Case Numbers: 3304495/2018 & others

EMPLOYMENT TRIBUNALS

Claimants		**Respondent**
Ms K Element & others	v	Tesco Stores Limited

Heard at: Watford, in person and by Cloud Video Platform ("CVP")

With the parties present on:

6, 8, 9, 10, 13-17, 20-24, and 28-31 March, 17-21, 24-28 April, 2-5, 15, 16, 23 and 24 May 2023

Without the parties present on:

7 March, 11, 12 and 14 April, 9, 10, 12, 17, 25, 30 and 31 May; 3, 4, 6, 7, 10 and 11 July 2023

Site visits:

22 February 2023 and 13 April 2023

Before: Employment Judge Hyams

Members: Mr R Clifton
Ms M Harris

Representation (principally):

For the claimants represented by Leigh Day:	Mr Sean Jones, KC, Mr Andrew Blake, of counsel and Ms Rachel Barrett, of counsel
For the claimants represented by Harcus Sinclair:	Mr Keith Bryant, KC, and Mr Stephen Butler, of counsel
For the respondent:	Mr Paul Epstein, KC, Mr Matthew Purchase, KC, and Ms Louise Chudleigh, of counsel

UNANIMOUS RESERVED JUDGMENT ON ISSUES ARISING AT THE STAGE 2 HEARING WHICH OCCURRED ON THE ABOVE DATES

1. The tribunal's conclusions on the legal issues arising in the course of a determination of the facts relating to the question whether or not the work of a claimant was of equal value to that of one or more comparators led the tribunal to the conclusion that the manner in which the parties had put their evidence and contentions before the tribunal for the stage 2 hearing within the meaning of the Employment Tribunals (Equal Value) Rules of Procedure 2013 which took place on the above dates was so inconsistent with the interests of justice that it was not just to determine the factual disputes as they stood at the end of that hearing.

2. The respondent had disclosed some (but possibly not all) of what the tribunal has concluded are the key documents. Those key documents are those (1) which are the best evidence of in-person training given to persons doing the jobs of the sample claimants or their comparators during the relevant period, or (2) which in themselves constituted the training in that they were to be read and applied by persons doing the jobs of the sample claimants and their comparators during the relevant period.

3. It was the respondent's case that its training documents were relevant only if the sample claimants or their comparators had in fact received the training described in those documents. It was the respondent's case that the tribunal's factual inquiry at the stage 2 hearing had to be about what the sample claimants and their comparators in fact did on a day-to-day basis, not what the respondent required them to do as their jobs as evidenced by the training which the respondent gave to persons doing those jobs. We have concluded that the respondent's contentions in those respects were wrong.

4. All parties had prepared their cases by reference to documents which they described as job descriptions for the six sample claimants and the eight comparators about whose jobs the tribunal heard evidence. Those job descriptions appeared to have been written on the basis of an assumption that the primary focus of the tribunal's inquiry at the stage 2 hearing was (or should be) what (1) the claimants and their managers and (2) the comparators and their managers said about the manner in which (respectively) the claimants and their comparators did their jobs. Such assumption was, the tribunal concluded, wrong.

5. In this case, there are before the tribunal many documents of the sort which the tribunal has concluded are key documents within the meaning of paragraph 2 above. The tribunal has concluded that all of the documents within the meaning of that paragraph ("such training documents") should here have been at least the primary focus of the tribunal's inquiry into, and determination of, the facts which relate to the question within the meaning of rule 1(2) of the Employment Tribunals (Equal Value) Rules of Procedure 2013. Only if a claimant or a comparator did

any aspect of his or her job in a way which differed from the manner shown by or stated in such training documents could there be a need to hear oral evidence about that aspect.

6. The interests of justice require an order that the respondent carries out a further search for the documents referred to in paragraph 5 above and discloses the results of that search.

7. The interests of justice require orders that the parties provide to the tribunal in respect of each sample claimant and each comparator

   (1) new written job descriptions within the meaning of rule 4(1)(d)(i) of the Employment Tribunals (Equal Value) Rules of Procedure 2013,

   (2) a new statement within the meaning of rule 4(1)(d)(ii) of those rules of the facts which all parties consider are relevant to the question within the meaning of rule 1(2) of those rules ("the question"), and

   (3) a new statement of the factual issues on which the parties disagree (whether as to the claimed fact or as to the relevance of the factual issue to the question) and a summary of their reasons for disagreeing, within the meaning of rule 4(1)(d)(iii) of those rules.

8. The precise terms of those orders will be discussed and if possible agreed with the parties when the stage 2 hearing resumes on 19 July 2023. At that hearing it will be decided whether there will be a subsequent resumption of the stage 2 hearing once those orders have been complied with. If it occurs, that subsequent resumption will be for the purpose of hearing oral submissions on the factual matters to which the orders referred to in the preceding paragraph, number 7, relate.

REASONS

Introduction; the structure of these reasons

1 In paragraphs 2-9 below, we summarise the claims which led to the hearing which we conducted on the dates stated above and the background to that hearing. In paragraphs 10-26, we refer to the relevant parts of the substantive law relating to the claims made in these proceedings. In paragraphs 27-36, we describe in some detail the manner in which we conducted the hearing. In paragraphs 37 and 38, we describe some site visits that we made in order to assist in our understanding of the evidence and factual issues before us. In paragraphs 39-48, we record our reasons for rejecting an application made by the respondent for certain documents to be put before two witnesses whose first language was not English and who were called to give evidence for the respondent while they were giving that evidence. In paragraph 49 we list the witnesses who gave evidence to us, stating when they did so and (in the case of

the respondent's witnesses) for what purpose. In paragraphs 50-63, we refer to some salient aspects of the evidence before us, and state our findings on that evidence. In paragraph 64, we state our conclusion on the submission which had been made to us that we would need to state what we understood had been agreed and as well as make findings of fact on those things about which the parties were not agreed. In paragraphs 65-88 we state our conclusions on the points of principle which led to our above judgment. In paragraphs 89-92, we state our reasons for the orders which we have (as recorded in our above judgment) concluded should be made and our intention to discuss and if possible agree the terms of those orders at the hearing which will be resuming before us on 19 July 2023.

The claims and the background to, and an overview of, the hearing which led to our above judgment

2 The claimants work in the respondent's retail stores. They claim equal pay on the basis that their work is of equal value to that of comparators who work in the respondent's distribution centres. The hearing which we conducted and which led to our above judgment was held in person and by CVP, so that there was on all of the days when the parties were present a hearing in person, with some persons present by CVP only. That hearing was a stage 2 hearing within the meaning of rule 6 of the Employment Tribunals (Equal Value) Rules of Procedure 2013, which are in Schedule 3 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, SI 2013/1237, and to which we refer below as "the EV Rules". The parties had agreed that there would be three such stage 2 hearings. This was the first one. It concerned six claimants whose cases were selected by their representatives as sample cases (not lead cases within the meaning of rule 36 of the Employment Tribunals Rules of Procedure 2013, since at the parties' request no order was made under that rule). They claimed that their work was of equal value to that which was done by one or more of eight comparators, who were also so selected.

