Appeal No. UKEAT/0228/20/AT(V)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 11 & 13 January 2021

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

TESCO STORES LIMITED — APPELLANT

MS K ELEMENT & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

The Appellant	MR PAUL EPSTEIN (One of Her Majesty's Counsel) And Ms Louise Chudleigh (of Counsel) Instructed by: Herbert Smith Freehills LLP Exchange House Primrose Street London EC2A 2EG
For the Respondents represented by Harcus Sinclair	MR KEITH BRYANT (One of Her Majesty's Counsel) And MS NAOMI CUNNINGHAM (of Counsel) And MR STEPHEN BUTLER (of Counsel) Instructed by: Harcus Sinclair (UK) Limited Melbourne House 44-46 Aldwych London WC2B 4LL
For the Respondents represented by Leigh Day	MR SEAN JONES (One of Her Majesty's Counsel) And MR ANDREW BLAKE (of Counsel) And MS JEN COYNE (of Counsel) Instructed by: Leigh Day Solicitors Priory House 25 St John's Lane London EC1M 4LB

SUMMARY

PRACTICE AND PROCEDURE

Tesco Stores Ltd is the Respondent to Equal Value Claims brought by approximately 9,000 Claimants. The issue in this Appeal is whether the Watford Employment Tribunal erred in law in making Orders against Tesco for the disclosure of documents and the provision of information relating to comparators. Tesco contends that the Claimants' pleaded cases disclose no *prima facie* case that would warrant such Orders being made and amounted to an impermissible "fishing expedition".

Held, dismissing the appeal, that the Tribunal Judge was entitled to make the orders that she did and the Claimants' requests did not amount to an impermissible fishing expedition.

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THE HONOURABLE MR JUSTICE CHOUDHURY

Introduction

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1. Tesco Stores Ltd ("Tesco") is the Respondent to Equal Value Claims brought by approximately 9,000 Claimants (the "Claims"), the vast majority of whom are represented by the firms Leigh Day ("the LD Claimants") or Harcus Sinclair UK Limited ("the HS Claimants").

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The issue in this Appeal is whether the Watford Employment Tribunal ("the Tribunal"), Employment Judge Manley presiding, erred in law in making Orders against Tesco for the disclosure of documents and the provision of information relating to comparators. Tesco contends that the Claimants' pleaded cases disclose no *prima facie* case that would warrant such

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Orders being made.

Background

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2. The Claimants are hourly-paid, store-based employees or former employees of Tesco. They claim that the work of store-based employees, who are predominantly female, is (amongst other things) of equal value to that of workers based in Tesco's Distribution Centres ("DCs"),

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who are predominantly male.

3. The Claims began to be issued by the LD Claimants in February 2018 and by the HS Claimants in September 2018. The Claims had been managed throughout by EJ Manley ("the

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Judge").

4. The LD Claimant's Claim of Equal Value is set out in paragraphs 3 to 5 of their Details of Claim:

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> **"3. The Claimant has been employed to do equal work (for the purposes of sections 65(1)(a) to (c) of the Equality Act 2010 and sections 1(2)(a) to (c) of the Equal Pay Act 1970) to that carried out by male employees ('the Comparators') employed by the Respondent (or by associate companies of the Respondent) at**

one or more of the Respondent's or its associates' distribution centres, including but not limited to the distribution centres at the addresses in the attached schedule.

4. The Claimant's primary case is that her work is of equal value to the work of the Comparators (section 65(1)(c) of the Equality Act 2010 and section 1(2)(c) of the Equal Pay Act 1970).

5. However, subject to further information and/or disclosure from the Respondent or its associate companies, in relation to (i) whether the Claimant's and the Comparators' roles have been subject to a valid job evaluation study and (ii) the work performed by the Comparators, the Claimant reserves her position as to whether her work is either (i) rated as equivalent to the work of her Comparators (under section 65(1)(b) of the Equality Act 2010 and section 1(2)(b) of the Equal Pay Act 1970) or (ii) like work to the work of her Comparators (under section 65(1)(a) of the Equality Act 2010 and section 1(2)(a) of the Equal Pay Act 1970)."

5. At paragraph 6 of the Details of Claim there is a list of the roles performed by male employees at the DCs. It is explained at paragraph 7 that:

"7. The Claimant cannot provide further particulars as to the identity of her Comparators (and in particular cannot identify any individuals) pending disclosure and further information. Further particulars as to the names, job roles and workplaces of the Comparators relied on will be provided once the necessary information has been received from the Respondent (or its associate companies)."

6. At paragraph 10, it is claimed that the comparators, or some of them, enjoy terms and conditions that are more favourable than the corresponding terms of the Claimants. These include terms as to the hourly rate of pay, premium payments for working unsociable hours, allowances and bonuses and working hours. The Details of Claim continue at paragraphs 11 and 13 to rely on the benefit of an equality clause and/or a right to equal pay and, at paragraphs 13 and 14, on the fact that the majority of staff at DCs are male, whereas store staff are either predominantly female or equally male and female. This is said to give rise to indirect discrimination against female staff which must be objectively justified.

7. It is notable that the Details of Claim do not identify any particular comparator by name.

8. The HS Claimants' Grounds of Claims are differently worded, but similar in effect, in that they assert that:

> **"The Claimant was employed at all material times to do equal work (for the purposes of Section 65 (1) (a) - (c) of the Equality Act 2010 ("EqA")) to that undertaken by at least some of the male employees of the Respondent working in its warehouses and/or distribution centres."**

9. The HS Claimants also do not identify comparators, stating at paragraphs 5 and 6 of the Grounds of Claim that:

> **"5. The evidence presently available to the Claimant suggests that the appropriate comparators are male employees of the Respondent working in its warehouse and/or distribution centres, including but not limited to warehouse operatives at Avonmouth Distribution Centre, Severn Beach, Bristol BS35 4BR.**
>
> **6. On the evidence presently available to the Claimant, the Claimant is unable to provide further details of the relevant comparators prior to full disclosure by the Respondent, such information being in the possession of the Respondent but not the Claimant. The Claimant will give full particulars once she has received the relevant information."**

10. Tesco's Grounds of Resistance in respect of both the LD and HS Claimants' Claims contend that they amount to an abuse of process because of the failure to identify, amongst other matters, the identities of the comparators relied upon and the basis on which it is said that the Claimants do work of Equal Value ("EV") to that of the comparators. It is also said that the Claims disclose no reasonable cause of action and (at paragraph 22 of the Grounds of Resistance in the LD Claim) that:

> **"In light of the lack of particularisation of the Claims, the respondent is unable to plead further to comparability other than to deny that the claimants are able to compare themselves with their would-be comparators."**

11. Tesco denies, in any event, that there is any sex discrimination and relies on a number of other material factors giving rise to any differences in pay. These include differences in the arrangements for determining pay as between stores and DCs, differences in labour market conditions and the market price for various types of labour, and the need to keep retail and distribution costs within efficient levels. The same factors are relied upon (without limitation) as providing objective justification for any indirect sex discrimination.

12. At a Preliminary Hearing held on 12 November 2018, various directions regarding disclosure were agreed between the parties and subsequently recorded in orders made by the Tribunal. Pursuant to those orders, Tesco provided some information as to job titles and job descriptions for "warehouse operative" roles within DCs, and a large quantity of related training materials. The Claimants considered this information to be "effectively useless" or of "very limited use" in identifying comparators for the EV Claims. Tesco's position is that this was the start of a process that would have led to the identification of lead claims in relation to warehouse operative roles and that it was not now open to the Claimants to seek to broaden the scope of disclosure to all DC roles.

13. The Claimants made applications for further disclosure and information from Tesco relating to how much comparators are paid, what work they do and potential material factor defences. Tesco objected to those applications on the grounds that information as to the pay of comparators is not relevant to selecting comparators and that compliance with the requests would be onerous.

14. The applications for disclosure and information were considered at a Preliminary Hearing before the Judge on 1 and 2 September 2020. Those applications were granted by the Tribunal, in part. The Tribunal's reasons for making the orders were contained in documents sent to the parties on 23rd September 2020 ("the Judgment").

The Tribunal's Judgment

15. At the Preliminary Hearing, Tesco sought to persuade the Judge that no orders should be made for disclosure or the provision of information at all. This was because the Claimants were said by Tesco not to have a *prima facie* case and that they were embarking on a "fishing expedition".

16. The Tribunal rejected those submissions, holding as follows, having considered the pleaded cases:

> **"11. As indicated, the first substantive case management preliminary hearing was in November 2018. Of course, this was an early stage of the proceedings and the parties appeared to have co-operated to take matters forward. There was no suggestion made, at that stage, that there was not a *prima facie* case and, as far as I can recollect, this has not been raised until this response to the disclosure application. In the course of giving some information the respondent accept that there is unequal pay as between the staff working in stores and those working in distribution centres.**
>
> **12. Looking at those pleadings, I am quite sure that a *prima facie* case has been shown sufficient to let these matters proceed. It is well known that there is extensive litigation involving other supermarkets. The Asda litigation is well ahead of this litigation and there are also claims involving Sainsbury's and the Co-Op.**
>
> **13. I also accept, perhaps to a limited degree, the fact that there was an exercise in 2014 which indicated the possibility of higher scores for those working in the stores than some of those working in the distribution centres gives an indication that there is at least a chance that work of equal value can be shown."**

17. Having satisfied itself that there was a *prima facie* case, the Tribunal went on to consider relevance, necessity and proportionality. As to those matters, it concluded:

> **"14. I therefore turn to the question of whether, at this point of the proceedings, what is being asked for, is relevant. Without going into the detail of each of the requests made I am quite sure that most of what has been requested appears to be relevant. It is relevant to the selection of comparators and this needs to be done now for the independent experts to become properly involved and for the Stage 2 hearing in February 2022. I will come to what orders I intend to make at the end of this judgment but, for now, I do not accept that anything that has been asked for is not relevant.**
>
> **15. I turn then to the question of whether the information and/or documents are necessary at this point of the proceedings. It is suggested to me by Mr Epstein that orders are not necessary. However, this does not sit easily with his suggestion that, if I were to make orders for disclosure, they would impact on the Stage 2 hearing. It seems to me that in order for that hearing to be effective and for the independent experts to be able to do their job effectively, we must have some of this information sooner rather than later. It seems to me that most of it is relevant. Some of the information sought is necessary but not all of it. To put it**

briefly, I do not accept that the six "high level" questions asked in the Harcus Sinclair claimants' application, whilst they may be relevant, are necessary at this stage. I am not making any order with respect to those questions at this stage.

