EMPLOYMENT TRIBUNALS

Claimants		Respondent
Ms S Brierley and others	v	**Asda Stores Ltd**

PRELIMINARY HEARING

Heard at: Manchester **On:** 21 & 22 March 2019

Before: Employment Judge Tom Ryan

Appearances
For the Claimants: Andrew Short QC
For the Respondent: Ben Cooper QC
For Ms G Spence: Jane Callan, Counsel

JUDGMENT

The respondent's application to withdraw the requirement on the appointed independent expert, Mrs G Spence, to prepare a report is refused.

REASONS

1. These are the reasons for the decision in respect of the respondent's application that, pursuant to rule 9(4) of the Employment Tribunals (Equal Value) Rules of Procedure 2013 ("ETEVR") the tribunal should withdraw the requirement on, Mrs Spence, and independent expert ("IE") to prepare a report. For convenience and to avoid needless repetition of the wording of rule 9(4), I may refer to the application as one for the recusal of Mrs Spence.
2. Although at this relatively early stage of the proceedings the tribunal had required 2 IEs, Mrs G Spence and Mr P Kennedy to prepare an equal value report, Mr Kennedy has retired on grounds of ill-health and therefore this application was made in respect of Mrs Spence alone. It was understood and agreed by the parties and the tribunal that ACAS would be requested, depending upon my decision, to appoint either one additional independent expert or 2 new independent experts.

3. I was provided with 2 bundles of documents of some 1400 pages, written skeleton arguments from the parties and Mrs Spence, and a variety of authorities to which I refer below. I identify the particular documents by page reference. Where, in this judgment, I set out quotations from the documents I do so attempting to quote them word for word. I therefore do not repeatedly use the indication "sic" in respect of misspellings etc in the original.

The Application

4. The application was made in a letter from Ms Hudda of Gibson Dunn dated 9 November 2018 (30-45).
5. The application was advanced on 3 alternative bases: that there had been actual bias on the part of Mrs Spence; in the alternative that there had been apparent bias and, in the further alternative, that, even absent such findings, the tribunal should properly make a case management decision to recuse Mrs Spence.
6. In the application itself, the respondent relied upon improper conduct and practical considerations as broad headings. Under the former it alleged discrimination and distrust of and/or hostility towards the respondent.
7. Under the heading of discrimination, the respondent relied upon the expression of views by the IEs about male and female workers and their attitudes to work; 2 specific comments by Mr Kennedy (identified below as RTM 19 and RTM 20 of Table 1, which comprises one of 3 tables in the annex to this judgment) which were said to have been discriminatory and from which it was said Mrs Spence did not demur; a suggestion that those views infected the IEs' joint approach to the case which was based upon general and specific comments of which several examples were given.
8. Under the heading of predisposed hostility/distrust, the respondent asserted that the IEs aligned themselves with concerns made by Leigh Day and went further even in the expression of those concerns; made statements which indicated scepticism and distrust for the position asserted by the respondent; that contrasting comments on the job descriptions ("JDs") of the claimants and comparators illustrated "comparative hostility" towards the respondent.
9. Then, under a further heading of "further improper conduct/failure properly to perform the statutory function", the respondent asserted that the IEs had displayed inadequate care and attention; improperly intervened which increased the scope of dispute and had disregarded the parties' detailed work. Finally, under the heading "practical considerations" the respondent relied additionally upon the fact of Mr Kennedy's retirement as a matter to be taken into account in considering the recusal of Mrs Spence.
10. I have set out this bare summary of the application to illustrate the extent and scope of the criticisms made by the respondent.
11. In support of the application Ms Hudda made a witness statement on 9 November 2018 (46-63) to which she exhibited a substantial volume of documents (64-286).
12. The application was further supported by a skeleton argument and oral submissions by Mr Cooper QC.
13. Mr Cooper at paragraphs 55 to 58 of his skeleton argument addressed the matter in this way. He alleged actual bias and impropriety on the part of Mrs Spence. She is alleged to have:

13.1. expressly and without proper basis questioned the truthfulness of the comparator JDs which indicates underlying hostility against the respondent;

13.2. taken it upon herself with Mr Kennedy to provide comments on the JDs outside the scope of the tribunal orders;

13.3. not only taken points on behalf of the claimants but invented or expanded upon them;

13.4. repeatedly sought to bolster the claimants' case on matters of disputed fact outside her field of expertise; and

13.5. conversely, repeated the claimants' challenges to the comparator JDs.

14. Alternatively, Mr Cooper argued at paragraph 57 that those matters together with "her association with Mr Kennedy's further improper and sexist comments" met the test for apparent bias.

15. As a further alternative Mr Cooper argued at paragraph 58 that, even if Mrs Spence were not disqualified for actual or apparent bias, she should be removed and replaced as an IE as an exercise of case management. In that regard he made the following points:

15.1. the matters relied upon compromise her credibility as an IE;

15.2. a number of comments demonstrated a basic lack of care attention and competence;

15.3. that Mrs Spence was not "up to the job for this case";

15.4. the risk that Mrs Spence's work will be seriously compromised is very great;

15.5. replacing Mrs Spence will cause little delay or disruption to the process;

15.6. that the case can proceed to the Stage 2 hearing without significant disruption even if the factor plan were to be amended; and

15.7. replacing Mrs Spence will not entail any substantial delay or disruption to the timetable or waste of effort.

16. At the conclusion of his oral submissions he also provided a note at my request summarising which of the specific allegations made by the respondent related to the alternative bases set out in the preceding paragraph. Mr Cooper reminded me, and I acknowledge, that despite this attempt to be particular the respondent also took what might be called a "rolled-up" approach, relying on the totality of the allegations in each case. In that note Mr Cooper repeated, and to some extent expanded, upon the factual matters in support of those elements.

Procedural background

17. By a letter dated 15 November 2018 (288-291), after I had indicated that I would give directions in relation to this application at a hearing already convened for 23 November 2018, Leigh Day responded for the claimants giving a summary of the basis upon which it resisted the application.

18. I gave directions on 23 November 2018 which included affording the IEs the opportunity to serve a response to the application and witness statements in support of their position and recognising that they might wish to be represented at the hearing of the application. At that time, I was told that Mr Kennedy was shortly to retire.

19. On 7 December 2018 Mr Kennedy wrote to the tribunal withdrawing as one of the appointed IEs on health grounds. He has taken no part in this application.

20. I received a response from Mrs Spence (300-301) dated 7 January 2019 and a witness statement from her (302-306) dated 18 February 2019.

21. At the outset of this application the parties agreed, after preliminary discussion, that neither Ms Hudda nor Mrs Spence would give oral evidence. It therefore proceeded by way of submissions only. Although there was also a preliminary application, as appears commonplace in this litigation, for disclosure of some documents (showing the time taken by the respondent to interview the relevant comparators), this was contested. I indicated that I believed the application could proceed, in the first instance at least, without considering that disclosure application. After almost 2 days of argument I reserved this judgment without that application having been renewed.

Chronology

22. I set out the chronology leading to the matters which gave rise to the application.

23. Because of the magnitude and complexity of this litigation the IEs were appointed at an early stage, with the consent of all parties. The manner and extent of the early involvement of the IEs was substantially agreed between the parties and recorded in earlier case management orders. It was hoped that an early appointment would assist in the proper and expeditious progress of the proceedings towards the Stage 2 hearing.

24. In August and September 2017 the IEs issued briefing notes to the parties (308-326).

25. In Briefing Note 1 ("BN 1" *et alibi*) the IEs recognised that they were potentially dealing with a different range and type of jobs than those they had encountered previously. They gave guidance about the job descriptions, describing it as essential that "the job descriptions are comprehensive, accurate and fit for purpose." In BN 2 they set out a provisional factor plan containing 13 factors that they considered would be relevant for the purposes of writing their report.

26. in BN 3, in which they addressed the format and content of job descriptions, they provided a template suggesting headings under which the facts should be organised: background, purpose of job and main tasks. Under the latter head they said, "this is a very important section of any job description." They also gave further advice on matters to be included in respect of each factor.

27. In BN 4 they gave guidance on the process of compiling and agreeing the JDs. They recognised that it had become custom and practice in cases of this sort for the representatives of the parties to prepare the JDs for the claimants and comparators.

28. The respondent approached the task by preparing the JDs in 2 parts. Part A, a document of some 183 pages contained a single page summary (509) of the structure of the job description and Parts A and B.

29. Part A was information common throughout the depot to give context, a detailed description of the activities undertaken by one or more of the job holders and a glossary of defined terms and schedules.

30. Part B was a description of the activities undertaken by each jobholder. A separate Part B was prepared for each of the comparators. For each comparator it was

intended to give core background details, a description of the combinations of activities undertaken by the jobholder, a description of the demands on the jobholder and a schedule of all changes to the content of the jobholder's work through the relevant period.

31. The summary concluded as follows:

> "Part A and Part B are intended to be read together. In particular, Part A has been produced as a single, common document in order to avoid a large amount of repetition in individual job descriptions, and contains the main detailed descriptions of relevant Activities and how they fit within the overall operation of the Depot: it should be treated as an integral part of each individual job description, not merely as an introductory or reference document.
>
> The information contained in these job descriptions was collected through interviews with the Job Holders and their managers, site visits, and a review of relevant documents."

32. The claimants' JDs were produced on a claimant by claimant basis without producing an equivalent of the respondent's Part A.

33. On 29 March 2018 the parties exchanged first drafts of JDs (509).

34. On 17 May 2018 the IEs produced a progress report (76-78). In it they said:

> "In addition we also received as part of the comparator descriptions a "Part A". This is a substantial document which we understand provides detailed information that is common to all of the comparators. The Independent Experts while noting this document are at this stage unsure as to its relevance in that we find that all the information that we would need to assess the jobs is contained in the "Part Bs" that is the job descriptions formatted according to our then provisional factor plan."