3 The hearing which we conducted was listed by Employment Judge ("EJ") Manley at a preliminary hearing which she conducted on 10 and 11 November 2021. The period for the comparison of the work of the claimants and the comparators was determined by EJ Manley to be 18 February 2012 to 31 August 2018.

4 The dates for the stage 2 hearing which we conducted were listed by EJ Manley at the hearing of 10 and 11 November 2021 and were recorded as follows in paragraph 1 of the record of that hearing.

> "Monday 6 March to Friday 24 March 2023 (15 days with parties);
> Monday 27 March to Friday 31 March 2023 (5 days tribunal only);
>
> Monday 17 April to Friday 28 April 2023 (10 days with parties);
>
> Tuesday 2 to Friday 5 May 2023 (4 days tribunal only)".

5 On 6 March 2023, however, we were confronted with a scenario which was summarised in this way in the main opening skeleton argument for the respondent (it was called the respondent's "opening submissions", but since both sets of claimants had referred to their opening arguments as "skeleton" arguments or submissions, we refer to all of the documents setting out the parties' initial contentions on points of principle as skeleton arguments), under the hearing "The evidence":

> "By way of background, there are 37 witnesses, currently more than 22,000 pages of documents, thousands of disputes for the Tribunal to determine, three witnesses who need interpreters, and at least two who require measures to ensure effective participation."

6 The hearing bundle was being added to at the time that that skeleton argument was finalised (it was dated 20 February 2023), and the bundle was expanded on what appeared to be a daily basis throughout the hearing before us. That bundle included the witness statements for all parties. Not all of the makers of those statements were called to give oral evidence, however. We refer below to the persons from whom we heard oral evidence.

7 The parties had prepared in addition to witness statements documents which they called equal value job descriptions ("EVJDs") and records of dispute in relation to the test claimants and their comparators ("RODs"). Those things were done pursuant to rule 4(1)(d) of the EV Rules, which provides:

> "the parties shall before the end of the period of 56 days [after the stage 1 equal value hearing] 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".

8 The issues for us at the stage 2 hearing which we conducted were as stated in rule 6 of the EV Rules, paragraph (1) of which provides:

> 'Any stage 2 equal value hearing shall be conducted by a full tribunal and at the hearing the Tribunal shall—
>
> (a) make a determination of facts on which the parties cannot agree which relate to the question and shall require the independent expert to prepare the report on the basis of facts which have (at any stage of the proceedings) either been agreed between the parties or

determined by the Tribunal (referred to as "the facts relating to the question"); and

(b) fix a date for the final hearing.'

9 "The question" in that paragraph is defined by rule 1(2) of the EV Rules as "whether the claimant's work is of equal value to that of the comparator".

Relevant law

Section 65(6) of the Equality Act 2010

10 We have already referred to the relevant parts of the EV Rules. They rely on and are subservient to the relevant parts of the Equality Act 2010 ("EqA 2010"). The operative provision of the EqA 2010 for the purposes of a stage 2 hearing within the meaning of the EV Rules is section 65(6), which is in these terms.

> "(6) A's work is of equal value to B's work if it is—
>
> (a) neither like B's work nor rated as equivalent to B's work, but
>
> (b) nevertheless equal to B's work in terms of the demands made on A by reference to factors such as effort, skill and decision-making."

Brunnhofer

11 In *Brunnhofer v. Bank Der Österreichischen Postsparkasse AG*, Case C-381/99 [2001] IRLR 571, the European Court of Justice said this.

> "**41**
> ***Determining whether work is the same or of equal value*** The national court is asking essentially whether the fact that the female employee claiming discrimination on grounds of sex and the male comparator are classified in the same job category under the collective agreement governing their employment is sufficient to reach the conclusion that the two employees concerned are performing the same work or work to which equal value is attributed within the meaning of Article 119 of the Treaty and Article 1 of the Directive.
>
> **42**
> In replying to this point raised by the reference, it must be borne in mind that it is clear from the Court's case law that the terms 'the same work', 'the same job' and 'work of equal value' in Article 119 of the Treaty and Article 1 of the Directive are entirely qualitative in character in that they are exclusively concerned with the nature of the work actually performed (see *Macarthys* [1980] IRLR 210, cited above, paragraph 11, and case 237/85 *Rummler* [1987] IRLR 32, paragraphs 13 and 23).

> **43**
> The Court has repeatedly held that, in order to determine whether employees perform the same work or work to which equal value can be attributed, it is necessary to ascertain whether, taking account of a number of factors such as the nature of the work, the training requirements and the working conditions, those persons can be considered to be in a comparable situation (see case C-400/93 *Royal Copenhagen* [1995] IRLR 648, paragraphs 32 and 33, and *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse* [1999] IRLR 804, cited above, paragraph 17). ...
>
> **48**
> It is therefore necessary to ascertain whether, when a number of factors are taken into account, such as the nature of the activities actually entrusted to each of the employees in question in the case, the training requirements for carrying them out and the working conditions in which the activities are actually carried out, those persons are in fact performing the same work or comparable work."

Shields v E Coomes Holdings Limited

12 *Shields v E Coomes Holdings Limited* [1978] ICR 1159 was a case concerning the right to equal pay for like work. It therefore was not a claim for equal pay for work of equal value. However, the things which the Court of Appeal said in it about the manner in which a job done by a claimant or a comparator must be assessed were, we concluded, applicable to claims for equal pay for work of equal value. We came to that conclusion primarily on the basis that there was no reason to conclude (or at least no reason that we could see to justify us in concluding) that the statements of principle in that case did not apply to cases where what was claimed was that jobs were of equal value rather than that they involved like work. In part that conclusion was based on a purposive approach to the law of equal pay. It was also based on the following factors.

12.1 The key issue in *Shields* was the relevance in a claim for equal pay for work which it was claimed was of equal value (using that term in the broad sense used by Underhill P, as he then was, in paragraph 22 of his judgment when sitting in the Employment Appeal Tribunal ("EAT") in *Prest v Mouchel Business Services Ltd* [2011] ICR 1345; we have set out paragraph 22 in paragraph 26 below) of a requirement of an employer which was not in actually relied on by the employer in practice.

12.2 That was an issue of principle which both could, and as a matter of principle (by reason of the doctrine of precedent, it being part of the *ratio decidendi* of *Shields* which appeared to us to be applicable here) should if it arose here be applied by us.

12.3 For the reasons which we state in paragraphs 67 and 68 below, that issue arose here.

13 We saw that it was said by Lord Denning MR in *Shields* at [1978] ICR 1159, 1169E that a comparison of two jobs where it is claimed that the work done in them is the same

> 'involves a comparison of the two jobs — the woman's job and the man's job — and making an evaluation of each job as a job irrespective of the sex of the worker and of any special personal skill or merit that he or she may have. This evaluation should be made in terms of the "rate for the job," usually a payment of so much per hour. The rate should represent the value of each job in terms of the demand made on a worker under such headings as effort, skill, responsibility, or decision. If the value of the man's job is worth more than the value of the woman's job, it is legitimate that the man should receive a higher "rate for the job" than the woman. For instance, a man who is dealing with production schedules may deal with far more important items than the woman — entailing far more serious consequences from a wrong decision. So his job should be rated higher than hers: see *Eaton Ltd. v. Nuttall* [1977] I.C.R. 272.'