16. Some, but not all, of the individual requests for information and disclosure are necessary at this point in the proceedings. Others, it appears to me, are not necessary at this stage as my orders may well give the answers requested. For example, the requests for information on cross docking, picking and manual handling equipment may need to be answered but may also be obvious from the information or documents supplied.

17. It is, in my opinion, without doubt, that some of this information and/or documents are needed now. They are necessary for the litigation as the information should be supplied so that comparators can be identified and we can move on to the next phases of this litigation. I do not accept that this is what is described by Mr Epstein as "fishing". Whilst I have not ordered all the documents and information requested by the claimants, that which I have, is directly related to the claims brought.

18. I next turn to proportionality. Of course, I accept whatever information and documents are ordered to be disclosed should not make for an unduly onerous exercise on the part of the respondent. But this is mass equal pay litigation. Some of the difficulties which the respondent has relate directly to the way in which it might collect any such information. It appears to me, and I have not heard anything from the respondent to the contrary, that some of this information should be readily available. To give a very simple example, they must know when some of the employees in the DCs [transferred] to Tesco and the gender breakdown in DCs, not least for gender pay gap information.

19. Although those questions go to a possible material factor defence, I accept that it would be useful for that information to be available at this point in the selection of the lead comparators.

20. When considering the overriding objective, I accept, entirely, that part of my job is to ensure that the parties are on an equal footing. The claimants do not have access to this information. The respondent does have access to it and should be able to provide it, I would hope, relatively quickly.

21. In spite of being invited to do so, the respondent has not indicated any particular aspects which are unduly onerous beyond that which they pointed out in their letter in June 2020. They have not managed to separate what they said then about the onerous nature of the and added nothing to what they said to these more focussed applications. I therefore have to assume that the respondent has the means, and it should have, considering that it is a very large organisation, to be able to disclose the information which I have decided to order within a relatively short period of time."

18. Accordingly, the Tribunal made the following orders:

"1 The respondent shall provide to the claimants' solicitors a list of all current hourly paid job roles with job descriptions in each of the open 19 DCs by 30 November 2020 and the same information and documents since 2012 to the date of this order by 30 January 2021.

2 The respondent shall provide to the claimants' solicitors the annual pay statement agreed between the respondent and each of the open 19 DC's relevant trade union(s) from 2012 to the date of this order by 31 December 2020. In the event that the rates of pay for each DC role is not set out in such annual pay statements, the respondent must provide the current lowest, median and highest hourly rates of pay and premiums for each DC role as well by 31 January 2021

and the same pay and premium information from 2012 to the date of this order by 28 February 2021.

3 The respondent shall provide to the claimants' solicitors in respect of each of the open 19 DCs a copy of all contracts relating to each DC and in respect of each hourly paid DC role from 31 December 2020 and the same documents from 2012 to the date of this order by 28 February 2021. If the contracts do not contain a bullet point list of range of activities for the individual, a list of such activities must be provided as well by those dates.

4 The respondent shall provide to the claimants' solicitors in respect of each of the open 19 DCs a gender breakdown of all hourly paid DC roles with in each DC by 31 January 2021.

5 The respondent shall identify to the claimants' solicitors which of the open 19 DCs have employees who were transferred under TUPE since 2012, either in or out of the respondent's employment; the date of the relevant transfer including how many employees transferred in or out."

19. It is relevant to mention a further open preliminary hearing that took place from 5 to 14 October in relation to the Claimants' Rated as Equivalent ("RAE") Claims, based on what was said to be a job evaluation exercise carried out by Tesco in 2014 and which had rated their jobs as equivalent to one or more of three jobs in DCs. That exercise is the one referred to in paragraph 13 of the Judgment. On 14 October 2020, the Judge gave oral reasons (written reasons being sent to the parties subsequently on 29 October) for concluding that the 2014 exercise was fundamentally flawed and was not a valid job evaluation exercise on which the Claimants could rely in order to bring RAE claims.

20. On 26 October 2020, Tesco lodged an appeal against the Judgment. The appeal was allowed through on the sift by HHJ Auerbach and expedition was ordered. Tesco had requested that the Employment Appeal Tribunal ("EAT") direct a stay of the Tribunal's orders for disclosure and information, compliance with part of which was required by 30 November 2020. HHJ Auerbach stated that the proper course was to seek a stay from the Tribunal. The Respondent did so but the Tribunal refused. Tesco then lodged an urgent appeal against that refusal. That appeal was allowed by Stacey J on 27 November 2020. Accordingly, the Tribunal's orders are stayed pending the outcome of this appeal.

Legal Framework

21. Rules 29 and 31 of the **Employment Tribunals Rules of Procedure** (as contained in Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**) (**"the ET Rules**") are relevant for present purposes. These provide:

> **"Case management orders**
> **29. The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. Subject to rule 30A(2) and (3) the particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.**
> **…**
> **Disclosure of documents and information**
> **31. The Tribunal may order any person in Great Britain to disclose documents or information to a party (by providing copies or otherwise) or to allow a party to inspect such material as might be ordered by a county court or, in Scotland, by a sheriff."**

22. It is clear from Rule 31 that the Tribunal's powers in respect of disclosure and information are coterminous with those of the County Court. That means that the power to order disclosure is the same as in Part 31 of the Civil Procedure Rules ("CPR") and the power to order the provision of information is the same as in Part 18, CPR.

23. CPR 31.5 provides that an order to give disclosure is an order to give "standard disclosure". This is defined in CPR 31.6 as follows:

> **"31.6 Standard disclosure—what documents are to be disclosed**
> **Standard disclosure requires a party to disclose only–**
> **(a) the documents on which he relies; and**
> **(b) the documents which –**
> **(i) adversely affect his own case;**
> **(ii) adversely affect another party's case; or**
> **(iii) support another party's case; and**
> **(c) the documents which he is required to disclose by a relevant practice direction."**

24. The guiding principle for disclosure is not, therefore, mere relevance but whether the document is one on which a party relies, adversely affects his own or another party's case, or

supports another party's case, as was made clear by Linden J recently in **Santander UK PLC v Bharaj** UKEAT/0075/20/LA:

> **"18. As Lewison LJ said in relation to [the test in CPR 31.6] Shah v HSBC Private Bank (UK) Limited [2011] EWCA Civ 1154 at paragraph 25:**
>
> > **'It is notable that the word 'relevant' does not appear in the rule. Moreover the obligation to make standard disclosure is confined 'only' to the listed categories of document. While it may be convenient to use 'relevant' as a shorthand for documents that must be disclosed, in cases of dispute it is important to stick with the carefully chosen wording of the rule...'**
>
> **19. Thus, the test under Rule 31.6 is not one of relevance, although documents which satisfy the Rule 31.6 test will by definition be relevant. Relevance is a more flexible and potentially broader concept and, obviously, there are degrees of relevance: see the discussion in HSBC Asia Holdings BV & Anor v Gillespie [2011] ICR 192, particularly at paragraph 13(2). For this reason, I will use the term "disclosable" rather than "relevant" where I am referring to documents which the parties are required to disclose pursuant to their duty of disclosure."**

25. Linden J went on to consider CPR 31.12 (3), which provides for specific disclosure:

> **"23. Rule 31.12(3) also provides for orders for specific inspection (see also Rule 31.19 which deals with claims to withhold disclosure or inspection). As I have said, Practice Directions 31A UKEAT/0075/20/LA and 31B contain helpful guidance as to how these powers should be exercised in relation to hard copy and electronic disclosure respectively. These Practice Directions emphasise the need for a proportionate approach and explain how the overriding objective should be applied in this context.**
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> **24. As is well known, in Canadian Imperial Bank of Commerce v Beck [2009] IRLR 740 CA, Wall LJ said this at paragraph 22:**
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> > **"In our judgment, the law on disclosure of documents is very clear, and of universal application. The test is whether or not an order for discovery is 'necessary for fairly disposing of the proceedings'. Relevance is a factor, but is not, of itself, sufficient to warrant the making of an order. The document must be of such relevance that disclosure is necessary for the fair disposal of the proceedings. Equally, confidentiality is not, of itself, sufficient to warrant the refusal of an order and does not render documents immune from disclosure. 'Fishing expeditions' are impermissible."**
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> **25. In applying this passage, ETs should bear in mind what was said by Mr Justice Eady in Flood v Times Newspapers Ltd [2009] EMLR 18 about the approach to applications for specific disclosure, correctly using the terminology of CPR Rule 31.6 rather than the potentially broader and less precise concept of relevance:**
>
> > **"23. The first requirement is that any documents sought must be shown to be likely to support or adversely affect the case of one or other party. Thus, the question to be asked in each case is whether they are likely to help one side or the other. The word "likely" in this context has been considered in the Court of Appeal and is taken to mean that the document or documents "may well" assist: see e.g. Three Rivers District Council v Governor and Company of the Bank of England (No 4) [2003] 1 WLR 210.**
> > **24. Secondly, the hurdle must be overcome of demonstrating that disclosure of the documents sought is 'necessary' in order to dispose fairly of the claim or to save costs. This only arises for consideration if the first hurdle has been**

> **surmounted. Unless the documents are relevant in that sense, it is not necessary to address the test of necessity.**
> **25. Thirdly, there is a residual discretion on the part of the court whether or not to make such an order - even if the first two hurdles have been overcome … It is at this third stage that broader considerations come into play, such as where the public interest lies and whether or not disclosure would infringe third party rights in relation, for example, to privacy or confidentiality. If so, the court must conduct a careful balancing exercise …"**
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> **26. I entirely agree and note that these passages were adopted by the Employment Appeal Tribunal at paragraph 24 of its decision in Birmingham City Council v Bagshaw and others [2017] ICR 263. … "**

26. I agree with Linden J's analysis of the authorities.

27. CPR Rule 31.5(1)(b) provides "the court may dispense with or limit standard disclosure" and CPR 31.12, as referred to in **Santander**, provides that "The court may make an order for specific disclosure or specific inspection". These powers introduce an element of judicial discretion into the disclosure process. That discretion must be exercised in accordance with the overriding objective. For Employment Tribunals that is set out in Rule 2 of the ET Rules:

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

28. The position as to the Tribunal's powers as to disclosure may be summarised as follows:

(a) the Tribunal's powers under Rule 31 of the ET Rules are coterminous with those of the Court under CPR 31;

(b) as such, the guiding principle is not relevance but whether the documents are relied on by a party, or are likely to support or be adverse to a party's case. A document falling within that description will be relevant;

(c) if relevance in that sense is established, the test for making an order for disclosure is whether it is necessary for the fair disposal of the proceedings; and

(d) the Tribunal has a discretion as to whether to order disclosure. Such discretion must be exercised in accordance with the overriding objective.