They continued,

> "In general terms the job descriptions provided by both parties are comprehensive and complete. By way of contrast with our experience in many other cases we found we are almost overwhelmed with many pages of substantial and detailed information. This is particularly so in the case of the comparator job descriptions.
>
> Nevertheless our job is to review the job descriptions and this was done reading and re reading them while making notes for future reference.
>
> The independent experts do have some questions arising from the job descriptions but overall these are not such that we would as in other cases request the parties to change their approach to the presentation or content of job descriptions at this stage in the proceedings."

35. They went on to state that they had carried out some trial evaluations using the draft assessment scheme that they were devising. They said that that exercise had "helped to identify issues arising from the job description/work as described where further thought is required in terms of what to take into account and how to do so."

36. On 15 June 2018 Leigh Day wrote to Gibson Dunn, copying the letter to the IEs with their comments on the JDs of the prioritised lead comparators. They said,

> "Following the meetings with the comparators and as reflected in the comments on the job descriptions, we have concerns about whether the job descriptions have been

authorised by the appropriate individuals. We do not make this assertion lightly, but we draw support for this from the following factors:

(1) a number of comparators had not read either one or both parts of their job descriptions. This is strongly indicative of an absence of ownership of job information by the comparators, leading to the job descriptions inappropriately featuring more preparation with line managers than the comparators themselves;

(2) the job descriptions contained a large number of tasks that the comparators said they never undertaken; and

(3) many descriptions appear to exaggerate the work undertaken, with one comparator stating "the description in the document makes it sound more difficult than it was" when he was taken to a passage in his job description."

37. On 29 June 2018 Gibson Dunn wrote to the IEs setting out the proposed agenda for the roundtable meeting ("RTM") which was due to take place on 5 July 2018 with the parties and the experts attending. At point 2 of that letter they said, "On 15 June 2018, the parties exchanged comments on the draft job descriptions, which were largely factual in nature. The parties have agreed that such factual matters should be canvassed in correspondence in the first instance."

38. On 29 June 2018 the experts responded (85) setting out matters that they would wish to have addressed at the RTM and saying, "We also wish to raise with – hear from the parties about the process by which they produced the job descriptions. This is relevant both to our understanding of the matters also raised in the Leigh Day's recent correspondence." They also said they wished to raise the issue of exaggeration and value judgements.

39. It was stated in submissions, and apparent in any event, that there had been correspondence between Gibson Dunn and Leigh Day in the intervening period in respect of Leigh Day's letter of 15 June. Insofar as it was suggested by the respondent that by the short paragraph I have quoted from Gibson Dunn's letter (see paragraph 37 above) that the IEs were to understand that the issues raised by Leigh Day were matters that the parties were reserving to themselves to attempt to resolve or that those matters were not to be considered or addressed by the IEs then that is not a submission that I can accept.

40. My reasons for that conclusion are as follows. At this stage the general intention of the tribunal and the parties was that the parties and the IEs were to liaise and exchange information in order that difficulties over the content and drafting of the JDs that might otherwise occur could be avoided or minimised. The IEs had been appointed at an earlier than usual stage. They had provided briefing notes which were intended to assist the parties. The progress report which I have quoted above indicates that, until that point, the IEs had no substantive concern about the way in which the process was being undertaken. However, they had then been made aware of matters of concern. I interpose that it was stated clearly before me that those concerns are maintained by Leigh Day on behalf of the claimants even now. It is unavoidable in my view that those concerns, if justified, might have a bearing upon the facts found by the tribunal at Stage 2. Since the IEs were involved in the consideration of the JDs at this stage the fact that they later referred to and commented upon these concerns is understandable. Whilst I accept that as between solicitor and solicitor the expression adopted by Gibson Dunn, "such factual matters to be canvassed in correspondence" is wide enough to encompass the matter of concern raised by Leigh Day and might indicate to a solicitor that it

was intended that they the solicitors to the parties should attempt to resolve this issue, I am not persuaded that the IEs would necessarily have read that expression as effectively shutting them out from commenting upon Leigh Day's letter. I therefore reject the submission that it was improper for the experts, in principle, to make some comment on that concern.

41. Thus, the parties and the experts attended the RTM on 5 July 2018. In the course of that meeting a number of comments were made by Mr Kennedy and Mrs Spence upon which the respondent relies in support of this application.

42. The meeting was not recorded and transcribed. Detailed notes were taken by Ms Aprile of Gibson Dunn and form a memorandum (86-113). It is common ground that this was not a verbatim account but neither is any dispute taken with the contents of the memorandum as being an accurate record of what was said.

43. It is I trust, sufficient for me to identify the passage to which my attention was drawn and upon which the parties rely without quoting each passage extensively in order for the parties to know the basis upon which I have reached my conclusion. I have set the passages out in Table 1 and identify them by cipher ("RTM1") et cetera, the person speaking and page reference.

44. Following the RTM the parties were due to exchange revised draft JDs on 3 August 2018 incorporating agreed amendments.

45. On 20 July 2018 Gibson Dunn wrote to Leigh Day (159-164) responding to the concerns raised concerning the authorisation of the comparator job descriptions. Gibson Dunn described the assertion as "serious and wholly unfounded" and continued:

> "Regrettably, however it was the focus of significant discussion at the recent roundtable meeting with the Independent Experts, without the Respondent having had the opportunity to formally respond to it."

46. Gibson Dunn set out at length the process by which they maintained that the job descriptions had been prepared and dealt with some matters of detail.

47. On 25 July 2018 Mr Kennedy wrote to the parties, copying in Mrs Spence, (114-147) providing his comments on the lead claimants' JDs having seen at that stage the respondent's comments upon them. This resulted in a discussion between the parties as a result of which there were agreed amendments to the timetable which the tribunal had set for that part of the process. On 26 July 2018 the respondent wrote to Mr Kennedy (155) explaining the revised timetable and asking if the experts could provide their comments on the respondent's JDs by 31 of August or sooner if possible. Mr Kennedy responded saying that the experts would be able to complete their review of the comparators JDs by 31 August 2018.

48. On 3 August 2018 both parties wrote to the IEs raising questions on the briefing notes (172 for the respondent and 174 for the claimant).

49. On 21 August 2018 Mr Kennedy sent to the parties a document described as "Interim Report of the Independent Experts – Job Descriptions". With that report he included appendices A and B containing the IE's detailed review of the comparator and claimant JDs respectively and a further document, appendix C, a position paper on Part A of the comparator JDs.

50. Section 1 of the first document, the Interim Report, (181-187) was a general commentary on the JDs (and the parties' commentary thereon). The respondent

relies on a number of paragraphs in this section in support of its argument. I quote those passages which were specifically drawn to my attention in submissions.

> **"Overview -** Firstly we have seen and read the exchanges of correspondence between the parties representatives on the question of what we might refer to as the provenance of the comparator job descriptions. We were recently asked in correspondence addressed to the IEs whether or not we had any views on this. We declined to comment. However, having carried out the review of job descriptions as in this report we now think that it is clear that there is an issue between the parties on the production and thereby the content of job descriptions that cannot be avoided and needs to be addressed.
>
> What we see from our review is two quite different approaches. On the one hand we have what appear to be very detailed documents covering every aspect of the work done by the comparators which is to be prefaced by a general overview of the work done at the location in question by another lengthy and detailed document (Part A) . All too often extended accounts of what is required or involved based on company policy etc. precede a short statement referring in very general terms to an activity. What is missing is an account of what the job holder actually does. May we suggest that we are not in the business of assessing the employers policies and practice but rather and quite specifically - what the job holder does or is required to do in their work.
>
> While for the claimants we see what is a much more job holder specific account of the work this as we shall indicate below lacks detail.
>
> It seems to us that the Respondents have worked from the base of a generic account of the work of the comparators and then applied this to each individual comparator whether or not all of such applies to any given job holder. It is therefore not surprising when items in a job description are challenged by the Claimants representatives through the medium of the jobholder.
>
> It is not, however, just the respondents / comparators for whom there are problems with the job descriptions. Overall we found that the Claimant job descriptions lacked detail particularly in terms of giving context and background to accounts of job holder activity. Here again there are instances of items being directly challenged on the basis that the job holder did not do X or Y.
>
> Perhaps all of the above might be summarised as - The comparator Job descriptions overdo the context and are light on description of the actual task actions performed. While on the other hand the claimants job descriptions identify tasks but are light on context." (182)

51. The respondent also drew attention to a number of comments made by the IEs in respect of Leigh Day's comments on the comparator JDs and their own reading of them. The passages I was asked to consider are as follows:

> **"Reporting of Tasks/ jobs** - There are several instances in each of the comparator JDs of involvement in a task or responsibility as reported in the job description being challenged by the Job holder (Leigh Day commentary) to the effect that that they the job holder did not do this. Alternatively the Job holder states that this task was outside the period under review.
>
> If so then this does support our concern that the Job descriptions tend towards the generic rather than being job holder specific.
>
> **Difficulty / complexity of a task -** There are several instances throughout the comparator job descriptions of the job holder (Leigh Day commentary) suggesting that

> a task was considerably more straightforward / less complex and less demanding than is implied by the text of the job description.
>
> For example the Job description text will describe a task such as loading a pallet so that it appears as if the job holder must consider a number of factors, regulations etc. The Job Holder in Leigh Days commentary then responds by suggesting "It's just common sense". While we are wary of the use of terms such as "common sense" might it not be the case that the job holder simply makes sure or quickly assesses if it is safe and secure and knows what wouldn't be so.
>
> This is just one example of potential overstatement - there are many others." (183)

52. Under the heading of Reporting of Targets and Productivity the IEs commented that both the reporting and what arose from Leigh Day's commentary was "confusing to say the least". Under the same heading the IEs expressed the view that;

> "While the text of the job descriptions goes to some lengths to portray targets and productivity as an important aspect of the job with the critical consequences if targets are not met – the job holder input in Leigh Day's commentary tends to suggest a much more relaxed regime." (184)

53. Under the heading of "Training" the IEs suggested that reporting on that subject should be, "reviewed taking care to ensure that was reported relates to the specific jobholder and that the form the training took exactly describes it occurs in practice." (185).