14 The claim in *Shields* was brought by a woman who worked in a bookmaker's shop. The employer's justification for the difference in pay between men and women was recorded in the headnote in this way:

> "The employers considered the shop to be one of nine situated in areas where the prospect of robbery and customers causing trouble was high and they paid the male counterhand more than the employee [i.e. the claimant] because he was employed to act as a deterrent and to render immediate physical assistance if required. He was also expected to be available in case of trouble when the manager opened the shop in the morning and, when necessary, to carry cash between the employers' betting shops."

15 However, as the headnote recorded in the next sentence:

> "There had been no trouble of the kind feared since the employers took over the shop."

16 In his judgment, at 1174G-1175CH, Orr LJ said this:

> 'The subsection [i.e. section 1(4) of the Equal Pay Act 1970 as amended by the time of the claim made in that case; section 1(4) concerned "like work"] by its terms requires that, in comparing her work with his, regard should be had to the frequency with which any such differences occur in practice as well as the nature and extent of the differences, and it is abundantly clear, in my judgment, that the comparison which the subsection requires to be made is not between the respective contractual obligations but between the things done and the frequency with which they are done. But it is equally clear from the terms of the decision of the industrial tribunal that the majority of the members misdirected themselves in this respect by paying too great

> attention to the contractual obligations and too little to the acts in fact done and their frequency, and in particular to the fact that Mr. Rolls [the comparator] had never, on the evidence, had to deal with any disturbance or attempted violence. It is true that the arrangement made by the company for dealing with such incidents was, apart from the Equal Pay Act 1970 and Sex Discrimination Act 1975, a sensible one, and the fact that no trouble in fact arose does not establish that they were being overcautious in making that arrangement at the nine shops, but the fact that Mr. Rolls did not ever have to deal with any trouble is by the terms of section 1(4) very material for the present purposes and in my judgment much too little regard was paid to it by the industrial tribunal. The same consideration applies to the duty of Mr. Rolls to be present at the opening of the shop by the manager: plainly a sensible precaution, but here again there has been no untoward incident and this was a matter which the industrial tribunal were required to take into account.'

17 At 1179-D-G, Bridge LJ said this:

> 'The matter falls for decision, as already stated, under section 1 of the Equal Pay Act 1970. In comparing the applicant's position with that of her fellow counterhand, Mr. Rolls, three possible questions fell to be answered, as they would in any case where a woman claims an equality clause by virtue of employment on like work with a man under section 1(2)(a). First, was their work of the same or a broadly similar nature? Secondly, if so, were any differences between the things she did and the things he did (regard being had to the frequency, nature and extent of such differences) of practical importance in relation to terms and conditions of employment? These first two questions arise under section 1 (4), which defines like work. The legal burden of proving that she is employed on like work with a man rests on the woman claimant. But if the first question is answered in her favour, an evidential burden of showing differences of practical importance rests upon the employers. The third question under section 1(3) [which was re-enacted as part of section 69 of the EqA 2010] arises only if the woman has established that she is employed on like work with a man. Can the employer then prove that any variation between the woman's contract and the man's is genuinely due to a material difference (other than the difference of sex) between her case and his? If so, her claim to an equality clause is defeated.'

18 At 1180C-H, Bridge LJ said this:

> 'In considering this second question, it has been emphasised in a number of cases that a difference between duties which the man and woman whose work is being compared are under a contractual obligation to perform is not a relevant difference unless it results in an actual difference in what is done in practice. It is by comparing their observed activities not their notional paper obligations that the relevant differences are to be ascertained. This is an important principle. Where the differences between the employees to

be compared are not reflected in differences in things done, they fall for consideration only when the third question is asked, viz. is the variation between the woman's contract and the man's (a difference in rate of pay or other contractual benefits) genuinely due to a material difference (other than the difference of sex) between her case and his? The kind of differences which can be considered at this stage are manifold and it would be undesirable to attempt to categorise or limit them. A difference in mere seniority, whether measured by age or length of service, would be an obvious example. It may nevertheless be difficult to draw a clear line of demarcation between differences proper for consideration under subsection (4) and those which can only be considered under subsection (3). The Employment Appeal Tribunal has held that differences in the degree of responsibility borne by two employees may properly lead to the conclusion that there are differences between the things they do for the purposes of subsection (4), even though it may be difficult to pin-point and identify the precise differentiation of activity: *Waddington v. Leicester Council for Voluntary Service* [1977] I.C.R. 266 and *Eaton Ltd. v. Nuttall* [1977] I.C.R. 272. No doubt this principle is correct, though how far it can be applied to the facts of particular cases may be debatable and must in the end be a matter of degree. The important thing is that the words of subsection (4) "differences … between the things she does and the things they do" should in no way be strained beyond their natural and ordinary meaning. If the differences relied upon to justify the more favourable treatment of a man than a woman cannot fairly be brought within these words, the employer still has the full protection of the fall-back provision in subsection (3) provided always that he can discharge the onus of making good his case of justification in accordance with the terms of that subsection.'

Beal v Avery Homes (Nelson) Limited

19 In *Beal & Others v Avery Homes Nelson) Limited & Others* [2019] EWHC 1415 (QB), Lavender J conducted an exercise which, if it had been conducted in an employment tribunal, would have been a stage 2 hearing within the meaning of the EV Rules. In paragraphs 24-33 of his judgment, he referred to the approach required to be taken when deciding whether or nor work was of equal value. In doing so, he referred extensively to the decision of the EAT (presided over by Underhill P) in *Potter v North Cumbria Acute Hospitals NHS Trust* [2008] ICR 910. In paragraphs 32 and 33 of his judgment in *Beal*, Lavender J helpfully said this:

'32. Of course, where an employee is contractually required to do something (and that requirement has not fallen into desuetude or otherwise been varied), then that activity will form part of their work (even if, in practice, they neglect or refuse to perform it). But most of the issues in the present case concerned activities where the contractual position was not so clear-cut. On the whole, the dispute was not as to what the employee did, but as to whether it formed part

of their work. I will deal with the individual issues later, but it may be helpful to set out in general terms what seems to me to be the appropriate approach. In general terms, therefore:

(1) Where an employee is instructed by their manager to do something, then, if they do it, that is surely part of their work. Moreover, that is so, even if they might have been entitled to say, "But that is not something I am obliged to do."

(2) The same is likely to be the case where the manager does not instruct, but requests or encourages, the employee to perform the activity in question. On the other hand, in such a case, it may be relevant to note for the expert's benefit (if it is the case) that the employee could not be required to perform that activity.

(3) Where an employee does something which they have not been instructed, requested or encouraged to do, it may still constitute work if, for instance:

(a) it is simply a way of doing something which forms part of their work; and/or

(b) their manager knows that they are doing it, but does not object and thereby tacitly approves of their doing it.

(4) On the other hand, something may not be part of an employee's work if they have not been instructed, requested or encouraged to do it, their doing it has not been approved by their employer and it does not simply constitute a way of doing something which forms part of their work.

33. I stress that these are merely general considerations, which are not intended to place a gloss on the Act and that each disputed issue has to be considered on the basis of its own particular facts.'

