. There remains, however, a discretion to be exercised even where Claimants have irregularly joined claims within the same claim form.

THE FOURTH ISSUE – THE APPROACH TO THE DISCRETION CONFERRED BY RULE 6 OF THE RULES

98. The next issue concerns the exercise of discretion in the event there is an irregularity arising through a failure to comply with Rule 9 of the Rules. Rule 6 provides that the Tribunal may take such action as it thinks just including waiving the requirements or striking out the claim in accordance with Rule 37 of the Rules. Tribunals will also need to have regard to the overriding objective. In considering how to deal with an irregularity arising from the inclusion of claims by Claimants in the same claim form, there are a number of factors which a Tribunal exercising its discretion judicially will need to take into account.

99. First, the Tribunal will have to have regard to the seriousness of the breach. If claims by more than one Claimant are irregularly included in the same claim form, that will result in a failure to ensure that the proper issuing fees (and if the proceedings continue, the hearing fees) are paid. That is a serious matter given that the Fees Order requires that fees be paid (but provides for lower fees to be payable in cases where more than one Claimant includes claims in the same claim form). If claims are wrongly included in the same claim form, fees due will be foregone.

100. Secondly, the circumstances in which such a breach comes about is relevant. If Claimants (or their advisers or representatives) deliberately include claims by more than one Claimant knowing that is not permitted by the **Rules** and in order to avoid the payment of fees, that is likely to be a highly material factor in considering the exercise of discretion. In reality, if that is the reason for the failure to comply, and given that the result of the breach is that fees that should have been paid will not have been, there are likely to be few, if any, cases where it would be appropriate to waive the requirement rather than strike out the claim (as the Employment Judge recognised in *Asda v Brierley*, and *Fenton*).

101. The Claimants contend that the power to strike out may only be exercised if either there has been a deliberate and persistent disregard of procedural requirements or the conduct has made a fair trial impossible, adopting the approach in **Blockbuster Entertainment Ltd v James** [2006] IRLR 630 at paragraph 5, and **Harris v Academic Enterprise Trust** [2015] ICR 617. Care needs to be taken with the application of that approach to the situation where there is a failure to comply with Rule 9 of the Rules resulting in fees not being paid when they should be paid. Those cases involved a failure to comply with Orders of the Tribunal in circumstances

where the conduct constituting the failure was unreasonable. In those cases, it is understandable that the focus should be on whether that conduct, that is the failure to comply with Orders of the Tribunal, involved either a deliberate and persistent disregard of the procedural requirements or rendered a fair trial impossible before it was considered appropriate to strike out a claim. In the context of a failure to comply with Rule 9, it is not realistic to talk of a persistent failure to disregard the Rule: the failure (that is, including claims by Claimants in the same claim form when they were not based on the same set of facts) will be a single event. Similarly, that is unlikely to render a fair trial impossible.

102. The real issue, in my judgment, is whether the failure to take sufficient care to ensure that Claimants were including claims in a claim form which were based on the same set of facts is a factor which points towards striking out the claim. This reflects the difference between the decision in *Asda v Brierley* and the decisions in *Farmah* and *Callaghan*. In the former case, the Tribunal considered that the Claimants did not deliberately intend to present claims knowing that that was not permitted by Rule 9 of the Rules in order to avoid payment of fees and therefore that was a factor favouring not striking out the claim. In the other cases, a different Employment Judge considered that legal representatives of the Claimants were under a duty to demonstrate that the Claimants satisfied the requirements of the Rules. The representative did not deliberately include Claimants' claims in a single claim form knowing that they should not have been included or intending to avoid the payment of fees but they did so without proper explanation and that was a factor indicating that striking out the claims was appropriate.

A

103. It is not appropriate, in my judgment, to take the view that different Tribunals can treat the same fact in different ways when exercising the powers conferred by Rule 6 of the Rules. As Langstaff J observed in **Harris v Academies Enterprise Trust** [2015] ICR 617 at para. 2:

B

> **"A discretion must be exercised judicially; that is, with due regard to reason, relevance, logic and fairness. It will usually be only if the judge has misdirected himself on the law that he is to apply, plainly misapplied it, failed to take into account a factor that demonstrably he should have done, left out of account something he should not have, or reached a decision that is so outrageous in its defiance of logic that it can be described as perverse, that his decision may be overturned."**