54. The respondent next relied upon a passage concerning Part A (185):

> "This is referred to in the opening/introductory paragraphs of the job descriptions. Two of the jobholders via Leigh Day's commentary state that they have not seen Part A. Might reasonably assume that none of the others have either? In any event this does raise some interesting questions. We refer the parties and the tribunal to our position paper on Part A."

55. The last specific comment on this document was a passage at the start of the IEs' general comments on the claimant JDs and the respondent's commentary on those. The IEs wrote: "**What we have done in this report.** We have considered each of the respondent's comments in turn as they apply to the claimant JDs. In doing so we have queried some comments and also made suggestions as to what might be the case."

56. In further support of their application the respondent relied upon a number of specific comments by the IEs made in appendices A and B to the interim report. A few of these were addressed in oral argument by way of example. I was invited by Mr Cooper to consider them all and I have done so. I was invited by Mr Short to consider all these comments in context, in relation to these latter comments that would mean considering the relevant passages of the JDs, the comments of the relevant party (i.e. Gibson Dunn comments on claimant JDs and vice versa) and then evaluating the IEs' comments in the light of the allegations made by the respondent.

57. The comments are identified in the respondent's application. However, I do not set out here each and every comment.

58. I set out those comments upon which Mr Cooper relied particularly in argument, and those identified in the application in Tables 2 and 3. Table 2 contains part of

the IEs' review and commentary on the comparator JDs. Table 3 contains the IEs' review and commentary on the claimant JDs. Table 2 also contains the respondent's response to the comments. The difference is due, I understand, to the timing in which these tasks were undertaken.

59. I consider that it is important for me to set out my understanding of the context and the magnitude of the task that the parties and the IEs were engaged upon at this stage. I consider the following matters are significant:

59.1. The parties are preparing for a fact-finding process. At this stage to hearing if there is disagreement as to any fact upon which the IEs will be asked to base their report it is for the tribunal to determine it. In doing so it will hear evidence from the employer and individual employees who may be claimants or comparators.

59.2. The purpose of involving the IEs at this stage, particularly in a case where the employer had not already got JDs for any of the relevant employees was to assist the parties in addressing matters that would be relevant for them when they came to prepare their report.

59.3. The scale of the work that the parties are undertaking is great. At this stage they are seeking to establish the relevant facts in relation to 5 or 6 lead claimants. If I appear uncertain it is because in October 2017 there was an order in respect of 6 lead claimants but the papers before me only contain, so far as I can tell, details for 5 of those claimants. Of those I have first version JDs job for 2: one of 23 pages and one of 48 pages. There are 7 lead comparators. They each rely upon Part A of the JD which comprises matters common to all comparators in the matters the respondents will say demonstrate the requirements of each function that any particular jobholder is required to undertake. The first version of the individual Part B JDs for 2 of them comprise 66 (Mr McDonough) and 88 pages (Mr Morris). For Version 6 of Mr Morris's part B is expanded to just over 200 pages. That for another comparator Mr Welch is a more modest 98 pages.

59.4. So even at the first stage, by way of example, the claimants made 158 comments on Part A, and on Part B: 105 comments (Mr McDonough); 98 comments (Mr Morris); 94 comments (Mr Prescott); 118 comments (Mr Matthews); 77 comments (Mr Welch); 81 comments (Mr Makin) and 86 comments (Mr Hoare). I remind myself that Mr Morris and Mr Hoare are both comparators for the 2008 claims as well as for the more recent ones and that the many thousands of claimants here have compared themselves with a large range of comparators.

59.5. Finally, it should not be forgotten that all this work is being done in respect of lead claimants and comparators. There are now 2 further batches of lead claimants and comparators to follow. The Stage 2 hearing for batch 2 is listed a year away. I recognise that the approach the tribunal may take to its fact-finding task in the forthcoming hearing may serve as a model for the parties to take into account as the case progresses. Given the scope of the litigation, acknowledged in argument by Mr Cooper, to be perhaps worth in the region of £2 billion, it is no wonder that the parties are wishing to approach their task in great detail and with great diligence.

Response to the application

60. As I have already recorded Mr Kennedy has made no comment on the application for recusal at all. Mrs Spence has done so both in a written response and in a witness statement.

61. In her response Mrs Spence set out a general refutation of the criticism of discrimination or distrust/hostility alleged by the respondent. She said:

> "It is accepted there have been differences in our approaches to the claimants and comparators job descriptions but this has been necessary as the sets of documentation have been very different."

62. Further to this she made responses to 4 specific comments:

62.1. At paragraph 9 of the application the respondent set out the allegedly discretionary comments of Mr Kennedy made at the RTM: see Table 1 at RTM 19 and RTM 20 (save for the final sentence of RTM 20). At paragraph 10 of the application the allegation is made against Mrs Spence that those views which are said to be discriminatory were made by Mr Kennedy without demur on her part. In her response Mrs Spence stated "it would be totally unprofessional for Mrs Spence to disagree with a colleague in front of the parties."

62.2. At paragraph 17 of the application the respondent stated that, "The IEs' starting position of distrust, reinforced by the allegations advanced by Leigh Day, has been expressly articulated by the IEs themselves." The respondent then quotes Mr Kennedy's remarks which comprise entries RTM 2, 3 and 4 of Table 1 and Mrs Spence's remark which I have quoted at RTM 5. In her response, Mrs Spence stated that the IEs "were concerned with the quantity of information and how it related to each job holder, which is why we requested roundtable meetings."

62.3. At paragraph 29 of the application the respondent itself refers to the scale of the litigation and said that it made no apology for approaching the drafting of JDs in the way that it did and said it had not "contrary to one typically flippant remark made by Mrs Spence during the roundtable meeting on 5 July 2018, produced anything comparable to "three pages about putting on gloves." This remark is set out at RTM 18. Mrs Spence responded saying it was not a flippant remark but "an attempt to explain that too much detail is not necessarily helpful."

62.4. The final specific criticism of Miss Spence in the application is at paragraph 31(d). In summary, the criticism of her is that she refers to employees driving trucks around the grids in the depot whereas in fact employees walk around pulling cages or trolleys. Her response was as follows: "When Mrs Spence visited the depots, a large number of the operatives drove a vehicle, if this was not the case in this job it is something that would be clarified at a round table."

63. In her witness statement Mrs Spence sets out at considerable length her experience, the objective of IEs in equal pay cases and recognises that the duty of the IEs is to the tribunal and not to favour one party over another. She continued to maintain her stance that she had not behaved in an improper or biased manner. In paragraph 9 of her witness statement Mrs Spence stated that the IEs had provided a template for the JDs to both parties and continued:

> "The resulting documentation was very different for both the comparator job descriptions and the claimant job descriptions. This happens in most equal pay cases. The Independent Expert(s) will then work with both parties to ensure that the job descriptions contain comparable, relevant details and to help reduce the number of disagreements. Where the dispute cannot be resolved this will be determined by the Employment Tribunal at a stage 2 hearing. The processes that the Independent Experts followed in this case were similar to that in other cases."

64. At paragraph 11 Mrs Spence explained, in relation to the interim report that the purpose of the comments were to reduce the size of the comparator job description documents "so that important points are not overlooked" and asked questions in respect of the claimant JDs to ensure "all their duties are included".

65. Mrs Spence disputes the allegation that she has expressed personal views relating to other retail organisations but said that she had referred to duties undertaken by the respondent's staff during depot visits and a store visit accompanied by the representatives.

66. Mrs Spence made a specific reference to paragraph 15(c) of the respondent's application where the respondent alleges that the IEs had not only "aligned themselves with and maintained the allegations made by Leigh Day … but they have (without any basis whatsoever) gone further even than the allegations advanced by Leigh Day.". She said that she had no view on how the JDs are prepared only that they contain accurate information in a format which enables her correctly to assess the job.

67. She denied any inherent hostility to corporate and comprehensive JDs but maintained that too much generic information is not helpful. She referred to Mr Kennedy's comment (RTM 1) about "weaponised job descriptions" accepting that was not a helpful phrase for him to have used.

68. At paragraph 16, she said this:

> "I need to stress that at this stage of an equal value case, I am only interested in obtaining job descriptions that describe accurately the work of the jobholder and the information contained in the comparator and claimant job descriptions is comparable. I am not undertaking any type of assessment and will not do so until after the stage 2 hearing."

69. At paragraphs 17 to 21 of her statement Mrs Spence explained the position with regard to her appointment as lead expert in this case and that it was known that Mr Kennedy was likely to retire before the conclusion of the litigation. Mrs Spence goes on to explain about the panel of experts, the fact that ACAS is currently undertaking a recruitment programme and expresses the view, which I would have inferred in any event, that new IEs are unlikely to be available for the stage 2 hearing scheduled to start on 13 May 2019.

70. At paragraphs 34 to 37 Mrs Spence reiterated her responses to the specific points which she had already addressed in her written response.

Submissions

Legal background

71. In addition to being reminded of my power contained in rule 9(4) of the ETEVR, my attention was drawn specifically to the following authorities:

Porter v McGill [2002] 2 AC 357 at 491, 493-4

R (Factortame Ltd & others) v Transport Secretary (No 8) CA [2003] QB 381 at 408-410

Armchair Passenger Transport Ltd v Helical Bar Plc [2003] EWHC 367 (QB) at paragraphs 22 and 29

Halliburton Energy Services Inc v Smith International [2007] RPC 17 428 at 440-441

Saunder v Birmingham City Council UKEAT/0591/07/RN

72. I record that it was agreed by all counsel that if I were to find either actual bias or apparent bias on the part of Mrs Spence on the basis contended for by the respondent then a proper conclusion would be to recuse her. I apprehend this to be on the basis that, whether or not the authorities on actual or apparent bias on the part of the judge apply to experts instructed by the parties, or scientific advisers (as in **Halliburton**) or an independent expert as here, the scope of my discretion under rule 9(4) would permit such a step.

73. In deference to the argument of counsel I summarise the position as it appears to be from the authorities. However, I do so relatively briefly having regard to the approach that I have taken set out in my conclusions below.

74. At paragraph 88 of **Porter v Magill**, Lord Hope referred to the decision of the European Court in **Findlay v United Kingdom** (1997) 24 EHRR 221 which was considering the concepts of independence and impartiality of the judicial tribunal which are referred to in article 6(1) of the ECHR.