20 The following passage of Lavender J's judgment in *Beal* was also of considerable assistance to us.

'***(2)(v) The Care Quality Commission and the Fundamental Standards***

43. The operators and managers of care homes must be registered and regulation 8 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 ("the 2014 Regulations") imposes an obligation on them to comply with regulations 9 to 20A, which are known as the "Fundamental Standards". Any breach of that obligation may result in regulatory action being taken by the CQC. Moreover, regulation 22 provides that, in certain specified cases, a breach of that obligation by the registered person will be a criminal offence, subject

to the defence that they took all reasonable steps and exercised all due diligence to prevent the breach.

44. None of the Sample claimants or Comparators were registered persons, so the 2014 Regulations did not apply directly to them. However, the Claimants proposed that each job description should include a list of those Fundamental Standards to which the employee's work was relevant. The Defendants opposed this proposal, on the basis that it risked trespassing into the evaluation, rather than merely the description, of their work, which at this stage is a matter for the expert, and not for the Court.

45. I agree with the Defendants that it would not be appropriate to include the proposed list in the job descriptions. It would be unnecessary and unhelpful and might involve the Court in going beyond its proper function at this stage:

    (1) An employee's work can be adequately described without the proposed list.

    (2) The expert will be able to have regard to the regulatory framework, including the Fundamental Standards, in assessing the value of each person's work. Insofar as he deems it appropriate to take these matters into account, his assessment is likely to be considerably more nuanced than simply saying, for each employee, "Their work is (or is not) relevant to this or that Fundamental Standard."

    (3) It follows that it is unlikely that the expert would be assisted by the proposed list.

    (4) However, if the proposed list were to influence the expert's opinion as to the value of an employee's work, then that might in itself be an undesirable outcome, since the Court ought not to be dealing at this stage with the evaluation of the employee's work, but merely the identification of that work.'

21 A further paragraph of much assistance to us was paragraph 88 of the judgment of Lavender J where this was said about the work of a claimant by the name of Mrs Shore.

> "In relation to Mrs Shore's work, the Defendants relied on the evidence of Mrs Greatrex. She said that there were some issues concerning Mrs Shore's attitude, including one complaint, although I was not told the outcome of this complaint. It is not relevant for present purposes, since the aim of this exercise is to describe her work, not whether she was doing it well or badly."

22 The next part of the judgment of Lavender J was about another issue relating to Mrs Shore. In paragraphs 89-91, Lavender J said this, which we also found illuminating.

> '89. In their closing submissions, the Claimants proposed the following revised wording:
>
> > "The JH worked in a pressurised environment because of her responsibility to complete certain fixed tasks during each shift, as well as helping with Care Assistant tasks, as described elsewhere in this JD.
> >
> > Understaffing of the dementia unit where the JH worked increased the work pressure on her. The unit was understaffed in November 2015 and October 2016, but not as at 16 May 2017. Throughout the JH's employment, including as at the Material Date, it was part of her role to deal with any increased pressures that arose as a result of any understaffing."
>
> 90. The two paragraphs of this proposed wording represent two distinct aspects of this issue. The first paragraph is essentially an evaluative issue, i.e. whether the demands of Mrs Shore's job, as set out elsewhere in the job description, and assuming no understaffing, should properly be described as a "pressurised environment". It would be neither appropriate no[r] helpful for me to apply that label to Mrs Shore's work, since the evaluation of her work is a matter for the expert at this stage.
>
> 91. The second paragraph is accurate and, in my judgment, should be included in Mrs Shore's job description. It is clear from CQC reports that understaffing had been an issue at Rowan Court, but appeared to have been resolved by 16 May 2017. It is perhaps only a statement of the obvious that a shortage of staff will create additional pressures for any senior employee, but that will be a matter for the expert to consider.'

23 We found paragraphs 104-105 of Lavender J's judgment to be of material assistance to us also. They (like paragraph 91 of that judgment) showed that there may in some cases be "merely a statement of the obvious", in other words something that adds nothing material to the factual position, but that in some cases the statement may be about something that increased the value of an employee's work.

24 A number of other parts of the judgment of Lavender J in *Beal* were of assistance to us in that they confirmed our own initial thoughts about the approach which we should be taking towards the assertions of the parties in this case. By way of illustration, paragraph 219 of the judgment showed that the words "Initiative and creativity had to be used in the performance of this task which involved steps

such as ordering relevant materials and using his carpentry and other skills to complete the conversion" should not be included because whether or not that was so was an "evaluative issue".

Prest v Mouchel Business Services Ltd

25 In *Prest v Mouchel Business Services Ltd* [2011] ICR 1345, Underhill P was obliged to decide whether or not changing the comparator in an equal pay claim involved, necessarily, the making of a new claim. That was relevant because of the 6-year time limit for which provision was made in section 2ZB(3) of the Equal Pay Act 1970 (the predecessor to section 132 of the EqA 2010). In paragraphs 11-13 of his judgment, at 1349-1350, Underhill P said this (we have for convenience in this and the quotation from that judgment set out below inserted the endnotes and for the sake of clarity underlined their text):

> **'11** ... [T]he sole issue which I have to decide is how section 2ZB applies in the case of a claim by reference to a comparator added by amendment. It was common ground that there were only two possible answers:
>
> (a) that the arrears date is for all purposes the date of the institution of the proceedings themselves, i.e. the presentation of the ET1, and that the fact that the particular comparator was named later is irrelevant; or
>
> (b) that, in relation to that comparator, the proceedings are only instituted when the application to amend is made. [Endnote 2: Mr Blake made it clear that he did not argue that the relevant date was when the application was *granted*.] [Mr Blake was counsel for the employer in that case. Co-incidentally, he appeared before us led by Mr Jones, acting for the Leigh Day claimants.]
>
> **12** The starting-point in choosing between those alternatives is that in my judgment Parliament in enacting section 2ZB(3) must have been concerned with when the substantive claim which attracts the liability for arrears was first formally brought before the tribunal. In the case of a claim introduced by way of amendment to existing proceedings, the date at which those proceedings were first instituted is logically an accident, and it does not makes sense to determine the relevant time limits by reference to it. If the claim is new in substance then it is artificial and unreal to regard it as having been instituted at some earlier date simply because an earlier claim with which it has become procedurally entwined was instituted at that date: cf the reasoning, albeit that the specific statutory provisions are different, of Brandon LJ in disapproving the "relation back" theory in *Liff v Peasley* [1980] 1 WLR 781 (see at pp. 799–803), subsequently approved by the House of Lords in *Ketteman v Hansel Properties Ltd.* [1987] 1AC 189. My view on this point is in accordance with the decision of Slade J in *Potter v*

North Cumbria Acute Hospitals NHS Trust (No 2) [2009] IRLR 900: see paras 114-116 (at p 913).

13 Thus the real question is whether the claims by reference to Mr. Welsh and Mr. Blenkinsop are substantively different from that which was initially pleaded. As to that question, there is a certain amount of recent authority to which both the parties referred. I review it as follows."

26 Having reviewed that authority, Underhill P said this.

"**21** In these circumstances I have thought it right to start with a clean slate, putting the authorities to one side for the present. I also put to one side the phrase "cause of action", not because I think that the cases which employ it are irrelevant but because it comes with a certain amount of baggage which may get in the way.