C

104. The question, then, is whether the legal representatives of the Claimants should have considered the question of whether the inclusion of claims by two or more complaints satisfied the requirements of the Rule and be able to demonstrate how they consider the inclusion of the Claimants' claims in one claim form satisfied the requirement. If so, and if there is no justifiable explanation for their failure to do so, that is a factor relevant to the exercise of the discretion. In my judgment, whilst the issue is a difficult one, I do not consider that the approach in **Blockbuster Entertainment v James** applies to the consideration of this factor. The context is a Rule which provides that Claimants may only include claims in one claim form if the claims are based on the same set of facts. If Claimants include their claims in one claim form, they will obtain the benefit of lower fees. If that is irregular, then the Claimants will have obtained the benefit of the reduction in fees when they were not eligible for the reduction and in circumstances which run counter to the purpose underlying the Fees Order. In those circumstances, in my judgment, the legal representatives of Claimants are obliged to consider whether the Claimants could include their claims within one claim form and to demonstrate how they consider that the requirements of the Rule are met. If they cannot do so, and there is no justifiable explanation for that failure, that is a factor which favours striking out the claim rather than waiving the irregularity. If, by contrast, there are reasons why Claimants' claims were included in one claim form and, subsequently, it transpires that they were not eligible for

D

E

F

G

H

A inclusion (for example, a change in the understanding of the law relating to the set of facts upon which claims are based, or a realisation that the facts are different from those understood to be the case) that may be a factor which may indicate, depending on all the circumstances, that waiver of the irregularity rather than striking out the claims may be appropriate.

B

105. Fourthly, relevant factors will also include any prejudice to the Claimants and Respondents of striking out the claim. If the Claimants are able to re-present their claims in claim forms which satisfy the requirements of Rule 9 of the Rules, the prejudice to them is likely to be that the period for which they may claim arrears will be reduced. The proceedings below all proceeded on the basis that Claimants would not be prevented from re-presenting their claims if their claims had been struck out for failure to comply with Rule 9 of the Rules, relying on a dictum in **Naif v High Commission of Brunei Darussalam** [2015] IRLR 134 at paragraph 27. That dictum indicated that the principle of issue estoppel which prevents a claim from being re-litigated would not apply where there had been no adjudication on the merits of the claim. In reply, counsel for the Claimants in *Farmah* referred to authorities such as **S.C.F. Finance Co Ltd v Masri (No 3)** [1987] 1 QB 1028 at page 1047G-H as indicating that the position may be different. The point was not subject to full argument and, for the purposes of this appeal, I proceed on the basis of the agreed position before the Tribunals below, namely that the Claimants were not prevented from re-presenting their claims if they were struck out for non-compliance with Rule 9 of the Rules.

C

D

E

F

G

106. In relation to the Respondents, Mr Jeans in *Asda v Brierley* contended that the waiver of the requirement meant that the Respondents suffered prejudice in that they lost the benefit of any limitation defence or any reduction in the period for which the Claimants could seek

H

payment of arrears (the date for seeking payment of arrears runs from the institution of proceedings so that, if the claim had to be re-presented, the period for seeking arrears would be reduced). In my judgment, this is not, on analysis, a matter of prejudice to the Respondent arising from the irregular inclusion of claims by Claimants within a claim form. The claims have been brought. They are irregular but not void (see Rule 6 of the Rules). The Respondent therefore knows that it faces valid claims from the date that the claims were lodged. If they do not succeed in persuading the Tribunal to strike out the claims, and if the Tribunal instead waives the requirement, the proper analysis is that the Respondent is unable to obtain a benefit that it wishes to obtain by applying to strike out. It is not prejudiced by the "loss" of any thing as a result of a refusal to strike out. They remain exposed to the potential liability by reason of a valid (albeit irregular) claim having been presented.

107. The Tribunal may also look at any other prejudice that may accrue to the parties, or the Tribunal system, as a result of the irregular inclusion of claims by more than two Claimants within one claim form when the claims are not based on the same set of facts. Whether or not that involves procedural disadvantages to a Respondent or additional administrative or judicial burdens which may affect the system (and be to the detriment of other users) will, generally, be a matter for the Tribunal to assess.

108. Finally, the Tribunal will need to consider any other relevant factor drawn to their attention. They will also need to have regard to the overriding objective, including the need to deal fairly and justly with claims. They will bear in in mind that striking out claims is a draconian sanction and will wish to ensure that that is a proportionate course of action, bearing

in mind the consequences of any failure to comply with Rule 9 (the non payment of fees), the reasons why that came about and all other relevant factors.