> "The court recalls that in order to establish whether a tribunal can be considered as 'independent', regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.
>
> As to the question of 'impartiality', there are 2 aspects to this requirement. First, the tribunal must be subjectively free from personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.
>
> The concept of independence and objective impartiality are closely linked …"

75. Lord Hope continued,

> "In both cases the concept requires not only that the tribunal must be truly independent and free from actual bias, proof of which is very likely to be difficult, but also that it must not appear in the objective sense to lack these essential qualities."

76. In my judgment these passages are useful as a reminder of the test for actual bias before going on to consider apparent bias.

77. So, in order to find actual bias, I would have to be persuaded by the respondent on the balance of probabilities that Mrs Spence was not subjectively free from personal prejudice or bias.

78. As to apparent bias Lord Hope went on to consider the test and approved the judgment of the Court of Appeal in **In Re Medicaments and Related Classes of Goods (No 2)** [2001] 1 WLR 700:

> "The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the 2 being the same, that the tribunal was biased."

79. No other member of the House addressed the test so Lord Hope's is the only explicit approval of the formulation of the test by the Court of Appeal. Be that as it may, that formulation of the test is the one I must apply if it is appropriate so to do. But whether this test applies to the question of apparent bias in relation to an independent expert appointed by the tribunal the authorities do not appear to speak with one voice.

80. In **Factortame** the court rejected the argument that the test was applicable in the context of a question about the appointment of an expert who was had been employed by a party. If an expert had some interest in the outcome of the case it was a matter of which the court should be made aware so that it could then decide whether to permit the expert to give evidence and, if it did, as to the weight to be attached to that evidence. In the case of a joint single expert appointed to report on personal injury in an ET case HH Judge Peter Clark rejected the submission that the **Porter v Magill** test for apparent bias applied in relation to an expert witness, see **Saunder**.

81. However, in **Halliburton** the Court of Appeal, applied the test for apparent bias in relation to a scientific adviser appointed by the court in a patent infringement case. The scientific adviser had expressed opinions which went beyond his proper remit and into areas which it was for the court to decide. At paragraph 31 Chadwick LJ giving the judgment of the court said:

> "It is important to keep in mind that the relevant perception is that of the fair-minded and informed observer. The fair-minded and informed observer may be taken have a proper understanding of the role of the scientific adviser and how that role interacts with the role of the court."

82. So far as I can discern, it does not appear to have been argued in that case that the test for apparent bias could not apply in those circumstances. There seemed to be a broad consensus before me that the **Halliburton** formulation for the fair-minded observer test for apparent bias i.e. one modified to substitute the role of the independent expert for that of the scientific adviser in the paragraph I have quoted might be an appropriate formulation.

83. I asked counsel to identify for me how they put the level of application of the test, that is to stay whether it was to be applied to an IE as strictly as to a judge or in this way, which I might describe as a "modified Halliburton", or at the level of an expert appointed by the parties where apparent bias could be relevant when the court decides whether to admit that expert's opinion evidence or in deciding what weight to attach to it.

84. In summary, Mr Cooper submitted that the nature of the independent expert's status, task and relationship with the Tribunal was such that they could not be considered in the same way as an expert instructed by a party or an assessor but that the test for apparent bias should be applied in just the same way as for a judge.

85. Mr Short, with whom Ms Callan agreed, submitted that the nature of the independent expert's role was more akin to that of an assessor, although an assessor does not prepare evidence for the court with whom he or she may be

sitting. Mr Short initially submitted that I should consider the position of the IE in the same way as an expert instructed by the parties but acknowledged the position of the independent expert might be considered to lie somewhere between the scientific adviser and an expert instructed by the parties.

86. Having reflected upon these arguments, I consider that the primary submission of Mr Short and Ms Callan on this point is to be preferred. However, I would not dilute the test by seeking to adopt a "hybrid" position. It appears to me that the authorities that deal with allegations of bias on the part of an expert appointed by the parties, not being matters which should automatically lead the court or tribunal into excluding the evidence but as matters going to the weight of that evidence, are considering a a significantly different situation in fact in principle. Although all experts, however appointed, owe the court or tribunal to whom they report, the obligation to be impartial in applying their expertise to the facts they are asked to consider, those appointed by the parties are carrying out their task upon the instruction of a party to the case. IEs, as their very name suggests, are not carrying out the same task.

87. The respondent's further alternative was that if I did not reach a conclusion of actual or apparent bias then the decision for me to make, having regard to my findings concerning the IEs, was one of case management. In that event, I have a general discretion. That discretion must be exercised in accordance with the overriding objective in rule 2 of the Employment Tribunal Rules of Procedure 2013 ("ETR").

Conclusions

88. I first considered the source of the power that the respondent asked me to exercise. I remind myself that the employment tribunal is a creature of statute.

89. Both the ETR and the ETEVR derive their effect from the Employment Tribunal's (Constitution & Rules of Procedure) Regulations 2013 and comprise Schedules 1 and 3 to those Regulations.

90. The ETR apply to all proceedings before the tribunal "except where separate rules of procedure made under the provisions of any enactment are applicable." The ETEVR apply to modify the ETR in relation to proceedings involving equal value claims. (Regulation 13). Thus, even on a reading of this regulation alone it is clear that the ETEVR do not completely supplant the tribunal's general case management powers, nor the provisions of the overriding objective set out in rule 2.

91. In my view the power to require an IE to prepare a report in an equal value case and the power to withdraw that requirement from an independent expert and to require another expert to prepare a report (rules 3 and 9(4) ETEVR) are the discrete source of the tribunal's power in this respect. I say this not least because the tribunal does not have available the services of any expert whom it can choose at will in such a case. The tribunal is restricted to an expert appointed to the relevant ACAS panel, and nominated by ACAS itself, see: section 131(8) EQA 2010. But, as I have stated above, in exercising that power I must seek to give effect to the overriding objective of dealing with the case fairly and justly which includes the 5 matters set out in rule 2 (a) – (c).

92. In those circumstances I do not find it surprising that all counsel appeared to be in agreement that if I were to find actual or apparent bias on the part of an independent expert then I should exercise those powers in the way contended for

by the respondent. Absent that agreement I should have reached the same conclusion for the reasons I have stated.

93. At whatever stage of the proceedings they are appointed the purpose of the independent expert's task is the same. The requirement upon them is to reach and report a decision, informed by their expertise, based upon the facts found by the tribunal whether the work of the claimant is equal to that of the comparator "in terms of the demands made upon [the claimant] by reference to factors such as effort, skill and decision-making", see: s. 65(6)(b) EQA 2010. In summary, they are required to make an evaluative judgment. As the experts in this case have said, and as all judges and practitioners in the field are aware, it is not a scientific exercise. It requires a fair judgment which feeds into the judicial process itself.

94. For those reasons I consider that a finding of actual or apparent bias would and properly should lead to the recusal of the IE in question.

95. The provision of rule 9(4) giving the tribunal a wide discretion to withdraw the requirement after giving the independent expert an opportunity to make representations, can also be exercised for other proper reason even absent a finding of actual or apparent bias. One obvious example might be where an expert has become unfit by reason of ill-health. But the circumstances which might lead to such a conclusion are not themselves circumscribed by rules or authority. I therefore accept that it is at least possible that in an application such as this, even finding that there was neither actual or apparent bias, nonetheless there could be a good reason to withdraw the requirement from the independent expert.

96. Thus, there are 3 questions for me to answer.

    96.1. Has the respondent demonstrated actual bias on the part of Mrs Spence?

    96.2. If not, has the respondent demonstrated apparent bias on her part?

    96.3. If not, should I remove the requirement in any event having regard to all the circumstances in the exercise of the wide discretion afforded by rule 9(4) ETEVR and seeking to give effect to the overriding objective?

Actual bias

97. Having regard to the formulation in **Findlay** the question thus becomes: has the respondent demonstrated that Mrs Spence was not "subjectively free from personal prejudice or bias".

98. In the application, as I have set out above, the respondent identifies the comments on which they rely as demonstrating improper conduct on the part of the IEs under the 2 sub-headings of discrimination and distrust of and/or hostility towards the respondent. Then in conclusion at paragraphs 45 and 46 of the application they say that the test for actual or apparent bias is satisfied. Mr Cooper's written submissions at paragraph 30 did not elucidate which factual points supported which aspect of the three-pronged argument that he maintained. Therefore I asked him for a note to try and help the tribunal focus its consideration. He provided the summary as I requested but described it as "essential for the matters set out below to be considered in the round … the respondent relies on the overall effect of the matters highlighted in oral submissions."

99. I therefore set out my conclusions following the structure of his, somewhat, helpful note. In section 1 he dealt with actual bias.

1.1 Expressly and without any proper basis challenging the account of the respondent's solicitors as to the process of drafting the JDs.

100. The comment upon which relies I have set out in paragraph 54 above. It is on the face of it in an inappropriate comment. To a casual reader it might suggest that it is for the experts to make a factual conclusion as to whether the jobholders have or have not read their JDs. In fact this is a question, if in the event it is an issue, for the tribunal. The context is that Leigh Day had raised and continue to raise a concern about this. The IEs' earlier progress report suggest that in general they did not have concerns about the drafting of the JDs. However, if as a result of their work at this stage the IEs had some basis for sharing the concern, albeit initiated by the other party, that a jobholder might not have read their job description and had not mentioned this but it had later come out at the stage 2 hearing then, in my judgment, they would have been open to serious criticism. Thus, the mere mention of a potential concern, by way of a rhetorical question, seen in the context of the entire exercise is not, I conclude, cogent evidence of hostility or distrust.