29. The Claimants' applications in the present appeal also extended to requests for information. The terms of Rule 31 of the ET Rules mean that for such requests CPR 18 becomes applicable. CPR 18.1 (1) provides:

> **"(1) The court may at any time order a party to –**
> **(a) clarify any matter which is in dispute in the proceedings; or**
> **(b) give additional information in relation to any such matter,**
> **whether or not the matter is contained or referred to in a statement of case."**

30. The words "any such matter" in sub-paragraph (b) of CPR 18.1 (1) refer back to the "matter" in (a), i.e. a matter which is in dispute. Thus, the qualifying condition for the order for additional information (previously referred to as 'interrogatories') is that it relates to a matter in dispute.

31. The principles to be applied when considering requests under CPR 18 are similar to those applicable to disclosure and include necessity and proportionality.

32. As with disclosure, an order for information will not be made if the request amounts to a "fishing expedition". The White Book commentary at 18.1.13 states:

> **"Requests for further information which are merely "fishing" will not be allowed. These are requests for information in which a party is trying to see if they can find a case, either of complaint or defence, of which they know nothing or which is not yet pleaded."**

33. The rationale behind this is clear: "fishing" will invariably involve the seeking of information about a matter that is not yet in dispute in proceedings, in that it does not form part of the pleaded case. Tesco places considerable reliance on the prohibition of "fishing expeditions". I have been referred to several cases said to support the Respondent's position on

"fishing". The first of these is **Hennessy v Wright (No.2)** (1888) 24 QBD 445 in which Esher MR, in the Court of Appeal, said as follows at page 448:

> **"In other words, the Plaintiff wishes to maintain his questions, and to insist upon answers to them, in order that he may be able to find out something of which he knows nothing now which might enable him to make a case of which he has no knowledge of at present. If that is the effect of the interrogatories, it seems to me that they come within the description of "fishing" interrogatories and on that ground cannot be allowed … the moment it appears that questions are asked and answers are insisted upon in order to enable the party to see if it can find a case, either of complaint or defence, of which at present he knows nothing and which would be a different case from that which he now makes, the Rule against a court's "fishing" interrogatories applies."**

34. In **Trader Publishing Ltd v Auto Trader.com, Inc** [2010] EWHC 142 (Ch) 26, the claimant's pleadings alleged that the defendant infringed their EU trademark rights in the UK. The claimant asked for the following information about the operation of the defendant's website:

> **"Please state where users from each of the other European Union Member States apart from the United Kingdom are redirected to."**

35. Vos J (as he then was) dismissed the application, stating at paragraph 16:

> **"16. [Counsel for the claimant] says that his Community trademarks give him a Community-wide injunction, which [Counsel for the defendant] accepts. But that does not define what is actually in issue in these proceedings. It is not part of the function of Part 18 to enable claimants to ask questions so as to elicit information which might give them claims against other defendants or indeed further separate claims against the Defendants that have been sued. The Claimant has to say what his claims are."**

36. It follows that requests for information must be in respect of claims already made and not so as to enable the requester to identify further claims. A similar point is also made in **Stocker v Stocker** [2014] EWHC 2402 (QB) at paragraph 26:

> **"26. … It is no less fishing to seek further information to assist a party to plead a defence of which she knows something (albeit not as much as she would like) than to plead a defence of which she knows nothing, and the words of Lord Esher MR should not be regarded as limited to the latter situation (see *Hennessy v Wright...)* "**

Grounds of Appeal

37. The two Grounds of Appeal are that:

(a) Ground 1 - The Tribunal erred in law in concluding that *prima facie* claims had been advanced by the Claimants against Tesco. There was no *prima facie* case and, accordingly, no power to make the orders sought. The applications amounted to "fishing expeditions" to enable the Claimants to formulate claims not yet in existence;

and

(b) Ground 2: The Tribunal erred in failing to determine Tesco's argument under Rule 4 of the **Equal Value Procedure Rules** ("the EV Rules") contained in Schedule 3 to the 2013 Regulations.

38. I shall deal with each Ground in turn.

Ground 1: Was there a *prima facie* case?

Outline of Tesco's Submissions

39. Mr Epstein QC, who appears with Ms Chudleigh for Tesco, submits that the threshold condition for the making of a disclosure order is the existence of a *prima facie* case and that this threshold condition was not met. The term "*prima facie* case" as used in the context of disclosure in equal pay claims was used by Hutchison J sitting as a judge of the EAT in **Leverton v Clwyd County Council** [1985] IRLR 197, a decision on which Tesco places some reliance. There, the claimant, a nursery nurse, claimed equal pay with male clerical workers. She relied upon a document produced by the Council in which it was accepted that the pay for nursery assistants compared unfavourably with that of clerical staff. The Council's position was that this document referred to all clerical staff, only 10% of whom were male and that there was nothing in it to suggest that the admitted disparity related to them (which it would have to do in order for her to establish a claim). On that basis, the Council resisted the claimant's application for disclosure in relation to unnamed clerical workers, stating that it would be of no value to her claim. In

upholding the Tribunal's decision to order disclosure, the EAT said as follows, in its very short judgment:

> **"8. … [Counsel for the Council] maintained his position by saying, in effect, that this application really discloses no course of action, to use the words appropriate to legal proceedings because nobody is named and the document upon which Mrs Leverton relies, on the face of it, does not indicate that the disparity is said to exist between female nurses and male clerical staff and may therefore be referring only to female clerical staff.**
>
> **9. To that we would respond by saying that there is nothing in that submission to indicate the contrary and that *prima facie* until the contrary appears (as it may when the matter is investigated) one would have thought that the submission being made was one across the board, namely, that there was a disparity between the whole of the nursery nurses and the whole of the relevant clerical staff.**
>
> **10. The chairman of the Tribunal in expressing his reasons for granting discovery, a course with which by now it must be clear we are in agreement, expressed himself in fairly wide terms in paragraph 7, and we quote:**
> **'In reaching my decision I have borne in mind that the Equal Pay Act (as amended) is remedial legislation and cases brought under the provisions to the Act should, in my judgment, be dealt with in a manner which will enable an applicant to obtain relevant information. If this were not so, it is obvious that in a large organisation such as the present respondents' an applicant might have no means of knowing whether or not she has a *prima facie* claim, because she would not have the information upon which she could actually name a male comparator.'**
>
> **11. For reasons which, if we may say so, we understand, those words caused a certain amount of disquiet in the appellants' camp because, on one construction, it might appear that he was saying that anybody could launch an application of this sort without having a prima facie case and seek by discovery, by ferreting around in the documents and contracts in their employers' possession, to make a case which until discovery took place did not even prima facie exist. We do not believe that the chairman meant that. He was speaking in the context of this case. If he did mean it then, as we made clear to Mr Webster in the course of the argument, it could not possibly be right to suggest that any employee could launch an application of this sort against his employer without any sort of prima facie case and rely upon discovery, and the assistance of the Tribunal in granting discovery, to make out some sort of case.**
>
> **12. The point here, as we see it, is that by virtue of the document which we have cited, the present applicant has a prima facie case. She is able to say to her employers 'Here you are asserting that there is a discrepancy, a disparity between the way nurses are treated and the way clerical staff are treated, and that provides me with a prima facie case. Until discovery, I cannot name the relevant comparators for the purposes of that exercise but I am content for the present to rely on your assertion that such people exist, and I want to have the material which will enable me to name them.' The only answer to that is the one that Mr Webster has energetically deployed, namely, that since only 10% of the relevant staff are male, it may be that there will be no disparity between that 10% and the nursery nurses, and that the whole of the complaint will relate to the female section of the clerical staff.**
>
> **13. Well maybe that will appear to be the case, and if it does, of course, this application will founder. But on the face of it we would have thought, as the chairman plainly did, that there was a prima facie case, because the words used would appear to be apt to cover both the male and the female part of the clerical staff. Events will show whether that was the intention. But on the face of it, the applicant has a prima facie case of disparity, she has therefore grounds for**

> **launching this application, and when requested to give, as she was requested to give, the names of comparators, it was, in our judgment, entirely legitimate for her to say 'Well, I need discovery in order to get the relevant names'." (Emphasis added)**

40. Mr Epstein relies upon the highlighted passages to suggest that there must be a *prima facie* case here on unequal pay and equal work before disclosure can be ordered. To establish a *prima facie* case, the case must cross what is described as an "evidential threshold" by adducing "credible evidence" to support the claim. Alternatively, the Claimants must, it is said, have established facts that, if left uncontradicted, would allow judgment to be entered. What the Claimants cannot do, say Tesco, is to make a case by "ferreting around in the documents and contracts in their employer's possession" (**Leverton** at paragraph 11). **Leverton** was cited in two subsequent, unreported decisions of the EAT: **Jatto v Godloves Solicitors** UKEAT/0300/07/JOJ and **Stevens v Greater London Magistrates Authority** UKEAT/0269/04/DZM.

41. Mr Epstein submits that there is nothing in EU law conferring a right on an employee to interrogate an employer for documents or information for the purposes of identifying whether there is a comparator who might be performing equal work for unequal pay. Reliance is placed on two CJEU decisions, **Kelly v National University of Ireland (University College, Dublin)** [2012] ICR 322 (C-104/10) and **Galina Meister v Speech Design Carrier Systems GmbH** [2012] ICR 1006 (C-415/10), as confirmation that there is no such right.

42. The fundamental flaw in the Tribunal's decision, submits Mr Epstein, is that having correctly held that there needs to be a *prima facie* case, it wrongly concluded that there was such a case. It is not enough that the pleadings merely allege equal work and unequal pay. Here the Claimants' claims rely upon every male DC employee as a comparator. That is patently absurd, says Mr Epstein, as the Claims do not set out the basis for alleging equal work and nor do they say against which comparator the comparison is made; it could not be the case, for example, that

a store-based employee could be doing work which is equal to that of a shift manager at a DC or someone in a supervisory role. A request for disclosure and information in order to be able to identify comparators when that has not been done amounts to a classic "fishing expedition". The issue here is not that the Claimants are not able to identify any comparators, but that they cannot identify the best ones. Mr Epstein submits that the EV claims process is not about pin-pointing the best comparators, but about analysing job demands to assess whether the work done is of equal value.