THE FIFTH ISSUE – THE APPROACH IN THE INDIVIDUAL CASES

109. The Respondent in *Asda v Brierley* relies on a number of factors in their grounds of appeal which they contend the Tribunal failed to have regard to. First, they say that the Tribunal failed to take account of the fact that legal representatives were expected to have regard to the need to ensure compliance with Rule 9 of the Rules, and, as they put it, the Claimants were not entitled to rely on their legal advisers' ignorance of the law. As explained above, one of the relevant factors is the need for the Claimant's legal representatives to consider whether, and to demonstrate how, the inclusion of claims by two or more Claimants in one claim form complied with Rule 9 of the Rules. Failure to do so without a justifiable explanation is a factor favouring striking out the claims. There is no reason on the facts of this case for distinguishing between the actions of the Claimants and their legal representatives. The position in the present case is that the Tribunal concentrated on whether the course of action pursued was the result of a deliberate decision on the part of the Claimants to present their claims in the way they did to avoid the payment of fees. The Tribunal has not addressed the question of whether there was any justifiable reason, given the cost benefits that flow from including multiple Claimants in one claim form, for the Claimants' advisers to act in the way that they did. The legal advisers' business plan included operating in the way they did and the question did arise as to whether the action that the Claimants' legal advisers were taking in respect of the inclusion of a number of Claimants within a single claim form was excusable or justifiable. If it were not, that would be a factor favouring striking out the claims. The Tribunal did not consider that issue and, for that reason, the Tribunal did err in the exercise of its power

to strike out or waive the requirement and so the appeal will be allowed and the matter remitted to the Tribunal to reconsider.

110. Mr Jeans also contends that the Tribunal did not consider the prejudice to the Respondents resulting from the loss of limitation defences and the reduction in the period for which the Respondents were exposed to arrears. As explained above this is not properly analysed as prejudice to the Respondents resulting from the irregularity. The Tribunal did not, therefore, err by not taking this alleged prejudice into account. Mr Jeans also relies upon the failure of the Tribunal to consider the benefits in terms of more efficient case management of the claims if they had been presented in a way that complies with Rule 9 of the Rules. On balance, in my judgment, the Tribunal did consider that and concluded on the facts of the present case that the claims would ultimately have been organised and dealt with in a way which had been established and there was no prejudice to the Respondents: see paragraph 110.1 and 110.2 of the Judgment. I would not find that the Tribunal erred in this respect. The Respondent also contends that the decision of the Tribunal was perverse. In one sense, this depends on the outcome of the Tribunal's consideration of the reasons why the non-compliance occurred. If the facts were that there was a breach of Rule 9 leading to a substantial underpayment of fees, and there was no justifiable or excusable reason for proceeding in that way, there may be an argument that a refusal to strike out would be perverse. If, however, there was some justifiable or excusable reason to explain why the Claimants' claims were presented as they were, the balance in terms of the exercise of discretion may be different. As the Respondents' appeal will be allowed, and as the Tribunal will need to consider the question of whether to exercise the discretion to strike out the claims or waive the irregularity afresh,

having regard to all the relevant circumstances, it is not necessary or feasible to determine the question of perversity.

111. There is no appeal in relation to the exercise of discretion in *Fenton* to strike out the claims.

112. In relation to *Farmah*, the Claimants who were struck out appeal against that decision. In my judgment, the Tribunal adopted the correct approach. The Employment Judge considered the seriousness of the breach (the failure to pay the fees that should have been paid). The Judge considered the reasons why that situation had come about and, correctly, in my judgment, for the reasons given above, considered that the failure to comply with Rule 9 of the Rules came about because insufficient care and attention had been paid to the detail of the claims, and the relevant provisions of the Rules and the Fees Order (see paragraph 86 of the Judgment in *Farmah*). The Tribunal considered the prejudice to the Claimants and to the Respondent and the system generally and, in relation to the latter, concluded (as she was entitled to do) that the presentation of claims not based on the same set of facts was likely to make the case management more complex and would lead to administrative and judicial burdens for the system which would delay the determination of other claims. The Judge was well aware that striking out the claims was draconian but considered that it was just in the circumstances. The decision to strike out those Claimants demonstrates no error of approach, no failure to take into account a relevant factor and is not perverse. There is no basis, therefore, for allowing the appeal by those Claimants.

113. The position in relation to the 23 Claimants who were not struck out is different. The reason why the Judge did not strike out those claims is that she considered that the presentation of their claims was not irregular as they could have been included in the same claim form. That decision is wrong for the reasons given above. The fact that a different course of action could have been taken does not alter the fact that the course actually taken (that is, including the claims of these 23 Claimants within the same claim form as 25 other Claimants when the claims were not based on the same set of facts) was irregular. The decision to treat these 25 Claimants differently from the other 23 Claimants included within the same claim form is therefore based on an error of law and, in addition, is unprincipled. The Employment Judge has not identified any relevant legal difference between these 23 Claimants which permits of a principled basis for a different exercise of the discretion conferred by Rule 6 of the Rules as compared with the other 25 Claimants. The Respondent's appeal in relation to the decision not to strike out the 23 Claimants' claims is therefore allowed and the matter will be remitted for the Tribunal to reconsider.

114. Similarly, in *Callaghan*, the Tribunal made no error in the treatment of the six Claimants whose claims she struck out essentially for the reasons given above in relation to the 25 Claimants whose claims were struck out in *Farmah*. Their appeals will therefore be dismissed. The Judge wrongly considered that there was no irregularity in respect of two Claimants as their claims were based on the same set of facts and could have been included within the same claim form. The decision to treat these two Claimants differently from the other six Claimants included within the same claim form is therefore based on an error of law.