1.2 Expressly and without any proper basis questioning the truthfulness of the Comparator job descriptions and/or aligning herself with the Claimants' allegations:

101. Mr Cooper note dealt with this general allegation under 4 specific further comments which I summarise.

(a) The change from the IEs' first comments in the 'Progress Report' is striking and supports conclusion that they subsequently allow themselves to be influenced by, and align themselves with, the allegations made by Leigh Day in the letter of 15 June 2018;

102. Essentially for the reasons that I have set out at paragraph 100 I am not persuaded that what Mr Cooper describes as the "change" from the general comments about drafting of JDs in the progress report supports a conclusion that the experts were influenced by or aligning themselves with the concern by referring to it. Neither can I properly draw the conclusion that the experts were expressing a view that they doubted the truthfulness of the JDs. What the voluminous documentation demonstrates in my view is a consistent and repeated desire by the experts to have comprehensive and, so far as possible, manageable documentary evidence of what a jobholder actually did.

103. Furthermore, I am not persuaded that in this process Mrs Spence was aligning herself with one party or the other. In equal pay litigation, no less than in other forms of litigation, more voluminous and detailed information is very often provided by one party than the other. The input by an expert at this stage in order to clarify what is unclear or to encourage either party to add material information is one which can be made depending upon the material first provided by the parties. It does not of itself suggest alignment by the expert in making any such comment.

(b) putting onto the agenda for the roundtable the issue of how the job descriptions were prepared despite having been told the parties that the parties would respond to each-other's comments separately (and despite now claiming not have a view about how the job descriptions were prepared);

104. In my judgment the first element of this specific criticism is repetitious of those set out above. The agenda item is set out in paragraph 38 above. The reference to the parties saying they would respond to each other's comments separately is at paragraph 37 above. As to that latter I am not persuaded that the experts would

necessarily have understood the correspondence in the way that solicitors for the parties might do as I have sought to explain in paragraph 40 above. I therefore do not draw any adverse inference from the mere fact that it was put upon the agenda. In relation to this and applying the same reasoning as previously I do not accept that enables me to draw the inference that the submission requires.

105. The last part of the point, the words set out in parentheses above, is a reference to Mrs Spence's witness statement at paragraph 14, see paragraph 66 above. This was a specific response by Mrs Spence to paragraph 15(c) of the application. I do not for that reason consider having rejected that essential allegation that this reference strengthens the respondent's argument.

(c) the joint comments of the IEs expressly indicating a 'suspicion' or '' concern that the Comparator job descriptions reflect 'a chart in HR … not what happens in the engine room';

106. This is a reference to the comments by Mr Kennedy reported at RTM 2, 3 and 4 in Table 1. The reference to concern is a reference to RTM 5 which was a comment by Mrs Spence. As to Mr Kennedy's comments I would accept that his use of language might be said by some not to be wholly professional. The expression with which he introduces the comment, "we have almost said in jest…" is one that, were it said in evidence to the tribunal, would call for an explanation. But, this was said in a less formal context. The circumstances were an attempt to communicate what the experts expected to see in JDs and once again, the comment falls short, in my judgment, of demonstrating the inference of influence or aligning that this comment is said to support.

107. Since the comment was not Mrs Spence's it is relevant to consider how she put it at RTM 6. It appears to me that she was being entirely frank with the parties. She is stating no more than that the experts had concerns with the underlying point that Mr Kennedy was trying to illustrate by his language and that it was Leigh Day's letter of concern which had caused the experts to think again. Reflecting on that comment by Mrs Spence it is not one which supports the inference I am asked to draw.

(d) Comments in Interim Report expressly stating the IEs' belief that the respondents have described 'generic' 'policy' in the Comparator job descriptions 'whether or not all of such applies to any given jobholder'…

108. I have quoted the relevant parts of the report for the purposes of this allegation at paragraph 50 above. This part of the report was a general reflection upon Part A of the comparator JDs. The parties encourage me to look at the matter in the round taking into account all the circumstances and the context in which matters are alleged to have been said. So I do. In my judgment a fair reading of those comments should take into account the way in which the matters are summarised in the last 2 paragraphs of the quotation set out above. Those demonstrate, in my view, that the experts were not aligning themselves or allowing themselves to be influenced in the way alleged but seeking to assist the parties in the way in which they perceived each party might obtain benefit from their participation.

1.3 Repeatedly taking points on behalf of and/or engaging in advocacy on behalf of the claimants in respect of points of factual dispute outside her expertise;

109. Under this general heading Mr Cooper makes 3 points.

(a) when commenting on the points of factual dispute raised by the respondent in respect of the claimant job descriptions: "we have…made some suggestions as to what might be the case';

110. The comment is set out at paragraph 55 above. In the next paragraph of this part of the experts' introduction to their specific comments on the claimant JDs they wrote:

> "Overall our intention is to bring to the attention of the parties what is missing from the JDs – where we think some criticisms are misplaced or missed the point but above all to put before the parties how the IEs regard information provided both in the JDs and in the respondents comments." (186)

111. Looked at in context I am unable to conclude that that amounts to the IEs taking points on behalf of the claimants or engaging in advocacy in their behalf.

(b) On [183] giving the example of the description of assessing load stability in the comparator JDs [571:567] as one of 'several instances' of 'potential exaggeration'; but by contrast advocating on behalf of the claimants at [212] in respect of a similar job description of factors relevant to a task [670 – 671];

112. The references in that allegation are to pages in the hearing bundle. The load stability example referred to above was summarised by the experts in the opening part of the interim report. It is the 4th quoted paragraph in paragraph 51 above. The contrasting comment is that of the IEs in relation to a claimant Checkout Operator whose job encompassed grocery packing. The comments of the respondent and the IEs are set out in Table 3 and referred to as "Ashton, 7".

113. Again, looked at in context, I am unable to infer that this amounts to taking points on behalf of and/or engaging in advocacy on behalf of the claimants let alone in respect of the point of factual dispute outside Mrs Spence's expertise. In my judgment is fanciful to criticise an expert who no doubt like everybody else in the case shops from time to time in a supermarket for making the comment in respect of common sense principles in packing shopping bags "there is probably an expectation that she would do so both by the customer an Asda. If you did not do so… Might this not lead to customer complaints. Also we observe many customers do not use common sense principles when packing their own bags." Whether this comment will assist the tribunal in making the appropriate findings of fact I cannot say. It appears to me that the last sentence of the quotation is merely reinforcing the common sense point that if you do not pack the groceries in a common sense way you may risk damaging something that the customer has bought. How the respondent perceives that this is advocacy on behalf of the claimants is not apparent to me.

(c) see generally the comments identified in the application letter at [35 – 6]: this particular example is given in all submissions were:

(i) in relation to comparator job descriptions: McDonough comments 17 & 39;

(ii) in relation to claimant job descriptions: Ashton comment 1 and Webster comment 9

114. The McDonough comments are set out in Table 2. The entries are identified by Mr McDonough's name and number. Those of Ms Ashton and Ms Webster are in Table 3 and are similarly identified.

115. I recognise that these are examples only of what is said to be offering assistance to the claimants. The use of the expressions, "may we suggest that" and "is it not the case that" is suggested to be Mrs Spence relying upon speculation and applying her own otherwise acquired knowledge.

116. Once again, this must be considered in context. It is said that the language used in the written comments of the experts evidences actual bias on the part of Mrs Spence. In Mr Cooper's submission this is to be characterised as taking points or engaging in advocacy on behalf of the claimants. Without intending any disrespect, I am not persuaded that the use of such language picked out in this way in respect of the stage at which the proceedings had reached tends to show actual bias on the part of the expert.

1.4 improperly (in breach of the Tribunal's orders and Rule 5) intervening so as to expand rather than reduce the points of dispute between the parties:

117. Under this heading Mr Cooper relies upon 2 matters: the IEs reopening the issue about the debate on the draft of the JDs in the first paragraph of the interim report (see paragraph 50 above); and a reference in an email of 3 September 2018 (299) from Mr Kennedy to the parties. In that email Mr Kennedy is suggesting that the IEs should lead roundtable meetings with all the jobholders because what he described as major reservations about the JDs as set out in the interim report.

118. As to the substance of the allegation about intervention in and expansion upon the argument of the claimants about the drafting of the comparator JDs, I have already expressed my conclusions on that at some length. The further aspect of this submission is that it is in breach of the tribunal orders and rule 5 which permits the tribunal to "order the independent expert to assist the tribunal in establishing the facts".

119. The reference to breach of the order was the submission that the experts had provided a report in advance of the position in the timetable which the tribunal had set.

120. As to those matters I consider the breach to be technical. There is nothing in the facts to suggest that the interim report was provided intentionally in advance in order to disadvantage one party rather than the other. I have to ask the question whether I consider that the contents of the IEs' communications and comments, taken in the round, have improperly expanded rather than reduced the point of dispute between the parties, as Mr Cooper submits.

121. In my judgment they do not. Whatever the merits as they may turn out to be of the dispute about the drafting of the JDs and whether the comments of the IEs or their communications might have been phrased differently, the points made on the part of the respondent in my opinion lend negligible weight to an allegation of actual bias.

1.5 repeatedly commenting in language, and/or acting in a manner, indicative of underlying distrust/hostility towards the respondent and/or favouring the claimants:

122. Under this topic Mr Cooper makes 9 separate points.

(a) Failing to address Mr Kennedy's 'weaponised job descriptions' comment (in circumstances where the remainder of the discussion at the roundtable meeting makes clear that this was directed at the comparator job descriptions and was part of the joint expressed views of both IEs to the effect that those job descriptions reflected policy not reality);

123. The comment in question is set out at RTM 1 in Table 1 and Mrs Spence's response is recorded at paragraph 67 above. She described it as "not a helpful phrase". In the context of a dispute, and nobody could be in any doubt as to the magnitude of the dispute between the parties here, to use the term "weaponised" was undoubtedly unhelpful. Whatever the intent of the person using the phrase it was unlikely to foster cooperation. Given the way in which the parties had respectively drawn up the JDs I have no doubt that Mr Cooper is right in suggesting that it was a term specifically directed at the comparator JDs and the way that they had been compiled. In a case such as this where there have been no prior JDs the parties in a case would undoubtedly wish to draw up the JDs in an extremely thorough way and will tend to include as much detail about as many aspects of the job as possible. Indeed, that was the thrust of the response to the IEs raising the way in which the JDs had been drawn at the roundtable meeting.