22 On the basis set out at para 12 above, the essential question with which I am concerned is whether the two claims – the one originally pleaded and the one introduced by way of amendment – are in substance the same. In my view that does not depend as such on the identity of the individual comparator named. Take a case where a hundred men are doing an identical job. As a matter of procedure, it has, at least in domestic law, been conventionally regarded as necessary for a claimant to identify one of those men – let us say A – as her comparator. But in fact which individual she chooses is a matter of indifference. [Endnote 4: For myself, I can see no logical reason for the practice of requiring the naming of an individual comparator in all cases, and specifically in "collective" cases. The reference under each of the heads of section 1(2) to "a man in the same employment" need not require the naming of a particular man; still less can any such requirement be found in the EU legislation. In the straightforward case where the pay is the same for all the men doing the particular work which the claimant says is of equal value to her own, I do not see why it should not be sufficient to plead "I claim to be paid the same as the widget-makers, who are all men" (or, it might be, "the grade 1 widget-makers"). Indeed the practice in the mass equal pay claims which are currently going through the system is that cases are generally initially pleaded in precisely that fashion. Though it is regarded as necessary for individual comparators to be named eventually, that is essentially by way of particularisation. I asked counsel if they could shed light on the origins of the practice of requiring the naming of names, and they helpfully provided notes following the hearing; but they were not able to find any authoritative discussion of the question. The earliest relevant reported case appears to be *Clwyd County Council v Leverton* [1985] IRLR 197, which takes for granted that individual comparators must be named but holds that it is legitimate to start by pleading a general case and giving further particulars after disclosure. I would not wish, by drawing attention to this point, to be thought to be recommending the discontinuation of the current practice. It remains the law that a claimant must be able to establish an actual, as opposed to a

> hypothetical, comparator in an equal pay claim (see *Walton Centre for Neurology and Neurosurgery NHS Trust v Bewley* [2008] ICR 672); and such are the complexities of local authority (and NHS) remuneration that it is a healthy discipline to ensure that general claims are made by reference to identifiable individuals. But it may nevertheless be worth bearing in mind that it is no more than a practice, and not a fundamental principle. (I should mention for completeness that Mr. Blake suggested that the reasoning in "Enderby (no.2)" – *Evesham v North Hertfordshire Health Authority* [2000] ICR 612 — was relevant in this context, but I did not find anything in it which explicitly addressed the question.)] What matters is whether the work that they (all) do is comparable [Endnote 5: It would be more useful to say "of equal value to hers", because that is the underlying question, as appears clearly from the EU legislation and the ECJ case-law. But unfortunately our domestic terminology has appropriated "equal value" as the label for a particular category of claims, i.e. those where the work is not "like" and has not been the subject of a formal job evaluation, so that the tribunal has to make its own judgment on the issue of equality of value.] to hers: it is the receipt of unequal pay for equal work which is the foundation of an equal pay claim. If the claimant subsequently decides for reasons of convenience [Endnote 6: Experience shows that there are many reasons why this may need to be done. The comparator(s) originally named may have been mistakenly identified as doing the work in question, or they may turn out on closer investigation to be atypical in some way. Or there may be pragmatic reasons for a change, such as that their documents may have gone missing, or they may be unavailable to give evidence or to have their work evaluated by an expert.] to substitute a fresh comparator – B – doing the same work as A (or as A was thought to have been doing) that does not mean that the nature of the claim has changed: whichever is taken as the individual comparator, the work is the same.
>
> **23** In my view, therefore, what matters is whether the work said to be being done by the new comparator is different from that said to be being done by the comparators originally named. It is only if it is indeed different that a substantially new claim is being advanced for the purpose of section 2ZB(3) (as explained at para 12 above); and the same applies to cognate questions such as that which arose in *Brett*."

The manner in which the hearing before us was conducted

27 The opening skeleton argument for the claimants represented by Harcus Sinclair UK Limited (to whom we refer below as "the Harcus claimants") helpfully summarised the manner in which they and the claimants represented by Leigh Day (to whom we refer below as "the Leigh Day claimants") had divided up the work of preparing for, and presenting, the claimants' cases in the hearing before us. In paragraphs 5-7, this was said (with a footnote, which we have inserted, underlining its text for the sake of clarity).

> "5. The first claims in this case were presented in February 2018. There have been many Preliminary Hearings since then. The approach approved by the tribunal has been to divide store roles carried out by the Claimants into three tranches. The first tranche covers three roles: Customer Assistant Replenishment, Customer Assistant Express, and Customer Assistant Nights.
>
> 6. Six sample Claimants have been selected and their equal value claims have progressed to this stage; all other claimants in tranche 1 roles [Footnote: There is an ongoing debate as to what effect the outcome of the sample Claimants' equal value claims will have for others in the same, tranche 1, roles. There is also ongoing debate as to how and when the tranche 2 and 3 claims should progress, and that matter is listed to be determined at a further PH in May 2023.] await the outcome of those claims.
>
> 7. This Stage 2 hearing has been listed to hear evidence in relation to the sample Claimants (two of whom worked as Customer Assistant Express, another two as Customer Assistant Nights, and the final two as Customer Assistant Replenishment) and 8 sample comparators (4 of whom worked in 'ambient' Distribution Centres ('DCs') and the other 4 in 'fresh' DCs). There is one Harcus Claimant and one Leigh Day Claimant in each of the three tranche 1 roles, and it has been agreed that Harcus will take the lead in respect of the fresh DC comparators, and Leigh Day in respect of the ambient DC comparators. The following skeleton submissions therefore focus on the 3 Harcus Claimants who are sample Claimants, and on the 4 fresh DC comparators."

28 We were fortunate to have appearing before us counsel who had a great deal of collective experience of, and expertise in, the law of equal pay. We were assisted greatly by their submissions and their focused approach to the presentation of the evidence. They all acted with highly commendable skill and worked very hard to ensure that we were able to hear all of the evidence and submissions more or less within the originally-set timetable, albeit that (as we describe below) we expanded the hearing considerably. We are grateful to all of them. The approaches of the claimants and the respondent towards the evidence and the issues differed considerably, however, and we were as a result obliged to determine some issues of general principle. It was, as can be seen from the extract from the respondent's main opening skeleton argument that we have set out in paragraph 5 above, being said to us that we were going to have to determine thousands of factual disputes. Initially, we accepted (because we had no basis for declining to accept) that assertion. However, we bore it in mind that it was necessary for us to apply our own critical analysis to the question of what factual disputes required determination. The Leigh Day claimants' main opening skeleton argument in fact urged us to do that, and we found that we could best set the scene for our discussion about and determinations on at least some of

the issues of principle which arose by setting out the following long passage from that skeleton argument.

'**WHY ARE THERE SO MANY ISSUES TO DETERMINE?**

19. As we said above, in theory the Tribunal's task at a Stage 2 Hearing should be a straightforward one. All that is required is to decide what work the employees do. One might expect there to be very little dispute. The problem, the Tribunal will have anticipated, is that the procedure makes no provision for the parties to put their case on the demands arising from the work before the IEs prepare their report. That, of course, is deliberate. The content of the EVJD is not intended to be an exercise in advocacy on the substantive merits of the question. Where a party tries to use the EVJD to make a case on equal value, it distorts the process and makes agreement impossible.