43. It is also submitted that an allegation based on mere suspicion or belief as to a certain state of events does not establish a *prima facie* case; there needs to be "something more". In support of that proposition, Mr Epstein relied upon an Australian first-instance decision, **Austal Ships Pty Ltd v Incat Australia Pty Ltd and others (No 3)** [2010] FCA 795 (file number WAD 163 of 2007), in which McKerracher J held, having referred to a review of authorities that included **Hennessy v Wright**:

> **"10. In circumstances where a party makes allegations in a pleading based on suspicion, it is not entitled to interrogate on those suspicions, for to do so is the clearest example of fishing by making a case where none exists: *WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 169 at 173-174 per Toohey J; *WA Pines* 41 FLR 175 at 181-182 per Brennan J; and 190-191 per Lockhart. More recently see Minister for Immigration & Multicultural & Indigenous Affairs v Wong [2002] FCAFC 327 at [28]-[36]).**
>
> **11. In *Wong* a Full Court of this court said:**
>
> > **32. It is clear from *Bannerman* that a mere allegation, in the absence of something more, would not suffice to require discovery and it may be said here interrogatories. In fact the case concerned both interrogatories and discovery and did not suggest any difference in principle between the two. What that something more is will depend on the particular circumstances of the case. In some cases (the present is not one) there may be evidence upon which it is open to conclude that the matter into which enquiry is sought may be made out so that discovery or interrogatories may be appropriate. In other cases it may be possible by reference to known facts to draw inferences which then found a suspicion. But mere suspicion not "grounded" on evidence or inference will not suffice …"**

44. Mr Epstein submits that the pleaded case in the present appeal is speculative and dependent on Tesco providing disclosure in order that claims may be formulated. The Claims

lack the "something more" referred to in **Austal** that warrant an order being made and the Tribunal erred in concluding that it was "quite sure" that there was a *prima facie* case.

45. Insofar as the Tribunal relied upon the existence of litigation against other supermarkets, it took account of an irrelevant factor which does not go to establishing a *prima facie* case. Furthermore, the Tribunal was wrong, say Tesco, to rely upon the 2014 exercise as providing any support for a *prima facie* case, given the Tribunal's own findings that the 2014 exercise had fundamental errors. Finally, there is an argument that the Tribunal incorrectly considered that its case management powers under Rule 29 of the ET Rules conferred upon it a broader power in respect of disclosure than that under Rule 31 of the ET Rules. By merely stating that it had to "have regard to" the coterminous powers under CPR 18 and 31, the Tribunal failed to appreciate that it was, in fact, bound not to exceed those powers.

Outline of the LD Claimants' Submissions

46. Mr Jones QC, who appears with Mr Blake and Ms Coyne for the LD Claimants, submits that, far from seeking disclosure and information in order to formulate claims, they do so in order to narrow the Claims in a way that is proportionate for all parties. There is no threshold requirement for a *prima facie* case as contended for by Tesco, and **Leverton** does not support its case. The proper approach is simply to consider whether an order for disclosure or information is necessary for the fair disposal of the proceedings. That test is comfortably met here.

47. Whilst the pleaded case is made against all male comparators in the DCs, that does not render it deficient, and is quite normal in such cases. The Claims are adequately pleaded in that there is an allegation of Equal Pay made in respect of a large number of comparators, albeit presently unnamed. If Tesco had genuinely considered the pleadings to be inadequate, it could

easily have sought to strike them out as disclosing no reasonable prospect of success. This is not a case of "fishing" because the Claims have been made and have been set out.

48. Mr Jones submits that it is important to bear in mind that, pursuant to s.66 of the **EqA**, which incorporates a sex equality clause ("SEC") into the contract of employment, each Claimant is already entitled to receive the same pay as that received by *any* comparator doing equal work where there is no material factor defence. There is a difficulty for claimants in EV cases, says Mr Jones, in that, unless there is access to information about comparators, where such information in most cases will only be held by the employer, claimants would be prevented from properly enforcing the statutory right to equal pay conferred on them by the operation of the SEC. Mr Jones labelled this difficulty "informational asymmetry". I was taken to the case of **Handels-og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening Ex p Danfoss** (C-109/188) [1989] IRLR 532 ("**Danfoss**"), in which the Court of Justice considered (amongst other questions) who had the burden of showing that a difference in pay, where the work done by a female employee was the same as or of equal value to that of a male employee, was not for reasons related to sex. The Court held:

> **"10. *Concerning the burden of proof (questions l(A) and 3(A))* The file shows that the main dispute between the parties originates in the fact that the mechanism of individual increases applied to the basic wage is operated in such a way that a female worker is incapable of identifying the causes of a difference in pay between her and a male worker carrying out the same work. The workers do not actually know which are the criteria for the increases which are applied to them and how they are applied. They are only informed of the amount of their increased wages, without being able to establish the effect each of the criteria for the increases has had. Those who fall into a particular pay grade are, therefore, unable to compare the different components of their pay with those of the pay of their fellow workers who are part of the same grade.**
>
> **11. In those circumstances the questions submitted by the national court must be understood as seeking to establish whether the Equal Pay Directive must be interpreted as meaning that, where an undertaking applies a pay system which is characterised by a total lack of transparency, the burden of proof is on the employer to show that his pay practice is not discriminatory, if a female worker establishes that, by comparison with a relatively high number of employees, the average pay of female workers is lower that that of male workers.**
>
> **12. In this respect it should be recalled, first of all, that in its decision of 30 June 1988 *(Commission v France,* 318/86, not yet published, point 27) the Court condemned a system of recruitment characterised by a lack of transparency as**

> **being contrary to the principle of equality of access to employment, on the grounds that such lack of transparency prevented any form of control on the part of the national courts.**
>
> **13. It should be emphasised, moreover, that in a situation where a mechanism of individual pay increases characterised by a total lack of transparency is involved, female workers can only establish a difference between average pay. They would be deprived of any effective means of ensuring the respect of the principle of equal pay before the national court if the effect of furnishing such proof was not to impose the burden of proof on the employer to show that his pay practice is, in fact, not discriminatory.**
>
> **…**
>
> **16. In those conditions, the answer to questions l(A) and 3(A) must be that the Equal Pay Directive must be interpreted as meaning that when an undertaking applies a system of pay which is characterised by a total lack of transparency, the burden of proof is on the employer to show that his pay practice is not discriminatory, where a female worker establishes, by comparison with a relatively large number of employees, that the average pay of female workers is lower than that of male workers." (Emphasis added)**

49. Mr Jones submits that **Danfoss** recognises that "informational asymmetry" may result in an employee being deprived of the means of effectively enforcing the right to equal pay. Being able to make an informed choice as to comparators is critical, says Mr Jones, as without the appropriate information there is a risk that the claimant would have to make successive claims if, subsequent to a claim relying on one comparator, a further claim is brought in respect of another, also doing equal work but who is paid *more* than the first. Such successive proceedings are deprecated as is made clear by the Court of Appeal in **Redcar and Cleveland Borough Council v Bainbridge and others (No.2)** [2008] EWCA Civ 885; [2009] ICR 133 in which Mummery LJ said at paragraphs 259 to 264:

> **"259. Finally, a key procedural point. The situation that has arisen in this case, and will arise in most equal pay cases, presents ETs with the need to make case management decisions rather than with an occasion for parties to invoke common law doctrines as complete answers to an equal pay claim. The ETs have the widest possible case management powers for dealing with a case justly, in ways which are proportionate to the complexity and importance of the issues and for ensuring that the case is dealt with expeditiously and fairly and so as to save expense.**
>
> **260. Equal pay cases are amongst the most challenging to come before employment tribunals. Mr Cavanagh raised the spectre of the claimants' ability to bring claim after claim without end, if (a) the law was that each time a different set of facts was alleged there was a different cause of action and (b) there was nothing to prevent that from happening by application of the principles of *res judicata* and election.**

261. There are two answers to that. The first is that, in our judgment, it is not permissible to allege a new cause of action in respect of a particular pay period in another action under the same head for the same pay period simply by selecting a different comparator. For a new cause of action for the same period it would be necessary to bring the equal pay claim under a different head, which would normally involve different comparators as well. Even if that were not the case, there is the second answer which lies in firm and fair management of equal pay cases from an early stage. We appreciate that, like most advice from on high, this is easier said than done, especially at a time when the limited resources of the ETs are stretched to breaking point by the avalanche of equal pay cases against public authorities.

262. Nevertheless, we would stress the desirability of the ETs (a) clarifying with the parties the ways in which the equal pay claim is being put, (b) identifying the comparators relevant to the different claims and (c) directing whether the claims should all be heard together and, if not, in what order they should be heard. In deciding what directions to give, ETs should bear in mind the need to avoid duplication of evidence and legal argument, and to cut down the number and length of the hearings in a way that will not unfairly prejudice the rights and interests of the parties.

263. It will also be advisable for ETs to point out that, although directions regulating the conduct of the claims made in the proceedings do not prevent them from being advanced in different ways, the end result may be that, after judgment has been given on the claim which has been advanced in one set of proceedings, no further equal pay claim can be made against the same employer for the same period in subsequent proceedings. In order to prevent or limit successive sets of proceedings, the claimants ought to be required to bring forward the entirety of their equal pay claims for a particular period in the same set of proceedings. It is within the case management powers of the ET to require claimants to identify in their proceedings all the different ways in which they intend to put their case and the issues that arise on the claims, explaining to them that, if they have decided in one set of proceedings not to advance their claim in a particular way in respect of the relevant period, they will not normally be entitled do so later in a new set of proceedings.

264. It is important that, when choices are made which may lead to a point of no return, they are informed choices. <u>There are available to the parties the ET's powers to order disclosure and further particulars so that claimants can take an informed view on the strengths and weaknesses of the respective ways in which their equal pay claims can be put.</u>" (Emphasis added)

50. That is what the Claimants were seeking to do in this case: obtain disclosure and information in order that they can take an informed view in identifying the best comparators. There would be no point in choosing a comparator who earns less than most for doing work of equal value, or whose duties included a non-standard task that increased the value of his role.

51. In any event, says Mr Jones, even if a *prima facie* case is a threshold condition for an order for disclosure, that can mean no more than a case that has some reasonable prospect of success, which these claims clearly do. If the threshold were higher than that, then one would

have the anomalous situation whereby a claim had sufficient prospects to be heard at trial but in respect of which no disclosure could be ordered. The claims here are such that there are reasonable prospects of success given the difference in pay, the gender make up of store and DC employees and the Claimants' broad understanding of what the DC employees do. Pending disclosure and information, there is no more that the Claimants could reasonably be expected to say.

52. Mr Jones submits that Tesco's other arguments are without merit. The Tribunal was entitled to take notice of the fact of other litigation in the same supermarket sector and of the 2014 exercise. The argument based on the Tribunal's use of the words "have regard to" and "looking to" (in relation to CPR 18 and 31) seeks to infer an error of law where there is none. The Tribunal clearly did *not* seek to exercise any power going beyond those provisions.