124. However, if the IEs are correct, as I find they are, in saying that their evaluation will be based upon the findings of fact as to what the comparator job holder actually does rather than on any general description of what such a job holder might do, then faced with the material provided by the parties in this case a comment about the nature of the JDs was not in itself inappropriate. For that reason, it is not safe or appropriate to infer hostility or distrust on the part of Mrs Spence because of a term that Mr Kennedy unhelpfully employed.

(b) '… We will have some roundtables, certainly with the comparators…'

125. This comment was one made by Mrs Spence herself. It is recorded fully at RTM 8 in Table 1. It follows directly on a comment by Mr Kennedy, "It is usually the case that if you ask the right questions of the jobholder, you end up in a position where nothing is left in dispute." Mrs Spence was suggesting that there might need to be roundtables with both comparators and claimants. The reference to comparators is because she apprehended that that was possibly "where the bigger disagreements will be." In my judgment that expression taken in that context does not indicate underlying hostility or distrust.

(c) Commenting (inaccurately) on the description of the depot layout in Part A of the comparator job descriptions in order to support Mr Kennedy's dismissive comments that 'we wouldn't refer to Part A' and "There is an overkill element';

126. This point is made in respect of comments recorded at RTM 11 and RTM 12. Whether Mrs Spence accurately or inaccurately described the depot layout and the significance of her description may be a matter for the tribunal to determine. During argument I expressed the view that it might be helpful for the tribunal to conduct a site visit as part of the Stage 2 hearing. The parties agreed. Such a visit might resolve that issue. If, in this respect, Mrs Spence was inaccurate or mistaken that would not of itself suggest bias. Hence Mr Cooper was making his argument that this was done to support Mr Kennedy's allegedly dismissive comments. Taking the application and Ms Hudda's witness statement at the highest they do not begin to support the inference that Mrs Spence inaccurately described the depot layout for that purpose.

(d) '… three pages about putting on gloves';

127. Mrs Spence made this comment and it is recorded at RTM 18. The obvious inference is that she was seeking to give an example as to what would helpfully be found in a job description and what might be unnecessary. Insofar as the

respondent's comparator JDs contained more detail rather than less it is understandable that the respondent might perceive this as in some way being critical of them. But, in my judgment, even if Mrs Spence was being critical, and I am not persuaded that she was, it is a comment of such little significance when looked at in context that it cannot support an inference of distrust or hostility.

(e) failing to address Mr Kennedy's (sexist) comments in further illustration of the joint view being advanced that the IEs believe that the respondent and employers generally describe policy not reality and are to be disbelieved.

128. This is the comment quoted in full at RTM 19. As to it being a sexist comment and the criticisms made of Mrs Spence I deal with those below since they are raised again by the respondent in support of the allegation of discriminatory views being held by the IEs. In this context it is suggested that Mrs Spence by failing to "address them", by which I understand Mr Cooper to mean both at the time and subsequently in her response and evidence, supports the view that the IEs tend to disbelieve employers because they generally describe policy not reality in JDs.

129. The difficulty with the criticism in this context that I find, and the reason why I reject the submission, is simply that Mr Kennedy was making a general comment about what was "in a chart in HR is not what happens in the engine room". I recognise that the so-called chart in HR is likely to be kept by the respondent and that the employees who may be comparators or claimants work in the so-called engine room. But absent any other feature which shows that this is a remark generally in favour of claimants rather than comparators I am not persuaded that the inference Mr Cooper asked me to draw is justifiable.

(f) '*… the text of the [comparator] job descriptions goes to some lengths to portray targets…';*

130. The context here, set out at paragraph 52 above, is that the experts are drawing attention to a difference of approach between the parties. I do not understand the respondent to say that they did not go to some lengths to portray targets and productivity as important. The comment on behalf of the claimants was that based upon the statements of the jobholder in fact the respondent operated a more relaxed regime.

131. The passage to which my attention is drawn is one paragraph in a short section on Targets and Productivity which the experts begin to address by saying that the matter, "needed to be substantially reviewed concentrating on what are the essential facts," because they considered the reporting of this in the JDs and what arose from the commentary was confusing. If the respondent's submission is, as I believe it must be, that commenting upon an area of factual dispute in those circumstances is evidence of distrust or hostility then I cannot accept it.

(g) contrast the repeated use of 'may we suggest', 'is it not the case', etc in the comments on the claimant job descriptions in the interim report, with 'once again', 'again', etc in noting (and relying on support their view that the comparator job descriptions reflect policy not reality) the disputes raised by the claimant;

132. I have already indicated that the mere use of this kind of language is inadequate in my view to support the inference. Given the scale of the litigation it is inevitable that this exercise of comment, response and experts' comments is one which is highly repetitive. Insofar as this submission rests on the "repeated use" of the language my conclusion is that the inference becomes no stronger.

(h) Suggesting that her role includes attempting to extract 'comparable" information from the claimants.

133. For this submission the respondent relied upon paragraphs 9 and 16 of Mrs Spence's witness statement, see paragraph 63 and 68 above. Based upon the way in which she expresses herself in those paragraphs, the inference of "attempting to extract" with the underlying connotation that this is in some way her acting to favour the claimants over the respondent, is clearly unsustainable. Equally unsustainable, in my judgment, is the suggestion that this supports an indication of underlying distrust/hostility. I consider it much more likely to demonstrate a recognition of the need to obtain relevant information from both parties.

134. Mr Cooper then suggested in paragraph 2 of his note that the tribunal should infer that Mrs Spence was tainted by the discriminatory views expressed by Mr Kennedy in the light of 5 factors. I set out the factors below express my conclusions on them and then upon the conclusion I have reached whether the inference for which Mr Cooper argues is made out.

2.1 the fact that those comments were made as part of the joint views being expressed by both IEs to the effect that, in their view, the respondent and employers generally describe policy rather than reality;

135. In a footnote Mr Cooper submitted that Mr Kennedy's comments were relied upon as part of the views being expressed that effect even if the tribunal did not draw the inference of sexism.

136. I remind myself that the original application in respect of Mrs Spence in this regard was that she did not demur from Mr Kennedy's comments. Although that particular line of argument was not pursued in the ultimate event by Mr Cooper my conclusions on that argument are relevant to the question of whether I draw the inference of sexism against Mrs Spence or not.

137. I therefore deal directly with the allegation made that Mrs Spence, by not demurring from Mr Kennedy's comments referred to at RTM 19 show that her approach was itself discriminatory.

138. I reject that argument. It is entirely fair to say that on the face of the record Mr Kennedy expressed apparently stereotypical views. If I had to decide whether they were actually discriminatory views, as opposed to apparently discriminatory views, I would need persuasion to come to a conclusion of actual discriminatory views on the part of Mr Kennedy. Looking at the whole of the quotation he appears to be describing something that he has observed from earlier experience. To describe what you have observed in other earlier situations does not of itself suggest that you will conclude that is what occurring in the instant case. So, whether anybody sitting at that meeting and hearing the context and the tone of voice of Mr Kennedy would have reached the conclusion that he himself would not have approached his task fairly I am unable to say. Although Mrs Spence's response to the effect that she would not disagree with a colleague in a meeting neither supports nor attracts from the respondent's suspicion that she herself might share such stereotypical views, the failure of Mrs Spence to expressly state her disagreement with those views is, in my judgment, overstated. Mrs Spence has explicitly refuted the allegations of holding a discriminatory attitude. Absent any proper support for a conclusion to the contrary the respondent falls short by some margin of establishing that attitude as being one held by her.

139. Once I acquit Mrs Spence, as I do, of herself having a sexist attitude i.e. a discriminatory attitude which would render her unfit to prepare a report in an equal pay case then the argument as now presented in my judgment is repetitive that with which I have dealt already.

> *2.2 Her failure to address the comments immediately at the meeting;*
>
> *2.3 The absence of any evidence that she recognise their impropriety and sought to address them with Mr Kennedy at the time even after the meeting;*
>
> *2.5 The fact that in neither her response to the application nor her witness statement does she recognise the impropriety of Mr Kennedy's remarks or seek to distance herself from the substance of them.*

140. I group these allegations together since they share a common theme. As is apparent from my conclusions above I do not uphold the argument that Mrs Spence did not address these. She provided an explanation in her response that she did not address the comments immediately because he thought it would be unprofessional to do so. She has provided a general refutation of the allegation of holding a sexist or discriminatory attitude. The argument that in some way her silence in either explaining or failing to condemn the comments somehow is to be taken as an adoption or acceptance of them as being sexist is ill-founded.

> *2.4 the fact that she and Mr Kennedy jointly make suggestions which are in fact consistent with the sexist bias revealed by Mr Kennedy's comments, in their respective remarks about the individual claimant and comparator job descriptions in the interim report (see paragraph 1.3, above)*

141. Mr Cooper is in effect reflecting paragraph 11(a) of the application suggesting that the stereotypical views has "infected" the approach of both Mr Kennedy and Mrs Spence because of what is said to be repeatedly supporting suggestions that the female claimants are likely doing more than strictly required whilst conversely supporting challenges to what the comparators do in practice.

142. This is largely based upon the IEs comments about the contents of the comparator JDs and their repeated request that what they need to know is what a jobholder does in practice rather than what he might do if he did everything that was in the generic job description for that particular function. The respondent attempts to derive further support for that from the IEs' comments which I have set out at Tables 2 and 3.

143. In my judgment on a fair reading of what was said by the IEs at the RTM and in the interim report, the comments do not demonstrate a sexist bias on the part of Mrs Spence. On the contrary they show an attempt to assist both parties to focus on the matters that they as experts know they will need to ask the tribunal to determine as facts if the parties are unable to agree.

144. Having then considered the 5 factors in support of the allegation of Mrs Spence been tainted by discrete reviews, I remain unpersuaded that they support that inference.

145. Having analysed each of the matters identified in the note provided by Mr Cooper in that way, I have also considered the matters in the way they are raised in the application itself and having regard to his request that I should consider everything in the round. So, I have, as it were, stood back and done that. Indeed, I was encouraged to do so by Mr Short and Miss Callan. Even looked at in that way

the respondent has not surmounted the hurdle of proving on the balance of probabilities that Mrs Spence was actually biased. In **Findlay** the European Court recognise that this would be a difficult matter to prove and this case exemplifies that difficulty.