20. In practice, this distortion takes three forms, each of which are to be found in the Respondent's approach to the EVJDs:

    (1) The talking up (to the point of exaggeration) of the work performed by the comparators;

    (2) The talking down (to the point of devaluation) of the work performed by the Claimants; and

    (3) The smuggling into the job descriptions of evaluative language in, it is presumed, the hope of affecting the IEs' assessment at least sub-consciously.

21. It was precisely in order to avoid this possibility that an effort was made to agree points of principle at the outset of the series of round table meetings (also referred to as "RTMs"). Those principles were formulated with help from the IEs who helpfully indicated what would likely assist them. The principles were set out in writing and a copy is at {H/30/1} ("the PoP Document"). The Claimants initially understood that these principles had been agreed by the parties at the RTMs. However, the Respondent's subsequent comments on the PoP document suggest an unwillingness to engage positively in the process. The Respondent then took a decision to cease participation in the RTMs altogether.

22. The effect has been to leave a very large number of disputes for resolution, a great many of which are about the inclusion of language which is either expressly evaluative (i.e. it refers not to the job tasks but the demands placed upon the employee) or else is either intended to (or risks) influencing the evaluation of demands. This was a matter raised by the Leigh Day Claimants at the last Preliminary Hearing. The Tribunal will recall that a hope was expressed that discussion might

lead to a material narrowing of the scope of such disputes. Whilst there has been some narrowing of issues it has not been as significant as the parties might have hoped or the Tribunal may have expected.

WHAT ARE FACTS?

23. The question "what are facts" may sound philosophical, but there are two practical issues:

    (1) "Editorial" disputes; and

    (2) Expressions of opinion.

Editorial disputes

24. Each party is responsible for its own EVJDs. If a party's EVJD asserts something as fact and its truth is disputed, the Tribunal may be asked to make a finding. However, it is not open to the other party to insist that a statement of fact is phrased in a manner which is more to their liking. For example:

    (1) at paragraph 337 of Janice Cannon's EVJD, the Respondent seeks to change "JH provides customer service" to "JH provides assistance to customers" {C4/3/80};

    (2) at paragraph 343 the Respondent insists that "serving customers on the shop floor" be changed to "assisting customers on the shop floor" {C4/3/81}; and

    (3) at paragraph 389 the Respondent seeks to change "JH checks all over the item to see if there are any marks or dust / dirt on it" to "JH glanced at the item to see if there are any marks or dust / dirt on it" {C4/3/90}.

25. Another example of an editorial dispute is where one party insists that additional material which does not directly describe the job should be introduced as "context". Usually, the purpose of the proposed inclusion is advocacy on the question of equal value. In other words, it is intended to diminish or increase the perception of the demand that the job imposes rather than describe what it is that the jobholder does. This sort of "advocacy" on the demands of the role is inappropriate at a Stage 2 Hearing. The Tribunal should reject it, whether it is an attempt to devalue the role in a RoD, or embellish it in the EVJD. For example:

    (1) at paragraph 1 of Carole Worthington's EVJD, the Respondent seeks to add:

> "The Woolton superstore is based in a quiet, affluent, area of Liverpool. It was a community store, with suburbs around it. Given its location, the store had older clientele and regular customers; local customers would visit the Store's café for a chat. There were Customer Assistants who worked at the store until they retired, as well university students and younger employees. JH's husband and daughters also worked at the store. The store had a relaxed atmosphere, and the job holder found it to be a happy place to work. Colleagues, including managers, would laugh and joke whilst getting the job done and it felt like a family. The JH usually had the flexibility to take her breaks when she wanted to and to complete tasks that she preferred such as reductions, safe and legal checks and replenishing promotion ends. The JH did not have targets and was not under any pressure to complete tasks within a defined timeframe" {C6/3/1};

(2) at paragraph 9.2.22 of Siobhan Williams' EVJD, the Respondent seeks to add (to the paragraph on notifying customers of promotions):

> "However, JH was not expected to be able to recall all such promotional offers and there were no consequences for the JH if the offer was not explained to the customer on every occasion" {C5/3/40};

(3) at paragraph 1.2.2 of Siobhan Williams' EVJD, the Respondent seeks to expand the sentence, "A security guard works from 15:15 – 23:00 every day", by adding, (as well as details of shift patterns across the RP):

> "When on shift, the security guard is located in between the store entrance and the checkouts and given the short distance, is able to clearly see and hear what is going on at the checkout, as well as at the entrance to the store. As there is a large area around the checkouts and entrance without much shelving, the security guard has a good view of the store. The security guard also walks around the shopfloor and walks over to any customers looking suspicious to deter shoplifting" {C5/3/2};

(4) at paragraph 32 of Janice Cannon's EVJD, the Respondent seeks to insert the wording:

> "The JH's tasks were routine and repetitive, and the only factors generally having any material bearing on the order in which those tasks were done was the timing of the delivery and the tidiness of the shop floor on a Thursday" {C4/3/9}.

(5) the Respondent seeks to insert a new paragraph 1.1.6 in Siobhan Williams' EVJD that says:

> "During the RP, the JH enjoyed herself at work, getting on well with colleagues (one of whom was the JH's cousin) and generally having a laugh. The JH explained that the JH felt comfortable at the store, which was a "community store" (with regular customers from the neighbouring area who JH would chat to) and that the JH liked the job. The JH and five of her colleagues worked at the Kingstanding store throughout the RP, with a further colleague starting in September 2012 and working throughout the RP. The JH knows her colleagues well, having worked closely with them over a number of years. The JH was not subject to targets during her shifts and there was no pressure on the JH to complete certain tasks before her shift ended" {C5/3/2}

26. The purpose of the suggested amendments set out above are, pretty obviously, to provide "context" that is intended to suggest that the jobs were somehow less "demanding" than they might otherwise be thought to be. As one might expect, the Comparator EVJDs similarly contain irrelevant "context" which is included for the opposite purpose. For example:

(1) Section 2 of the comparator job descriptions is intended to be a "context section". However, they are drafted to exaggerate the role of the comparators. They state that:

(i) "Ensuring the continuous and efficient delivery of service by Thurrock DC was critical to the supply of Stock to Tesco's customers; any material or sustained disruption to that service had a direct and adverse impact on the availability of stock for the 526 Stores it serviced and the customers who shopped in them" (see, e.g. Hornak EVJD at paragraph 2.9 {D6/1/19});

(ii) "Every policy, process, operation, and activity implemented or otherwise used in the DC was designed and applied to ensure maximum

productivity and minimum disruption to service at all times." (see, e.g. Hornak EVJD at paragraph 2.12 {D6/1/10});

(3) [sic; not (2)] Section 8 of the ambient comparator job descriptions is almost entirely commentary on and analysis of the comparator roles, by reference to "performance management regime", "accuracy", "management processes for accuracy", "personal accountability" and "absence management" (see for example Hornak, section 8 of EVJD at {D6/1/147 to 153}).