Outline of the HS Claimants' Submissions

53. Mr Bryant QC, who appears with Ms Cunningham and Mr Butler for the HS Claimants, adopts Mr Jones' submissions. Mr Bryant submits in his written argument that the proper (and usually uncontroversial) approach to case management and disclosure is that cases proceed by way of statements of case; followed by disclosure of evidence and provision of information; followed by an analysis of that evidence and that information to establish whether or not the pleaded case is proved. Tesco's proposed approach, submits Mr Bryant, turns this on its head, in that it suggests there should be a pre-evidence or pre-disclosure stage in which an assessment is made as to whether or not the case is proved to a *prima facie* standard. That approach is nonsensical and would lead to absurd results, including contested hearings before full evidence was available. It would also reward employers who sought to maintain opaque pay and job structures. The approach is circular in that claimants would be required to prove their case in order to obtain the disclosure and information required to prove their case.

54. Mr Bryant also submits that the fact that comparators are not named does not render the Claims deficient; indeed, the position is not dissimilar to that which obtained in **Leverton** itself, where the EAT considered it was entirely legitimate for the applicant to say, "Well, I need discovery in order to get the relevant names". The HS Claimants acknowledge that currently the claims as pleaded are against all male employees in the DCs. The provision of the disclosure of information requested will enable the Claims to be focused on a more manageable selection of comparators. Tesco did not argue for a more limited selection of documents, arguing instead that there was no power to order disclosure at all.

55. The authorities relied upon by Tesco in support of its contention that there is a need for a *prima facie* case do not assist. Its reliance now on **Leverton** is, says Mr Bryant, at odds with what Tesco wrote in its own Notice of Appeal about that case:

> **"16. There is a decision of this Tribunal on an Equal Pay disclosure on Leverton v Clwyd [1985] IRLR 197, although no authority was cited to it (so far as can be judged from the decision), the decision is only two pages long, it was made pre-CPR and the before the reversal of the burden of proof provisions, and could not be considered authoritative."**

56. Insofar as Mr Epstein seeks to suggest that the Claimants' claims must meet some "evidential threshold" before disclosure can be ordered, he has not clearly adumbrated what that threshold is. If the threshold is, as Mr Epstein's concession at this hearing indicates, that the claim has reasonable prospects of success, then that threshold is clearly met.

Discussion

57. Although the submissions in this case have ranged broadly, the actual question of law under this ground can be reduced to this: did the Tribunal err in ordering disclosure and the provision of information? The starting point in determining the answer to that question is to consider the Tribunal's powers as regards disclosure and information (referred to here

compendiously as "disclosure"). As set out above, these are contained in Rule 31 of the ET Rules and are coterminous with those available to the County Court under CPR 18 and CPR 31. Thus, the Tribunal may order disclosure in respect of material relied on by a party, or which is likely to support or be adverse to a party's case, where it is considered necessary for the fair disposal of the proceedings. I can deal briefly at this stage with an argument raised in Tesco's written submissions but not pursued by Mr Epstein orally; namely, that the Tribunal wrongly relied upon its general case management powers under Rule 29 of the ET Rules to exceed the limits that are imposed by the CPR on the power of disclosure under Rule 31 of the ET Rules. I do not accept that the Tribunal sought to do that at all. Whilst Rule 29 is mentioned in para. 2.1 of the Judgment - unsurprisingly, given that the Tribunal was considering a case management issue - there is nothing in its analysis to indicate that it was invoking that Rule in order to circumvent the strictures on Rules 31. In its analysis of the law, the Tribunal refers expressly to Rule 31 and to the fact that it needed to consider the powers set out in the CPR. The Tribunal's summary of the legal position as set out at paragraph 2.16 of the Judgment was as follows:

> **"2.16 I seek now to summarise the position as I see it in relation to what the law provides for disclosure of documents and information. First of course there must be a claim which has been made and which is, prima facie, a claim which has a chance of being successful. Second, if such a claim is underway, I must consider whether the requested information and/or document is relevant to the part of the proceedings that we are engaged in. Thirdly, I must consider whether the information and/or documents are necessary to enable the claim to proceed properly. Fourthly, I must apply the overriding objective to my considerations and do my best to put the parties on an equal footing, consider proportionality and the requirement to avoid delay and extra costs where possible."**

58. Whilst the Tribunal there accepted Tesco's submission as to the need for a *prima facie* case, the remainder of the summary refers to the need to consider relevance, necessity for the claim to proceed properly (i.e. that disclosure is necessary for fair disposal of proceedings), and the overriding objective. Apart from the reference to the need for a *prima facie* case, to which I return below, that was an appropriate description of the stages that the Tribunal was required to

follow for a proper application of its powers in respect of disclosure under Rule 31 of the ET Rules and, by definition, CPR 18 and 31.

59. Tesco also submitted that the Tribunal's earlier references to the need to "look to the power set out in the [CPR]" and to "have regard" thereto indicate that the Tribunal did not consider itself bound by the CPR. I do not accept that submission. Even if, which I do not accept, the language used by the Tribunal was inconsistent with an acceptance that it was bound to follow the CPR, such usage would not, of itself, give rise to an error of law, if it is otherwise apparent that the Tribunal directed itself correctly in law.

60. Mr Bryant's written submissions did contain a suggestion that the case management power contained in Rule 29 was *not* restricted by Rule 31. However, that argument was not pursued orally, and I say no more about it.

61. Tesco's primary argument is that the Tribunal, having correctly concluded that there was a need for the Claimants to establish a *prima facie* case, erred in concluding that there was such a case here. It also contends that the Claimants were engaging in a "fishing expedition" which, as the authorities have made clear, is impermissible. I shall consider these arguments by reference to the following headings and issues:

a. the equal pay context;

b. did the request amount to "fishing"?;

c. is there a need for a *prima facie* case before disclosure can be ordered?; and

d. did the Tribunal err in making the orders that it did?

The Equal Pay Context

62. Mr Epstein took me in some detail through the provisions in respect of Equal Pay in the **EqA** and the **EV Rules**. It is not necessary, in my view, to set out that detailed background in

this Judgment, which is focused on one procedural aspect, namely, the exercise of the Tribunal's power to order disclosure. It is clear, however, that the context of an Equal Pay claim must be considered in determining what it is that claimants in such cases can, and should, plead.

63. It is not controversial to note that the information that would be available to putative claimants as to potential comparators in an Equal Pay claim might sometimes be very limited. That will not always be the case: a claimant who considers that she does work that is equal to that of a known comparator, perhaps somebody working alongside her or whose work is well-known to her, would have the information that would readily enable her to particularise the claim for equal work. By contrast, the claimant might be one of many in a predominantly female section of her employer's organisation who considers that her work could well be equal to that of at least some, or all, of the higher-paid male employees in a predominantly male section. Such a claimant may have very little or no information about potential comparators, what they do and precisely how much they are paid. As Mr Jones submits, the lack of information in such cases does not act as a bar to bringing a claim and enforcement of the right to equal pay. If that were not so, then it would be a simple matter for employers to keep predominantly male groups of employees apart from predominantly female ones in order to avoid claims in respect of pay disparities between those groups where equal work might be an issue. The difficulties with obtaining information increase as the scale of the claims and the number of potential comparisons grows. It is far from unusual, in mass Equal Pay litigation, to see initial claims pleaded in fairly broad terms, using standard form claim forms and identifying comparators by no more than a location or class. Certainly, it would be highly unlikely, at the initial stages of a mass Equal Pay claim, to identify any specific comparators either by name or otherwise. I note here in passing that, as has been stated by Underhill J (as he then was) in **Prest and others v Mouchel Business Services Ltd and another** [2011] ICR 1345 at footnote 4, there is, in any event, no logical reason for the

practice of requiring the naming of an individual comparator in all cases, specifically in "collective" cases.

64. The response of Tribunals to such claims has not been to dismiss them for want of particularity but, in the exercise of their broad case management powers, to (amongst other things) order disclosure where appropriate. Such disclosure may enable claimants to identify a more focused group of comparators (and potentially Lead Comparators from amongst those) thereby rendering the claims more manageable. The appropriateness of that kind of approach has been approved by the Court of Appeal in **Redcar**: see the passages cited above.

65. None of this is to say that Equal Pay claims are subject to a special or more lax regime when it comes to pleading one's case, whether under domestic or EU law. The rules remain the same (save insofar as the specific EV rules apply), as do the principles relating to disclosure and the provision of information. However, in considering whether disclosure is necessary for the fair disposal of proceedings, the Tribunal will undoubtedly bear in mind the greater difficulties for claimants in such cases when it comes to having information about their claims, and the importance of not depriving claimants of an effective means of enforcing their rights. As stated by Mummery LJ in **Redcar** at paragraph. 259:

> **"259. ... The situation that has arisen in this case, and will arise in most equal pay cases, presents ETs with the need to make case management decisions rather than with an occasion for parties to invoke common law doctrines as complete answers to an equal pay claim. The ETs have the widest possible case management powers for dealing with a case justly, in ways which are proportionate to the complexity and importance of the issues and for ensuring that the case is dealt with expeditiously and fairly and so as to save expense."**

66. That also does not mean that a wholly speculative claim, not grounded on any realistic view of what the claim can achieve will necessarily provide any sort of foundation for an application for disclosure. A claim by a junior ranking shopworker that her work was of equal value to all of the male senior managers in another division would undoubtedly be met by the

response that it had no reasonable prospects of success. If the respondent employer does not respond in that way, then the application would be likely to be refused by the Tribunal on the basis that it would not be necessary for the fair disposal of proceedings, even if some of the requests for material might be relevant in the sense that it would support or undermine either party's case.

67. The Court of Justice's decision in **Danfoss** acknowledged the difficulties of limited information, particularly where pay structures lack transparency. It held, in the different context of the burden of proof, that where a female worker establishes equal work, the burden lies with the employer to show that its pay practice is not discriminatory. Whilst that does not say anything directly about disclosure or the provision of information (which are procedural matters that would be for the national court to determine) it does highlight the difficulties that claimants are likely to face in such claims.

68. With that context in mind, I turn to Mr Epstein's first contention, which is that the requests in this case amount to an impermissible "fishing expedition".

Was this a "fishing expedition"?

69. The prohibition on "fishing expeditions" is uncontroversial. It involves any request for disclosure that is made in order to enable the requester to find a claim, rather than to inform a claim already made. Mr Epstein contends that the request for disclosure in the present case amounts to "fishing" because it is made in order to identify the best comparators. I do not accept that submission.