146. As will now be clear, from my conclusions on the individual elements of the thrust of the submissions on actual bias, I conclude that the respondent has not shown on the balance of probabilities that Mrs Spence is actually biased.

Apparent bias

147. Having found that Mrs Spence has not been shown to be actually biased I consider that the appropriate test for apparent bias is akin to that adopted by the court in **Halliburton**. In reaching that conclusion I should say that I recognise that the scientific adviser in that case was not in an identical position to that of Mrs Spence. However, I consider that the difference is more conceptual than real. In his written submissions Mr Cooper set out what he apprehended to be the duties of an independent expert in equal value case. I doubt that the duties of the scientific adviser would be significantly different, allowing for those things to be changed that ought to be changed.

148. The question thus becomes: whether the circumstances would lead a fair-minded and informed observer, who is to be taken to have a proper understanding of the role of the independent expert and how that role interacts with the role of the employment tribunal, to conclude that there was a real possibility that Mrs Spence was biased. I shall refer to the relevant observer simply as the "FMO".

149. In the course of argument it appeared that there was broad consensus before me that the FMO might be thought of as a person such as an experienced practitioner in equal value cases or, perhaps even an Employment Judge.

150. Mr Cooper repeated the same matters in support of this submission as he had advanced in respect of actual bias.

151. He submitted that the clearest evidence that an FMO would conclude the real possibility of bias on the part of Mrs Spence was that the claimants agreed with the respondent that the comment by the IEs on the reading of JDs "Might reasonably assume that none of the others have either?" was a challenge to the account of the drafting process provided by the respondent's solicitors. In support of this he relies upon Leigh Day's letter of 11 March 2019 (27-29) which was part of the pre-hearing correspondence.

152. I remind myself that that letter was written containing an indication that there was still an issue between the parties as to the drafting the JDs. It is suggested that this is a challenge by the IEs to the truthfulness of information provided by the respondent's solicitors. Building upon that assertion the respondent submits that where both parties agree that an expert has challenged the truthfulness then any FMO would reach the appropriate conclusion that suspense could no longer approach the task properly.

153. Although the argument has an apparent attraction, I refer to my conclusions in relation to that passage in the interim report above. Moreover, whilst I accept that all the circumstances of the case are to be taken into account, I also consider that some caution should be exercised in placing reliance upon correspondence between the solicitors when considering whether a non-lawyer's comment on that correspondence should itself be criticised.

154. The second specific submission made by Mr Cooper is that the matters taken as a whole that he has set out show that Mrs Spence has indicated a predisposition or tendency to attribute greater weight to the work of the claimants and to minimise the weight of the comparators' work.

155. In my judgment that argument conflates the expert's role in assisting in the fact-finding process with the expert's role in evaluating value which although not a precise science is a more technical exercise requiring the application of the factor plan and the assessment scheme. I conclude that taken at their highest the respondent's criticisms of the experts say nothing as to the relative weight of the work. I reject that submission.

156. I therefore conclude, having weighed in considering apparent bias all the matters prayed in aid of the actual bias argument and the one additional submission with regard to the single rhetorical question, that an FMO would not in the circumstances conclude there was a real possibility that Mrs Spence was biased.

Discretionary removal of the requirement

157. Under this final heading, essentially the removal of the requirement of Mrs Spence as a matter of case management discretion, Mr Cooper again asked me to take all the matters that I've already considered into account in support of the proposition that Mrs Spence's credibility and reliability are so compromised that she cannot properly fulfil the function of an independent expert in providing reliable independent assistance to the tribunal.

158. Mr Cooper sets out at paragraph 6.1 of his note what he says are repeated failures either to read or to properly understand the material provided to Mrs Spence.

159. So far as those matters are concerned I remind myself that what is required of the expert is to provide a report on value based upon the facts as found by the tribunal. Even accepting for a moment, the argument that Mrs Spence has not read every last word or understood every last point accurately, I have to ask myself whether, absent actual or apparent bias, this demonstrates that she will not undertake the task of evaluation diligently. Even then, the respondent's submission that I should draw such inference is weak.

160. Finally, Mr Cooper relied upon a single comment from the roundtable meeting that Mrs Spence was aware of the possibility being cross-examined and said, "if there are too many documents, it gets too muddled." I do not accept the respondent's submission that that was an indication by her that she would struggle to master the material. In my judgment, Mrs Spence made an entirely realistic observation about the process with which all experts, practitioners and judges are familiar. In my judgment this falls far short of support for a submission that she would be unable to cope with her task.

161. I return to the submission that Mrs Spence should be removed on the ground that her credibility and reliability were compromised. It is open to any party to attack the evidence of a witness, expert or independent expert, as the case may be. It will be for the tribunal to consider the credibility and reliability of the witness. The briefest reflection demonstrates that the suggestion that a witness's credibility may be subject to attack is not a good foundation for recusing a properly appointed independent expert.

162. In that context, and again considering all these matters in the round I am not satisfied that there is a proper case management reason to remove from Mrs Spence the requirement to take part in the preparation of the report. I have therefore instructed that a request be made of ACAS for the appointment of an additional IE in place of Mr Kennedy. In doing so I recognise that it is improbable that an additional IE will be appointed and able to attend the forthcoming stage 2 hearing.

_____

Employment Judge Tom Ryan

Dated 9 April 2019

Sent to the parties on:

9 April 2019

…….

For the Tribunal:

……..

Note

Public access to Employment Tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Annex – Tables referred to in this judgment

Table 1 – Round table meeting – 5 July 2018

	Comment	Speaker	Page
RTM 1	We have to be careful that the plethora of information doesn't begin to obfuscate rather than inform … we have now entered the era of weaponised job descriptions	PK	88
RTM 2	We would just like to be - we need to be satisfied that people were interviewed; that they knew it was their job. The suspicion is … there are lots of things that are documented and planned that wouldn't be elsewhere.	PK	90
RTM 3	The suspicion is - we know as the is a highly organised work environment - there are lots of things are documented and planned that wouldn't be elsewhere. We have almost said in jest that what is on a charge in HR is not what happens in the engine room.	PK	continuing
RTM 4	The suspicion is that what we have are corporately produced job descriptions which have almost everything in them, but are they what the jobholder recognises what they do? We just want to be assured about them anyway.	PK	continuing
RTM 5	We had a concern about them anyway and then there was the lead a letter which made us think – yes, these are so formalised in such a way, perhaps they aren't exactly what happens on the shop floor.	GS	90
RTM 6	There was the claimant who you said did something different … now a new JD has come out for that claimant… how did that happen?	GS	92
RTM 7	And then with the job descriptions, you have some comparators saying they didn't recognise things.	GS	Continuing
RTM 8	If it comes to it, we will have some roundtables, certainly with the comparators … It may be that that is where the bigger disagreements will be. It may be that we need to see the claimants as well, to keep it balanced.	GS	93
RTM 9	I can't give precise examples (by inference of exaggeration and value judgments)	PK	94
RTM 10	Would it be possible on your Part B is to put in cross-references to whatever is relevant in Part A … that gives Part A some relevance … we carried out some very early trial assessments … and we didn't make any reference to Part A at all …. There is a lot in Part A that we will just say 'ok'	PK	95
RTM 11	The way it is at the moment we wouldn't refer to Part A	PK	96
RTM 12	There is an overkill element in describing the activities. I have in mind a case … about a porter at a hospital. There was a 3.5 page description of him bringing the milk in, including 5 risk assessments as he went through the doors.	PK	96
RTM 13	I'm not sure whether the change of Grids changed anyone's job considerably. … I can't see how it does given they are driving trucks around.	GS	96
RTM 14	If we look at… Leigh Day's comment … that is appropriate	GS	96

	because it says it changed how much they had to walk.		
RTM 15	… that is the one paragraph in that section that is relevant.	GS	97
RTM 16	I referred earlier to the plethora of information-obfuscation can happen, not necessarily on purpose but because of the bulk.	PK	97
RTM 17	It is a case of making it user friendly… I am sure that whatever we come up with, the report will be challenged. We are aware that we will get cross-examined. If there are too many documents, it gets too muddled we want as much information as we need in this form.	GS	97
RTM 18	I once had a job description about refuse collectors and there were 3 pages about putting on gloves. Any adult should be able to put on gloves the right way round.	GS	100
RTM 19	I refer back to the point, in my usual cynical manner, that what is in a chart in HR is not what happens in the engine room. You will find, in every organisation, but people do things in their work that do not form part of their job as it is described are intended to be…. I don't know if where it happens, but we will from time to time find instances of people doing things – they could wait for someone else, or ask a supervisor, but they just get on and do it. It is very common among teams of women. Men are much more territorial and say, 'this is not my job'.	PK	101/102
RTM 20	We are looking at the work, not the job as described. We see it all the time in the NHS and you have nurses on night duty deciding whether to call a doctor but, by the time they see them, the person would be dead, so they just given the injection. You try and get a hospital trust to admit that happens. We also had a prison governor who refused to acknowledge there might be violence in his prison.	PK	102
RTM 21	The guys assessing when something is damaged… there was a little bit of over-egging going on… you have to be careful not to build chains of responsibility	PK	105
RTM 22	I spend a lot of time in supermarkets…. One of the things I've watched people doing in supermarkets, not necessarily in Asda, is people doing the doing things they shouldn't be doing, or things are not recognised in terms of lifting and moving.	PK	106
RTM 23	I won't be going for much longer. I am 75… I will do Chapter 2 [i.e. the levels and scoring to be applied to each of the tasks, demands et cetera identified in the experts' Chapter 1 Factor Plan] now so that my successors have it.	PK	108

Table 2 - Leigh Day's and IEs' comments on comparator JDs and *respondent's comments in response*