Expressions of opinion

27. There are two significant issues that the Tribunal will need to beware of under this heading: express advocacy on the issue of demands and the use of what has been referred to by the parties as "evaluative" language.

Demands

28. The comparator EVJDs contain sections which deal explicitly with demands. It is anticipated that all parties will ultimately provide the IEs with similar material as the IEs have told the parties that they are likely to find it useful in due course. However, it is important for the Tribunal to have in mind that it is not being asked to make any findings on issues of demand at this stage. The commentary on demands is not to be treated as setting out "facts" because that would effectively bind the IEs on an issue which, at this stage, is a matter for them. Accordingly, any such commentary should be excluded from the EVJDs.

29. There are examples throughout the comparator EVJDs and are best seen in the RoDs for the comparators and identified within the category "analysis/evaluation". For example, in the RoD for Ernie Davis:

(1) Within section 2 (which is supposedly a "context" section), paragraphs 2.19 to 2.21 refer to "System Direction, Control and Monitoring" {D5/4/2}, and 2.34 to 2.36 refer to "Risks and Hazards" {D5/4/3}.

(2) Within section 3 (supposedly an overview section), 3.30 to 3.32 refer to the supposed "monotony" of the comparators' work {D5/4/7};

(3) Section 6 includes sections on “Burden of Responsibility” {D5/4/27} and “Burden of Accountability and Responsibility” {D5/4/55};

(4) Section 7 contains sections on “focus and concentration” and “stamina” {D5/4/83};

(5) Section 8 is titled “Performance and Accountability”; and

(6) Sections 9 and 10 are titled Working Conditions {D5/4/87} and Risks and Hazards {D5/4/93} and contain repeated analysis and evaluation (as well as significant repetition of earlier parts of the EVJD).

Evaluative/Analytical/Subjective Language

30. The second significant issue is the frequent use of evaluative language. This is a broad category. However, it is clear that the use of language may potentially influence how demands are assessed. This has been acknowledged by the International Labour Office in its document “Promoting Equity, Gender Neutral Job Evaluation for Equal Pay: a Step-by-Step Guide 2008”. This states (at page 51):

> “Another aspect which may influence the evaluation is the use of terms which devalue a job, for example:
>
> “Routine” “Basic” “Simple” “General” “Only”
>
> Thus, use of terms which devalue the job requirements should be avoided.”

31. While the ILO document focussed on job evaluation studies, the EVJDs in equal value claims should similarly avoid language which devalues or overvalues the requirements of the jobs being compared.
32. Different types of evaluative language are considered in turn immediately below: the common theme is ... the Respondent’s use of language in its comparator EVJDs and Claimant RoDs in an inappropriate way to seek to overvalue the comparator roles and devalue the Claimant roles.

Responsible

33. In most cases, it should be possible simply to describe what someone does. Describing them as being “responsible” for doing it adds an evaluative gloss. For example, [if] one says “I put the bins out on a Thursday night”, that describes the task. If one says “I am responsible for putting the bins out on a Thursday night” that imbues the task with

an implied importance which is really aimed at creating an impression of increased demand.

34. Because "responsibility" is a matter which is very often taken into account by job evaluation experts, the danger of over- and misuse of the word is a familiar issue. It is for that reason that it was raised specifically at the round table meetings ("RTMs") and referred to in the PoP document.

35. The original proposal was as follows:

> "The word 'responsible' is to be reviewed and removed from the EVJDs. Where there are relevant facts which might be relevant to the issue of personal responsibility (such as an absence of checks by another person) a narrative explanation of the relevant facts should be provided. The IE will then be able to take account of those facts to the extent which the IE considers appropriate." {H/27/4, at paragraph 12}

The IEs agreed with that proposal {H/28/3 at paragraph 9 in red text}. The idea was that rather than, as it were, using the word "responsible" to hint at some particular personal responsibility, it should instead be spelt out. The Respondent's position was that the use of the word responsible was to be reviewed but they took out the reference to it being removed and added further caveats on when it could be used (see the PoP Document: {H/29/4}). The final version of the PoP Document simply stated that the word "responsible" would be reviewed. {H/30/4}.

36. In accordance with the PoP document, the Leigh Day Claimants have largely removed the word "responsible" from their Claimant JDs unless the specific use was justifiable, particularly if it was a personal legal responsibility (such as selling age-restricted products to underage customers). The Leigh Day Claimant EVJDs use the word "responsible" between 3 and 6 times (excluding where used as part of the name of a training course). By contrast, the ambient comparator EVJDs use the word "responsible" over 30 times (except in relation to Wayne Jones who performed assembly activities, where the word is used 7 times). For example, the EVJD of Ernie Davis states that he "was responsible for unloading a range of UoDs" {D5/1/20, paragraph 3.15}, and that he was "responsible for collecting those UoDs" D5/1/20, paragraph 3.16}. These are simply a misuse of the word, in an attempt to exaggerate the task being performed, and should be replaced with a sentence explaining what was done: i.e. in the first example, the job holder "unloaded a range of UoDs".

Had to/required to/might do/may do

37. The Respondent has repeatedly stated in comparator JDs that a comparator "had to" or "was required to" do something, rather than simply saying "he did it". The EVJD of Ernie Davis uses the phrase "had to" in 192 paragraphs, and the phrase "required to" in 108 paragraphs. See, for example, in paragraph 3.6 {D5/1/18} "the job holder had to push pull and twist"; in paragraph 3.21 {D5/1/20} "the job holder had to manually handle"; paragraph 3.37 {D5/1/22}, the job holder had to travel to waiting lanes."

38. Again, this language goes beyond a simple description of what is done. It is done too often to be a mere accident of drafting. It is likely intended to contrast with the irrelevant "contextual" material described at paragraph 25(5) above, where the Respondent appears to be keen to suggest that working in a store is an environment which has few demands and little pressure of expectation. In that context, the gloss of obligation added by this use of language is, like the use of the word "responsible", intended to make an unstated point about job demands.

39. A further contrast is seen in the Respondent's approach to the Claimant RoDs. While in the EJVDs, the Respondent states that the comparators "had to" and were "required to" do things, in the Claimant RoDs the Respondent has repeatedly changed the descriptions of the work that the Claimants "do" to say that they "may", "might" or "could" do such work.

Subjective language

40. The comparator EVJDs are littered with evaluative and subjective language. To give some examples: in Ernie Davis' EVJD "careful" or "carefully" are used 15 times; "pressure" or "pressures" are used 18 times; "monotony" or "monotonous" are used 10 times; "concentrate" or "concentration" are used 12 times; "demand", "demands" "demanded" or "demanding" are used 19 times. There are other examples.

41. By contrast, in the RoDs prepared in response to the Claimant EVJDs the Respondent seeks to add subjective language to the Claimants' EVJDs which has the effect of minimising or devaluing the work they do. For example, the Respondent proposes inserting the word "routine" at 7 points in Carole Worthington's EVJD and at 5 points in Janice Cannon's EVJD. In the Respondent's proposed changes, the word "only" is inserted to convey a limitation on the work done 6 times in Carole Worthington's EVJD, 9 times in Janice Cannon's EVJD and 21 times in Siobhan Williams' EVJD. This is exactly the language that the ILO guidance (paragraph 30 above) states should not be used as it devalue[s] the role. Specific examples include: at paragraph 3.7.3 of Siobhan Williams' EVJD, which deals with responding to customers' body language, the Respondent seeks to add "although JH would

> likely only notice such body language in the most obvious of cases" {C5/3/16}6; and at paragraph 9.3.5, concerning resetting the till receipt machine: "it only involved the JH pressing the reset printer button on the Mainbank Checkout" {C5/3/41} [Emphasis added]. The suggested language was not, it will be noted "the JH was 'responsible for' or 'had to' press the reset printer button …'.