70. On any view of the pleadings in this case, it is apparent that there is already in existence a claim for Equal Pay made by refence to comparators presently identified as male employees

working in DCs (and in the LD Claimants' case, working in one of a number of non-exhaustively identified roles). Tesco complains that the claim is too broadly put or is unparticularised in that it is not known who the comparators are, but that does not mean that, for the purposes of determining whether the request for disclosure amounts to an impermissible "fishing expedition", there is not yet a claim in existence.

71. In each of the domestic "fishing expedition" authorities to which I was taken, the position of the requester was that the information was being sought in respect of "a complaint or defence of which they know nothing or which has not yet been pleaded": White Book at 18.1.13 (see above at paragraph 32). That was the position of the requester in **Hennessy**. In **Trader Publishing**, the requester was seeking information that might have given it claims against other defendants in relation to infringements outside the UK, whereas the pleaded case was limited to infringements within the UK. Whilst in **Stocker**, it appears that the Court was extending the prohibition on "fishing" to cases of which the requester knows "something" as opposed to knowing nothing, it should be noted that the Court found in that case that the requester could "perfectly well plead [the case in respect of which information was sought] as matters stand": see **Stocker** at paragraph 26. Moreover, the issue was decided primarily, it would seem, on the basis that the requests were "neither necessary nor proportionate to enable the applicant to prepare a case or to understand the case she has to meet": **Stocker** at paragraph 26. Accordingly, I do not consider **Stocker** to be authority for the proposition that in *any* case where the requester knows something of the case to be pleaded but has not yet done so, a request for information amounts to "fishing". In any event, none of the situations considered in the domestic cases compares with that of the Claimants in this Appeal where, as I have said, a case containing the essential ingredients of the claim has already been pleaded.

72. The Australian case of **Austal** does not, in my judgment, assist Tesco. There it was stated that it was "fishing" to request information in respect of pleaded allegations based only on "suspicion": see **Austal** at paragraph 10; and (citing from **Minister for Immigration and Multicultural and Indigenous Affairs v Wong** [2002] FCA FC327) that a "mere allegation in the absence of something more would not suffice to require discovery…": see **Austal** at paragraph. 11. I was not referred to any domestic authority in support of the proposition, apparently contained in **Austal** that it would amount to "fishing" to seek disclosure or information in respect of a pleaded case founded on a suspicion. It seems to me, however, that if a pleaded case is truly unfounded, based on nothing more than a groundless suspicion, then the Court would be likely to find that the request for disclosure is in fact about a case of which the requester currently knows nothing, or in respect of which he has no reasonable grounds for making the allegation. In any case, I do not consider that **Austal** is persuasive authority for the proposition relied upon. I say that for the following reasons:

a. The passages drawn to my attention from **Austal** are contained in a review of the authorities and do not form part of the *ratio* of the case. The application by the requester in **Austal** was refused, it would appear, on the basis that the claim was speculative and/or did not relate to any issue between the parties.

b. Furthermore, **Austal** is a first-instance judgment in relation to a regime of issuing interrogatories that is not identical to requests for information under CPR 18.

c. Finally, the circumstances in **Austal**, whereby the requester had already had responses to 932 of 1,149 interrogatories but was still unable to plead a case, render it, in my view, clearly distinguishable from the present case.

73. The Claimants' pleaded case is clear that their work is equal to the male employees in DCs and that there is a disparity in pay. Far from requesting information for the purposes of

finding a claim, the Claimants do so, in my view, in order to narrow and particularise existing ones.

Is there a need for a *prima facie* case?

74. Even if the requests are in respect of existing claims, and so do not amount to "fishing" in the strict sense, Mr Epstein contends that the claims, such as they are, do not amount to a *prima facie* case, that being a necessary pre-condition to an order for disclosure in an equal pay case. The primary source of this argument ("the prima facie case argument") is the decision of the EAT in **Leverton**, which is set out above.

75. The particular passage relied upon is at paragraph. 11 of **Leverton**:

> **"11. For reasons which, if we may say so, we understand, those words caused a certain amount of disquiet in the appellants' camp because, on one construction, it might appear that he was saying that anybody could launch an application of this sort without having a *prima facie* case and seek by discovery, by ferreting around in the documents and contracts in their employers' possession, to make a case which until discovery took place did not even *prima facie* exist. We do not believe that the chairman meant that. He was speaking in the context of this case. If he did mean it then, as we made clear to Mr Webster in the course of the argument, it could not possibly be right to suggest that any employee could launch an application of this sort against his employer without any sort of *prima facie* case and rely upon discovery, and the assistance of the Tribunal in granting discovery, to make out some sort of case." (Emphasis added)**

76. Notwithstanding the reservations expressed in Tesco's Notice of Appeal as to the authoritative value of this decision (see paragraph 55 above), Mr Epstein says that **Leverton** is clear authority for the proposition that a *prima facie* case must exist before a tribunal could grant discovery. Such *prima facie* case must, according to Mr Epstein, cross an evidential threshold variously described as amounting to "credible evidence" or as one having "reasonable prospects of success". There are several difficulties, in my judgment, with that submission:

a. First, Hutchison J in **Leverton** clearly considered that on one reading of the tribunal's judgment it was saying that disclosure was ordered in order to enable the claimant to "make a case which until discovery took place did not even *prima facie* exist" or to "make

out some sort of case": see **Leverton** at paragraph 11. A case that does not even *prima facie* exist would be one in respect of which the claimant either has no present knowledge or has not been pleaded; in other words, an application made in those circumstances would amount to an impermissible "fishing expedition" in respect of matters that were not yet in dispute. Clearly it would have been wrong to order disclosure in those circumstances, and the EAT was there doing no more than restating long-established principles about "fishing".

b. Second, the EAT's concern about the way in which the decision below was expressed was that it may have overstated the position. However, it did not conclude that the tribunal had erred in law. **Leverton**, in fact, upheld the order for disclosure, notwithstanding the apparent lack of particularisation in terms of comparators. As Hutchinson J states at paragraph 13:

> **"13. ... But on the face of it we would have thought, as the chairman plainly did, that there was a prima facie case, because the words used would appear to be apt to cover both the male and the female part of the clerical staff. Events will show whether that was the intention. But on the face of it, the applicant has a prima facie case of disparity, she has therefore grounds for launching this application, and when requested to give, as she was requested to give, the names of comparators, it was, in our judgment, entirely legitimate for her to say 'Well, I need discovery in order to get the relevant names'." (Emphasis added)**

The situation there was not dissimilar to that in the present case in that a claim was based on a broad group of comparators which the Claimants would only be able to narrow down or name after disclosure. Notwithstanding the broad scope of the claim, the EAT in **Leverton** was satisfied that there was a "*prima facie* case". The use of the term '*prima facie* case' in that context does not appear to denote that there was a need for any sort of evidential threshold to be crossed. Mr Epstein submits that that cannot be right because the conclusion that there was a *prima facie* case was premised on the document showing a disparity in pay between nursery and clerical workers. However, the EAT appeared to accept the employer's submissions as to the limited utility of that document to Mrs

Leverton's case in the context where over 90% of the target comparator group was female and where the disparity identified in the document might be limited to female employees. The EAT, nevertheless, considered there was a *prima facie* case because, irrespective of the document, the allegation was made across the board: see **Leverton** at paragraph 9. The inherent weakness in the document, as referred to in **Leverton**, tends to undermine Mr Epstein's suggestion that there was any sort of evidential threshold in the form of "credible evidence" before an order for disclosure may be made. The EAT did not use the term "credible evidence" in its judgment.

c. Third, in my judgment, the term '*prima facie* case' was being used in **Leverton** in the sense of the claim having some reasonable prospects of success. Indeed, Mr Epstein accepted in the course of oral submissions that a *prima facie* case could be equated with one that had reasonable prospects of success. Clearly a claim based on a comparison with a predominantly female group of workers might be said to be doomed to failure based on the pleaded case alone (assuming that the employer's document was not pleaded). However, Mrs Leverton was able to show that there was *some* basis for her claim for equal pay, however weak, that demonstrated it had some reasonable prospects of success. The EAT said this in terms when it stated Mrs Leverton has "grounds for launching this application": see **Leverton** at paragraph 13.

d. Fourth, it would be a significant leap in the jurisprudence, in my judgment, if this one case were to be regarded as establishing some sort of evidential threshold which must be crossed before disclosure could be ordered. There is no other domestic authority cited in support of the proposition and such an approach would result in the circularity identified by Mr Jones and Mr Bryant, whereby claimants would be required to prove their case in some evidential sense pre-trial, in order to be entitled to receive the documents and information required to prove their case at trial.

77. Mr Epstein also took me to the cases of **Jatto v Godloves Solicitors** UKEAT/0300/07/JOJ and **Stevens v Greater London Magistrates Authority** UKEAT/0269/04/DZM, two decisions of HHJ McMullen, as providing support for the approach taken by the EAT in **Leverton**. However, in **Jatto** the EAT cited **Leverton** as saying that a questionnaire (as was part of a putative claimant's armoury then) served after the claim "must not be used in order to try and construct a claim at this stage": see **Jatto** at paragraph 33. That is consistent with my reading of **Leverton**, set out above, as merely re-stating well-established principles related to "fishing". There is certainly nothing in **Jatto**, apart from citation of the relevant passages in **Leverton** relied upon by Mr Epstein, which provides support for his contention that there is an evidential threshold and a need for a *prima facie* case. As for **Stevens**, whilst **Leverton** is cited, HHJ McMullen states that, "It deals with the proposition that a person may not establish grounds for bringing a complaint by launching an application for disclosure". That is also consistent with my reading of **Leverton** set out above. HHJ McMullen goes on, having noted that, unlike the case before him, **Leverton** was concerned with an application for disclosure against a Respondent, to say:

> **"15. … Secondly, an appropriate adaptation [to Leverton] can be made to deal with that situation. Once the Applicant has established a prima facie case, the Respondent is entitled to seek (for it is not automatic) disclosure of all materials which might be relevant to the proceedings in asserting its own defence or in weakening the grounds of the Applicant's complaint.**
>
> **16. In the present case, given the positive assertions made in the Originating Application, the Respondent was entitled to seek disclosure of the materials cited. Indeed, the Applicant accepts that he did do work for other persons whilst engaged with the Respondent. The Respondent made a reasoned case for an Order for disclosure and as a matter of substance, therefore, the Chairman cannot be faulted in the exercise of her discretion when deciding to accede to the application."**

78. It would appear from the opening sentence of paragraph 16 that the positive assertions made by the claimant in the claim were sufficient to cross the *prima facie* case threshold, thereby entitling the respondent to make its application for disclosure against the complainant. In other words, a positive assertion in the pleaded case was enough to warrant disclosure. Mr Bryant

points to this case in support of the proposition that a mere assertion is enough to engage the power to order disclosure. Mr Epstein submits that a mere assertion on its own, without "something more", can never engage that power. In my view, the correct position lies between those two extremes. An assertion in a pleading can range from being entirely baseless or unarguable to being an unproven allegation with some reasonable prospect of success. Where in that range a particular assertion falls will be a matter for the Tribunal to assess, should the question arise, having regard to the pleadings and all the circumstances. The question is simply whether the claim has a reasonable prospect of success. There is nothing in **Stevens**, or any other domestic authority to which I was taken, to suggest that there is a need for "something more", as Mr Epstein puts it. It certainly cannot be the position (as it would be if Mr Epstein were correct) that any mere assertion without more means that the claim is baseless and therefore undeserving of an order for disclosure. Were that not so, then pleadings would routinely have to set out the evidence in support of each assertion made; however, it is not the function of pleadings to recite the evidence.