115. The Judge did, however, consider in the alternative that if even if the irregularity did apply to the two Claimants, there would be no underpayment of fees if their claims could continue but the other six Claimants were struck out. She would therefore not have struck out their claims in any event. I have considered whether, given the fact that the fees paid in respect of those two Claimants would have been £500 and that was the fee paid for the eight Claimants whose claims were included in the claim form, it would be logical to say that there would not be an underpayment of fees if those two Claimants were able to continue with the claim form and the other six Claimants had to re-present their claims and pay the issuing fees relevant to their claims. However, that does not offer any principled basis for distinguishing between the eight Claimants on the basis of the claim form that was presented. That claim form had eight Claimants within it and the claim form was irregular because not all the claims were based on the same set of facts. The fees paid for the issuing of that claim form with the eight Claimants named within it (and including the two Claimants) were not the correct fees. The happenstance that the claim form could have been drafted differently and, on the figures of the Claimants included within it, any underpayment of fees could have been avoided by the combination of including some Claimants in a single claim form (and allowing them to benefit from the lower fee payable in respect of such a claim form) with the others presenting their claims in individual claim forms does not avoid the fact that the fees paid in respect of the Claimants actually included in the claim form were less than those that were payable. To try to achieve that result by striking out some Claimants, and requiring them to re-present their claims but allowing others to continue their claims would be unprincipled. It would not appear to be treating all Claimants justly and fairly. Indeed, the Employment Judge appeared to accept that at paragraph 43 of her Judgment where she noted that adopting such an approach meant that she would not have treated all the Claimants equally. For that reason, the decision of the Tribunal that it

would not strike out the claims of Ms Wright and Ms Jones is flawed. The Respondent's appeal in respect of those two Claimants will be allowed and the matter remitted to the Tribunal for reconsideration.

ANCILLARY MATTERS

116. The Claimants and Respondents made a number of legal points in their written arguments and oral submissions and referred to a number of documents. I have sought in this Judgment to deal with what I consider to be the principal points raised. All the Claimants and the Respondents can be assured however, that I have carefully considered all the points made and all the documents relied upon in considering these appeals. I am grateful to all counsel for their written and oral submissions, and to the legal teams for all parties, for the helpful way in which they prepared the documentation and arguments in these appeals.

THE DISPOSAL OF THE APPEALS.

117. In summary, therefore, the Respondent's appeal in *Asda v Brierely* is allowed and the matter will be remitted to the Tribunal to reconsider in accordance with this Judgment. The cross-appeal of the Claimants in *Asda v Brierley* and the Claimants' appeal in *Fenton* are dismissed.

118. The Respondent's appeals in *Farmah* in relation to the decision not to strike out 23 Claimants and in *Callaghan* not to strike out the claims of two Claimants are allowed and the matter will be remitted to the Tribunal to reconsider in accordance with this Judgment. The Claimants' appeals in *Farmah* and *Callaghan* against the decision to strike out 25 and 6 Claimants' claims respectively are dismissed.

119. The Respondent's appeal in *Ahmed v Sainsbury's* against the decision of the Tribunal that the Claimants' claims were based on the same set of facts is allowed. The matter is remitted to the Tribunal to determine whether the relevant claim forms (other than that involving Ms Ahmed which is irregular) are irregular. A Tribunal will, at some stage, need to consider whether to strike out any irregular claims or waive the requirement imposed by Rule 9 of the Rules.

120. As indicated at the hearing, a decision on whether any or all of the appeals remitted to the Tribunal should be remitted to the same or a differently constituted Tribunal will be made after the parties have had the opportunity to consider this Judgment and make written submissions.

CONCLUSION

121. Rule 9 of the Rules permits Claimants to include their claims within one claim form if their claims are based on the same set of facts. On a proper interpretation of that Rule, it requires the Tribunal to identify the complaints that the Claimants are bringing and the set of facts needed to establish those complaints and then to consider if those sets of facts are the same. In the context of a claim alleging a breach of an equality clause included in a contract of employment by the **2010 Act**, that involves a comparison of work carried out by a person of one gender with the work carried out by a person of a different gender to determine if the work is equal work. If female Claimants are performing different work from each other, that is, they are doing different jobs, their claims will not be based on the same set of facts as the claims will involve comparison of a different set of facts (their different work) with male comparators. Similarly, the claims of male Claimants seeking to compare their work with that of other female

A Claimants are not based on the same set of facts. Consequently, Rule 9 of the Rules does not permit such Claimants to include claims within a single claim form and to do so is an irregularity. A Tribunal has a discretion to strike out an irregular claim or to waive the irregularity. That discretion is to be exercised judicially in accordance with the principles identified above.

B

C

D

E

F

G

H