Leigh Day's comments **and *respondent's response***	**IEs' comments**	**Comparator, comment number, page number**
JH said that there were no distinct processes, it was just "giving the training". *[Dispute about the accuracy of the comments… additional context provided by the JH added into the JD.] …. There is otherwise no amendment required the job description.*	This refers to paragraphs 4.3.8 & 4.3.9 in the JD. The JH comments in LDs insertion seem to suggest that the instructor role in term of manual handling was fairly straightforward – we would like to know what "just giving the training" actually meant in practice. Given LDs comments there does seem to be a need for clarification and further detail as to the process involved and what the JH actually did. How often he was so involved is also required.	Morris, 47, (192)
JH reported that these were mostly observations rather than questions. *The comments made by the jobholder regarding nature of the P8 inspections have been added to the job description, but otherwise there is no amendment required.*	we are not sure what point is being here other that it seems to be suggesting that what is reported in the JD 5.7.1 and 5.7.2 was in practice far less formal and/or rigorous than is implied by the text in these paragraphs. Is this so?	Morris, 50, (192)
JH specifically commented that he did not are doing this for a whole week. JH recalls it was one of the targets, and they were met most days. *…there is no amendment required the job description.*	While noting the JH comment here we are concerned at the possibility of the account in the JD in terms of supervision and performance targets having been presented in an unnecessarily complicated way… If a reference is to made to the JH using his discretion as in 6.5 it would be useful if an example of such can be given as well as indication as to how often such might be required.	Morris 55-56, (193)
JH said he was not asked very often. *…indications of frequency given by the jobholder have been added to the job description.*	This is a rather serious comment with some serious implications. If what is reported by the JH is the case then it very much degrades the account of such as in the JD.	Morris, 78, (194)
Tension between the regular oral contact and the isolation mentioned … *The job description has been amended to read …*	clarification needed. Is too much being made of a simple "I'll do this – you do that". Also how often with the situation referred to occur.	Morris, 89, (195)
[These comments, relating to a number of points in the JD were to the effect that the jobholder did not do the tasks described or do it in the relevant period or only did it occasionally.] *[In some instances the response was to amend the JD in respect of frequency, in some instances it was stated that no amendment was required.]*	The majority of the above refer to activities which the JH report is not doing. A few others refer to his only having a minimal or rare involvement in them. We have to ask what is going on.	McDonough, 3 – 7, 10 – 14, 23 – 29, 31, 33 – 36, (195)
JH said he was only a buddy once,	noted – however – the fact this comment is made suggest that the JD has imported generic material	McDonough,

and this is probably before 2008. *The relevant paragraph has been amended to clarity, but no further amendments have been made.*	on the assumption that applies to each and every comparator. [This was a comment referred to in oral argument]	17, (195)
JH report that damaged goods were identified to supervisor, but otherwise there were no forms or processes for him to follow. *The job description has been amended to specify the detail of the reporting procedure. Similar amendments were made to the job descriptions for other jobholders.*	again the implication the text of the JD is that something substantive in terms of knowledge of a procedure was required. The JH comment is clearly at odds with this.	McDonough, 22 (195)
These were described as observations by supervisors, rather than knowledge being tested. *The respondent set out quotations from Mr McDonough's interview, made references to what other jobholders said and recorded that additional detail provided by the jobholder had been added to the job description but no other amendment was required.*	Again we have some disagreement between what we think is supposed to have happened as per the JD text – paragraph 5.8.1 and the JHs recollection of what happened. We need clarification here. Might it be the case that the JD version of PAT inspection did not occur as described on every occasion? or even for every job holder?	McDonough, 39, (196)
JH didn't check his pick rate until half way through our shift. He said there isn't a lot you can do with falling behind as have to pick by line. He explained that supervisors would usually know if you're having problems from the figures on the screen and they would see what they could do to help [meet target]. *The job description has been updated to reflect the fact that the jobholder typically checked his pick rate mid-shift… no further amendment is required.*	noted – the JH describes a much more prescribed and "governed" way of working where he is subject to the demands of the process than the implied autonomy in the text of the JD.	Prescott, 29, (199)
The JH stated that this involved nothing more than inserting and withdrawing the forks. *… Detail has been added to the job description, but there is no further amendment required. Similar amendments have been made… for other jobholders.*	noted – but again a contrast between the implied complexity of action is in the JD and the JH's statement describing a simple task.	Matthews, 25
	There is an overkill element in describing the activities. I have in mind the case I did about a porter at the hospital. There was a 3.5 page description of him bringing the milk in, including 5 risk assessments as he went through the doors.	3rd comment from RTM quoted in Ms Hudda's witness statement at paragraph 29

Table 3 - Respondent's and IEs' comments on claimants' JDs

Respondent's comment	IE comment	Claimant, comment number, page number
Smokers are in the vast majority of cases aware of that [i.e. tobacco product being sold at a kiosk], and so rarely request tobacco at checkouts.	Can we suggest that over time the practice of smokers asking for tobacco products at the checkout has declined. We have ourselves observed people asking at the checkout if they can purchase cigarettes (could the checkout operator send for some from the kiosk?) This was observed in several supermarkets shortly after the restriction on sales came in. If such occurs or did occur within the relevant time frame then we suggest that it should referred to as a rare occurrence.	Ashton, 1, (209)
The job holder is closely supervised…	As Independent Experts we have seen, observed and reported on job roles that are "closely supervised" most of these have been in manufacturing environments.… We are not sure that this is what occurs was described in the respondent's comments above.	Ashton, 3, (210)
The guidance in relation to the way items may be bagged are common sense principles…	Whether or not these common sense principles are performance managed or enforced is not necessarily relevant. What we are concerned to note is that the job holder assists the customer using such principles. May we suggest that there is probably an expectation that she would do so both by the customer and ASDA. If she did not do so but randomly packed goods might this not lead to customer complaints. Also we have observed many customers do not use common sense principles when packing their own bags.	Ashton, 7, (212)
… However, from casual observations in the course of their work and as a customers, checkout operators will acquire some knowledge and familiarity…	This again seems to be a case of what is supposed to happen and what actually happens. From our observations customers frequently ask check out operators where items can be found. This seems to be particularly so when a customer has forgotten an item. We have observed checkout operators on several occasions direct customers to the relevant aisle etc. What does need to be addressed however is how often this might occur.	Ashton, 9, (212)
The jobholder is not trained nor expected to have product knowledge regarding brands, product ranges or substitutions	Very much the same as above – is it not the case that checkout operators will have acquired this knowledge and if asked by a customer will use it to help the customer…	Ashton, 10, (213)
The jobholder is not expected to know or keep track of promotions or offers…	As above – however we recognise that knowledge this area concerned a more complex range of matters that those referred to as above. Nevertheless is it not the case that checkout operatives will acquire some knowledge of offers etc. We have observed checkout staff suggesting to customers that there is an offer on whatever. We are not suggesting this is a very significant involvement on their part but we do think that even an occasional involvement should be recognised in	Ashton, 12, (213)

	some way whether it is officially recognised or not. The party should with this item as with the others above be able to agree on a balanced reportage rather than excluding or overstating matters.	
All equipment is switched off and thoroughly clean when the counters are closed each evening, ready for set-up in the morning. Due to her shift times, the jobholder is not involved in that process. In the morning, the jobholder would only be required to spot clean if she noticed any dirt.	It seems to us that the JD text is quite modestly reporting what most people would do on arrival at a food handling workstation. It is not a major event but does nevertheless relate to a basic responsibility under the factor for Health and Safety (including Hygiene).	Webster, 9, (221)
The jobholder is not responsible for checking or ordering consumables….	We wonder whether we have here a response to some unclear reporting. … It is not unreasonable to expect a JH to check that they have access to adequate supply items used in their work… In other words we are asking is this what the claimant's intended report here. If so we would of course need to know how often this occurred etc.	Webster, 12, (222)
The jobholder is not responsible training, monitoring or supervising any other staff, including seasonal staff, which is always done by a manager or section leader.	Would it not be the case that the JH as do other staff acts as a mentors – guide to seasonal staff. This is a very common phenomenon across many employments. While not necessarily a formal arrangement it will occur and does not detract from the supervisory role of others. However we would want to know how often such occurs.	Webster, 16, (223)
[This comment is a detailed description of security products which I am unable to précis briefly]	Noted – once again the lack of context and detailing the JD enables are to provide a very detailed context. The claimant way wish to revisit this item 14.8.1 in order to clarify the position and the JH's exact role in this matter as well as the frequency thereof.	Darville, 20, (236)
The jobholder is not responsible for monitoring or supervising any other staff, including seasonal staff…	Asked comment as a direct challenge to any involvement on the part of the JH in any form of mentoring/demonstrating etc. however informal that might be. We suggest that the claimant may wish to revisit this matter and consider a fuller description of the context and circumstances in which the JH might be so involved.	Darville, 29, (238)
The jobholder is not trained nor expected have product knowledge regarding specifications, uses, sizes….	… Perhaps the claimant could provide more information as to advice given – for example does she draw a customer's attention to the labelling etc. on products. As is suggested in R's comments.	Forrester, 1, (225)
Due to local conditions, sales in this store decreased significantly from 2007 to 2013, with a commensurate decrease in the volume of stock to be replenished.	… Perhaps the claimant could provide more information as to advice given – for example does she draw a customer's attention to the labelling etc. on products. As is suggested in R's comment.	Forrester, 2, (225)
The jobholder is not on shift at 9 AM or 5 PM (she leaves at 6 AM and comes in at 10 PM), so the "Full Fun 9, Fit for 5" policy is not relevant to her duties.	so who does this then? And, would it not be the case that even if finishing at 6 am. The JH would have in mind "full for 9" and work accordingly?	Forrester, 7, (228)
The jobholder is not expected to know will keep track of promotions	As is always the case this is a difficult one – in our experience people/employees in retail environments	Forrester, 9, (228)

or offers, which are numerous store-wide and constantly changing, nor she briefed on or asked to advertise Asda's own brand products in our interactions with customers.	will know the answers to some customer questions and will make suggestions based on some acquired knowledge – this may not be what they were trained to do were expected to do but they do it. How important or significant is remains to be considered at Report stage.	[This was not identified in the application but was referred to in submissions.]