79. Mr Epstein also prayed in aid two CJEU decisions, **Kelly** and **Meister**, in support of an argument that there was no obligation under EU law on employers to disclose material, even where there was a plausible case of discrimination to be answered. It seems to me here that Mr Epstein was perhaps setting up something of a straw man in that, as I understood them, it was not being suggested by the Claimants that there *was* any such obligation. In these cases, the CJEU was asked to determine whether the underlying Directives on discrimination themselves provided a right to disclosure. In **Kelly**, the CJEU held that whilst it was not possible to derive a specific disclosure obligation from the Directives, this being an issue for the national court, the refusal of disclosure could risk compromising the achievement of the objectives pursued by the Directive. It said:

> **"38. Accordingly, the answer to the first question is that article 4(1) of Council Directive 97/80 must be interpreted as meaning that it does not entitle an applicant for vocational training, who believes that his application was not accepted because of an infringement of the principle of equal treatment, to information held by the course provider on the qualifications of the other applicants for the course in question, in order that he may establish "facts from which it may be presumed that there has been direct or indirect discrimination" in accordance with that provision.**
>
> **39. Nevertheless it cannot be ruled out that a refusal of disclosure by the defendant, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by that Directive and thus depriving, in particular, article 4(1) thereof of its effectiveness. It is for the national court to ascertain whether that is the case in the main proceedings."**

80. A similar point was made in **Meister** at paragraphs 46 and 47. These authorities, far from supporting Tesco's case, appear to me to support the analysis above under "the Equal Pay context" as to the need for tribunals to have regard to the informational difficulties faced by claimants in proceeding with such claims. It is those kinds of difficulties which could risk depriving the Directive of its effectiveness.

81. Mr Epstein submitted that the Claimants accepted before the Tribunal that there was a requirement for a *prima facie* case, and referred me to certain passages in the skeleton arguments and the transcript of the hearing below. However, those passages, as I read them, do nothing more than show that the Claimants were treating the Respondent's contentions as to *prima facie* case as synonymous with there being an arguable case or one with some reasonable prospects of success, as the following example (Transcript p.20) demonstrates:

> **"p.20**
> **20 Even on that basis, even on the basis of a common**
> **21 understanding of what is done in the two areas, it seems**
> **22 to us there is at least a prima facie case, and by that**
> **23 I mean one which is on its face arguable. The reason**
> **24 why you couldn't demand anything more than that is**
> **25 because an equal value decision is itself one which is**
> **p.21**
> **1 not so screamingly obvious that one is obliged in effect**
> **2 to call in independent experts to work out whether jobs**
> **3 are of equal value or not. What one can't expect of**
> **4 claimants is they are going to be able to point at**
> **5 someone working somewhere else whose daily work they**
> **6 don't have direct experience of and say can we say in**
> **7 any sense it is obvious the work you are doing is of**
> **8 equal value? All one can ask for it seems to me for**
> **9 a prima facie case is a sensible arguable case, and we**

10 have that."

82. For these reasons, I conclude that **Leverton** is not authority for the proposition that there must be a *prima facie* case in the form of some evidential threshold before the power to order disclosure is engaged. The test is, assuming the documents are relevant in the sense of being likely to support or be adverse to a party's case, the well-established one of whether the order for disclosure is necessary for the fair disposal of proceedings. If authority were needed for that, it is to be found in **Canadian Imperial Bank of Commerce v Beck** [2009] IRLR 740, where the Court of Appeal held at paragraph 22:

> **"22. In our judgment, the law on disclosure of documents is very clear, and of universal application. The test is whether or not an order for discovery is 'necessary for fairly disposing of the proceedings'. Relevance is a factor, but is not, of itself, sufficient to warrant the making of an order. The document must be of such relevance that disclosure is necessary for the fair disposal of the proceedings. Equally, confidentiality is not, of itself, sufficient to warrant the refusal of an order and does not render documents immune from disclosure. 'Fishing expeditions' are impermissible."**

83. The same applies in respect of a request for the provision of information, assuming that the request relates to a matter in dispute between the parties, whether or not such matter is contained or referred to in a statement of case.

84. Any concern that the absence of a *prima facie* evidential threshold would enable employees to plead purely speculative claims containing nothing more than assertion and thereby seek onerous and ultimately futile disclosure would seem to me to be unfounded. Such a claim would be unlikely to give rise to an order for disclosure because of existing safeguards against abuse. To take an example in the equal pay context referred to above, if a claim were brought by a junior store clerk comparing herself to senior male managers, it would have no reasonable prospect of success. In those circumstances, the claimant would face the possibility of a strike-out or deposit application. If no such application were made, any application by the Claimant for

A disclosure would be likely to be refused on the grounds that it would not be necessary for the fair disposal of the proceedings.

B 85. If I am wrong, and there is a need to establish a *prima facie* case in the sense of crossing some evidential threshold, then it is clear that that threshold would be a very low one indeed. That is evident from the facts in **Leverton** itself, where the claim, based as it was on a comparison with unspecified workers in a predominantly female section, was inherently weak, and the C document stating that there was a disparity in pay could have been referring only to the female clerical workers.

Did the Tribunal Err?

D 86. Turning, then, to the Tribunal's judgment, it is stated at paragraph 2.16:

> **" … first of course there must be a claim which has been made and which is, *prima facie*, a claim which has a chance of being successful" (Emphasis added)**

E 87. The highlighted words show that the Tribunal was not applying the term '*prima facie*' in the sense of an evidential threshold as contended for by Tesco, but merely in the sense of having some reasonable prospects of success. That was the correct approach. In considering whether the Claim had "a chance of being successful", the Tribunal considered the pleaded F case and noted the following:

(a) the Claimants are "for the most part female hourly-paid employees or former employees": see paragraph 8;

G (b) the comparators are "male employees performing various roles in distribution centres": see paragraph 9;

(c) Tesco did not previously suggest that there was no *prima facie* case: see paragraph 11;

H and

(d) Tesco accepted, in the course of giving some information, that there is unequal pay as between store-based staff and those working in DCs: see paragraph 11. (I also note in

passing that the LD Claimants refer, in their Skeleton Argument, to the existence of certain public domain information apparently confirming higher hourly rates for employees in DCs).

88. The Tribunal then concluded as follows:

> **"12. Looking at those pleadings I am quite sure that a prima facie case has been shown sufficient to let these matters proceed …"**

89. In my judgment, that conclusion is unassailable. The essential ingredients of an equal pay claim, namely, equal work and unequal pay between claimants and their comparators, are present. Moreover, there is some reasonable basis for asserting a difference in pay. These matters taken together are more than adequate to support the conclusion that the claims had a reasonable prospect of success or, as the Tribunal put it, a "chance of being successful", which amounts to the same thing. True it is, that there is nothing on the face of the Claims to support the equal work claim beyond the assertion in the pleading. However, there is equally nothing to indicate that the assertion is wholly groundless. The LD Claimants specify a number of (non-exhaustive) roles, most of which appear to be manual or clerical-type roles and which exclude "managerial staff". The HS Claimants assert that their work is equal "to that undertaken by at least some of the male employees" in DCs. In the equal pay context where, for reasons already outlined, comparator information may already be difficult to acquire, and without the benefit, at this stage, of a job evaluation exercise or any independent expert report, it is difficult to see what else the Claimants could reasonably be expected to say in their pleaded case at this stage.

90. Mr Epstein submits that the Claimants do have some information and that they could have said something like, "We wish to rely on a warehouse operative at Avonmouth DC who undertakes assembly and loading". Similarly, it is said that the Claimants should use information they have, however limited that may be, in order to identify comparators and should not be entitled to disclosure in order to select potentially better ones. Those submissions appear to me

to misunderstand the difficulties that claimants in such cases face. In the absence of any information that all employees at all DCs are on similar terms, being forced at this stage to focus on a single DC might well be detrimental to the Claimants' ability to enforce their equal pay rights. Similarly, it would be unsatisfactory if, as a result of the lack of disclosure, the Claimants were unable to identify employees in other DCs who were on significantly higher rates of pay. There would be a real risk of the kind of successive proceedings deprecated in **Redcar** if, having established equal value in respect of some comparators in Avonmouth, it subsequently emerged that the same employer had higher-paid comparators elsewhere. Choices made by claimants as to comparators should be informed choices, made before reaching the "point of no return": see **Redcar** at paragraph 264. If claimants cannot make such choices, then there could, in such circumstances, be a risk of there not being a fair trial of the issues.

91. Mr Epstein sought to persuade me that the comments of Mummery LJ in **Redcar**, to which I have referred, were made specifically in the context of *res judicata* and are not relevant to cases for disclosure, which necessarily arise at an earlier stage in the proceedings. However, it seems to me that the point made by the Court of Appeal as to the desirability of ensuring that informed choices are made prior to the point of no return, i.e. the point at which claims are lodged and after which it would be difficult to lodge a new claim in respect of the same pay period, is one of general application. Claimants do have to get it right first time, and the Tribunal can use its powers of disclosure to enable claimants, where appropriate, to obtain the information they need in order to make the necessary choices.

92. Coming back to Mr Epstein's suggestion, as to the comparators which the Claimants *could* have identified with what they have, it is not clear to me that merely identifying an assembly and loading operative at Avonmouth would tell Tesco very much more than what it is already being told; for example, the LD Claimants' claim already refers to the comparators as including male employees performing the role of "warehouse operatives" and "loaders/unloaders".

93. I pause here to deal with a short point made by Mr Epstein as to warehouse operatives: it is submitted that the original orders made in November 2018 were focused on warehouse operatives and that it was not subsequently open to the Claimants to broaden the scope of their applications by seeking information on other job roles. There is nothing in this point. The Tribunal considered this argument and concluded that it was understood that the Claimants were seeking to compare their work as being of EV to that of people working in the DCs: see paragraph 3.6 of the Judgment. It seems to me that it is the Respondent, and not the Claimants, that is continuing to raise a point that has already been fully addressed and which is not the subject of this appeal.

94. It is significant, in my view, that Tesco has not sought to argue that the Claimants had no reasonable prospect of success, on the basis, for example, that male DC employees do work that is patently several orders of magnitude more demanding in terms of effort, skill and decision-making than any work done by the Claimants, or that certain sub-groups of the male employees do so. Mr Epstein sought to downplay the significance of there not being such an application by saying that it is rare for discrimination claims to be struck out and referred me to the case of **Ahir v British Airways PLC** [2017] EWCA Civ 1392. However, although the threshold for strike-out of claims in discrimination cases is high, it is not insurmountable, and ought not to deter a tribunal from striking out if there is, indeed, no reasonable prospect of success: see **Ahir** at paragraph 16. One is left with the impression that it is accepted that it is at least arguable that these largely manual and clerical roles in DCs may well be comparable, at least in some cases, to the work done by the Claimants. It certainly does not appear unreasonable for the Claimants to assert a belief to that effect.

Other Supermarket Litigation

95. Tesco also contends that the Tribunal erred in taking account of two further matters in reaching its conclusion. The first is in its reference to other supermarket equal pay litigation. This appears in paragraph 12 of the Judgment as follows:

> **"12. Looking at those pleadings, I am quite sure that a *prima facie* case has been shown sufficient to let these matters proceed. It is well known that there is extensive litigation involving other supermarkets. The Asda litigation is well ahead of this litigation and there are also claims involving Sainsbury's and the Co-Op."**

96. Mr Epstein submits that other litigation involving other employers cannot establish a *prima facie* case in this litigation. It is not clear to me that the Tribunal was here doing anything other than taking judicial notice of the fact that other Equal Pay litigation, in a similar context, has reached a more advanced stage. Indeed, the first sentence of paragraph 12 contains the Tribunal's conclusion on the *prima facie* case or reasonable prospects of success. The fact that other, similar litigation has reached a more advanced stage without, it would appear, any similar issue being taken, puts the Tribunal's decision in context and no doubt gave the Tribunal some comfort for reaching the conclusion that it did. But that does not mean that the other litigation amounted to a reason, or part of the reasons, for concluding that the present case had reasonable prospects of success.

The 2014 Exercise

97. The final point taken by Mr Epstein as to the Tribunal's reasoning is its reliance upon the 2014 Exercise, as to which the Tribunal said as follows:

> **"13. I also accept, perhaps to a limited degree, the fact that there was an exercise in 2014 which indicated the possibility of higher scores for those working in the stores than some of those working in the distribution centres gives an indication that there is at least a chance that work of equal value can be shown."**

98. Mr Epstein contends that the Tribunal had no business in relying upon the 2014 Exercise, given that there was shortly to be a hearing about its validity. Mr Epstein also highlights the finding made by the Tribunal at that later hearing, which was that the 2014 Exercise was

fundamentally flawed, only covered a small subset of the tasks of the DC jobs considered and excluded consideration of a key demand on the job-holder, namely, physical effort. Mr Jones submits that there was no error in taking the 2014 exercise into account because the documents still state what they state and were before the Tribunal, albeit they were subsequently not upheld as amounting to a valid job evaluation exercise.

99. In my judgment, Mr Jones' submissions are to be preferred. The documents referring to the 2014 Exercise were before the Tribunal and were clearly relevant to the matter it had to consider. In circumstances in which the Respondent is arguing that there is no *prima facie* case at all, it is clearly relevant to take account of a document that might, on the face of it, be supportive of the Claimants' case. The fact that the Respondent took issue with the validity of one of its own documents was not a reason, at that stage, before there had been any determination about it, to disregard it. In any event the Tribunal was appropriately cautious in its reliance on the 2014 Exercise, which was said to have been accepted only to a "limited degree". Moreover, the Tribunal did not treat the 2014 Exercise, or the conclusions drawn from it, as conclusive; instead it described it as merely indicating the *possibility* of higher scores for those working in the stores and that there is at least a chance that work of equal value can be shown. In my judgment, that was a perfectly reasonable approach to take in respect of the 2014 Exercise, which the Tribunal was entitled to consider. I see no error of law.

Conclusion on Ground 1

100. For all of these reasons, Ground 1 of the Appeal fails and is dismissed.

Ground 2 – Failure to Consider Argument as to the Application of Rule 4 of the EV Rules

101. The Ground of Appeal here is that the Tribunal failed to determine Tesco's argument that there existed a mechanism in the standard orders for stage one equal value hearings under Rule 4

of the EV Rules for the identification of comparators by the Respondent without the need for further disclosure or information.

Submissions

102. Tesco relies on the following passage in the Judgment:

> **"4.2 ... Mr Bryant says that I should reject the suggestion made by the respondent, which I will come to, that they could nominate the comparators." (Emphasis added)**

103. It is submitted that, having said it would deal with the Respondent's submission that it could nominate comparators, the Tribunal erred in failing to do so. Tesco's proposal was that the Claimants should nominate comparators by 30 September 2020 and, in default, Tesco would identify six typical warehouse operative comparators. This would, said Tesco, have avoided the need for the disclosure sought and would have kept this litigation on track. Mr Epstein submits that, had the Tribunal determined the point, there was every chance that the Tribunal would have come to a different conclusion on the disclosure issue.

104. Mr Jones submits that Rule 4(1)(b)(i) of the EV Rules, which is the "mechanism" on which Tesco relies, is designed for situations in which the employee can identify a specific comparator but does not know his name; it is not intended to allow the employer to select a comparator using its own information, which is what Tesco's proposal envisaged. That would have the effect of usurping the Claimants' rights and would obviously lead to Tesco not identifying the best comparators from the Claimants' perspective. In any event, this was an argument in the alternative, and having made the orders that the Judge did, the point did not arise for consideration. Even if the Judge *had* expressly considered it, she would have reached the same outcome.

105. Mr Bryant in his written submission, made the additional point that Rule 4(1)(a) of the EV Rules (to which Rule 4(1)(b)(i) refers) applies where the Claimant has been ordered to disclose in writing the name of the comparator or, if the claimant is not able to do so, to disclose information which enables the respondent to identify the comparator. As there was no such order or such disclosure, the provisions of Rule 4(1)(b)(i) do not apply. The Tribunal expressly stated at paragraph 2.2 of the Judgment that:

> **" … This litigation has not reached the point where appropriate comparators can be identified."**

Discussion

106. Rule 4 of the EV Rules provides:

> **"4.— Standard orders for stage 1 equal value hearing**
> **(1) At a stage 1 equal value hearing a Tribunal shall, unless it considers it inappropriate to do so, order that—**
> **(a) before the end of the period of 14 days the claimant shall—**
> **(i) disclose in writing to the respondent the name of any comparator, or, if the claimant is not able to name the comparator, disclose information which enables the respondent to identify the comparator; and**
> **(ii) identify to the respondent in writing the period in relation to which the claimant considers that the claimant's work and that of the comparator are to be compared;**
> **(b) before the end of the period of 28 days—**
> **(i) where the claimant has not disclosed the name of the comparator to the respondent under sub-paragraph (a) and the respondent has been provided with sufficient detail to be able to identify the comparator, the respondent shall disclose in writing the name of the comparator to the claimant;**
> **(ii) the parties shall provide each other with written job descriptions for the claimant and any comparator;**
> **(iii) the parties shall identify to each other in writing the facts which they consider to be relevant to the question;**
> **(c) the respondent shall grant access to the respondent's premises during a period specified in the order to allow the claimant and his or her representative to interview any comparator;**
> **(d) the parties shall before the end of the period of 56 days present to the Tribunal an agreed written statement specifying—**
> **(i) job descriptions for the claimant and any comparator;**
> **(ii) the facts which both parties consider are relevant to the question;**
> **(iii) the facts on which the parties disagree (as to the fact or as to the relevance to the question) and a summary of their reasons for disagreeing;**
> **(e) the parties shall, at least 56 days before the final hearing, disclose to each other, to any independent or other expert and to the Tribunal written statements of any facts on which they intend to rely in evidence at the final hearing; and**
> **(f) the parties shall, at least 28 days before the final hearing, present to the Tribunal a statement of facts and issues on which the parties are in agreement, a statement of facts and issues on which the parties disagree and a summary of their reasons for disagreeing.**
> **(2) The Tribunal may add to, vary or omit any of the standard orders in paragraph (1)." (Emphasis added)**

107. I agree with Mr Bryant that these provisions do not apply because the Tribunal had not, in fact, made the orders under Rule 4(1)(a). The rule provides that the making of an order is mandatory unless the Tribunal considers it inappropriate to do so. Clearly, by stating that the litigation had not yet reached the stage where appropriate comparators can be identified, the Tribunal did not consider the Rule 4 orders to be appropriate. That, it seems to me, puts an end to Tesco's arguments under Rule 4. It cannot be an error of law not to deal with an argument that is based on the application of a rule that does not, on the Tribunal's assessment of the position, arise at this stage. The Tribunal's indication at para. 4.2 of the Judgment that it will come to deal with the Respondent's suggestion can, in these circumstances, be seen as nothing more than a slip; the point had already been addressed.

108. Even if I am wrong about that, it is clear from the terms of Rule 4(1)(b)(i) that this is intended, as Mr Jones submits, to cater for the situation where the claimant has a particular comparator in mind but is unable to name him. The use of the definite article throughout that Rule, referring to "*the* comparator" to be named, supports that interpretation: "where the claimant has not disclosed the name of *the* comparator to the respondent under sub-paragraph (a) and the respondent has been provided with sufficient detail to be able to identify *the* comparator, the respondent shall disclose in writing the name of *the* comparator to the claimant." That procedure does not appear to envisage the kind of proposal made by Tesco whereby, in default of the Claimants identifying comparators, it could make its own selection. I agree with Mr Jones' submission that giving the Respondent free-rein to choose comparators in this way is not only not in accordance with the rule, but is also contrary to the effective enforcement of the Claimants' rights. There can be no assurance at all that the Respondent would select viable, let alone the best, comparators for the Claimants' case. The Tribunal was therefore correct not to accede to Tesco's proposal.

109. For these reasons, Ground 2 of the Appeal also fails and is dismissed.

Conclusion

110. The Appeal is dismissed.

111. It just remains for me to thank all Counsel and their supporting legal teams for the helpful, clear and concise submissions made on Monday and for the co-operative way the Appeal has been presented. Thanks are also due to all parties for accommodating the late change from a hybrid to a remote hearing and for their patience in waiting for this *ex tempore* judgment.