29 In paragraph 14 of the respondent's main opening skeleton argument, this was said.

> 'The Harcus Sinclair claimants have suggested that it is for the full Tribunal to determine only "factual" disputes. However, as the EV rules make clear, if there is a dispute, the Tribunal must also determine the relevance of asserted facts to the question of whether a claimant's "work" is of equal value. What "relevance" means for this Stage 2 hearing is that if a fact might reasonably be relevant for the purposes of the later assessment of value by the IEs or party experts, that fact must be included in the job description.'

30 There was no authority given for the proposition in the final sentence of that paragraph, and none was provided to us during the course of the hearing. The proposition did not take into account the effect of rule 6(3) of the EV Rules, which is in these terms:

> "At any stage of the proceedings the independent expert may make an application to the Tribunal for some or all of the facts relating to the question to be amended, supplemented or omitted."

31 The Harcus claimants also said this in paragraph 18 of their main opening skeleton argument.

> "The Harcus Claimants recognise that completing the evidence in the allotted time will require robust tribunal management of the hearing, and that none of the parties is likely to be able to ask all of the questions they would wish to if there were no time constraints. For example, one of the Respondent's statements served in relation to a Harcus Claimant (from Matt Diment) is 187 pages long (which is nearly twice as long as the JD to which it responds) and to ask about every disputed matter in that statement would take many days. It should be remembered, however, that the aim of this hearing is for the tribunal to make findings of fact about what 6 store workers and 8 DC workers did at work on a day to day basis. To allow more than 5 weeks would, the Harcus Claimants say, be wholly disproportionate to that aim."

32 The timetable which the Harcus claimants proposed was in fact the most attractive to us, as it used for the hearing of the evidence the time which had originally been set aside for the hearing of evidence. However, it was not realistic, given the volume of material which we were going to have to consider, even on the basis that much of the material before us was either a duplication or of at

best only peripheral relevance and, if it were relevant, of only little weight. The timetable proposed by the respondent was not included in the respondent's main opening skeleton argument and we saw it only because it was set out in an additional skeleton argument for the Harcus claimants in relation to the steps to be taken for the hearing of evidence from such of the witnesses as were properly to be regarded as vulnerable. The respondent's proposed timetable proposed the use of the whole of the hearing time up to and including 28 April 2023 for the oral evidence of and relating to the six sample claimants. That evidence consisted of the sample claimants' own oral evidence and much oral evidence intended to be adduced by the respondent in response to that of those claimants. The respondent's proposed timetable did not allow any time for the evidence on behalf of the respondent from and in relation to the eight comparators. The justification for that stance was stated in the following paragraphs of the respondent's main opening skeleton argument.

> '**TIMETABLE**
>
> 119 The parties will work to seek to agree a timetable. The claimants' counsel have kindly sent a first draft timetable to the respondent's counsel.
>
> 120 It is important to note that Stage 2 hearings are not like regular Tribunal cases where all facts do not necessarily have to be found as many will be background to the central issues in dispute. In Stage 2 hearings, every point of fact in dispute which is relevant to evaluation requires determination for the purposes of the job description, and in this case, there are thousands of them (although the parties will continue working to narrow disputes up to and during the hearing).
>
> 121 The respondent's overriding concern is that it would not be in the interests of justice for the case to be shoehorned into the available time at the cost of the opportunity to test all issues in dispute properly.
>
> 122 As HHJ Clark said in the equal pay context, "proportionality […] cannot override the duty to do justice according to law between the parties" *Hovell v Ashford & St Peter's NHS Trust* [2009] ICR 254, para 11. There are other authorities in other fields of law expressing the same approach – that fairness must not be sacrificed to speed.'

33 The problem with the approach which was proposed by the respondent at that time was that it assumed that the hearing would have to be adjourned part-heard, and such an adjournment would have been highly undesirable from the point of view of the doing of justice. In addition, if we accepted the proposed approach of the respondent then the length (and therefore the costs) of the hearing would be increased considerably. The claimants' counsel both (understandably and justifiably) expressed considerable alarm and concern at the prospect of those things. However, the first day of the hearing was taken up entirely by the advancing of three applications, one made by each set of claimants and one

made by the respondent. The first two applications were made by the Leigh Day claimants and the respondent for the taking of measures over and above those which had been agreed by the parties with a view to ensuring that all of the parties' witnesses who might be considered to be vulnerable were able to give their evidence effectively and fully. The third application was made by the Harcus claimants and was for us to exclude (i.e. not admit as evidence) certain passages from the witness statement of Mr Matt Diment.

34 On 7 March 2023, we the tribunal spent a day (1) reading as much as we reasonably could in order to start to be able to hear evidence and (2) considering those three applications. During the course of 7 March 2023, we sent by email our decisions on the three applications and our reasons for them. We say no more here than that we dismissed all three applications for the following summary reasons. We dismissed the first two applications because we concluded that the measures which had previously been agreed by the parties would in our view be sufficient. We did not determine the third application fully on 7 March 2023. We left it open to the Harcus claimants to press that application if it appeared to them to be necessary to do so. The possibility that it would not be necessary to do so arose from the fact that we, through EJ Hyams, repeatedly said to the parties both on the first day of the hearing and on the second day with the parties present, 8 March 2023, and subsequently, that we would be determining only relevant factual matters, and because Mr Epstein helpfully said that (1) the respondent would not be relying at this stage 2 hearing on any assertions of fact in the respondent's witness statements or EVJDs which were not material to the issues which we had to decide at this stage 2 hearing, and (2) things which were relevant only at a final hearing within the meaning of the EV Rules fell within that description of immaterial factual assertions. However, Mr Epstein was not willing to accept on behalf of the respondent that the physical location of a distribution centre ("DC") was not material in a stage 2 hearing. He also asserted that "the presence or absence of direct or indirect supervision is going to be highly relevant".

35 On 8 March 2023, EJ Hyams discussed with the parties the need to confine the scope of our inquiry to those things, and only those things, which were relevant, albeit that if something factual was relevant only peripherally then we might conclude that it was not in the interests of justice, applying the overriding objective set out in rule 2 of the Employment Tribunals Rules of Procedure 2013, to come to a conclusion on that thing. Rule 2 provides this.

> "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."

36 In the end as a result of

36.1 us (1) allocating to the hearing with the parties present days which had been set aside for our use in private, i.e. 2-5 May 2023, (2) allocating to the hearing some additional hearing days (28-31 March 2023 and 15, 16 and 23-24 May 2023), (3) allocating an additional six days (11, 12 and 14 April 2013 and 9, 10 and 12 May 2023) for us to read (in private) witness statements and EVJDs, and in the latter set of days to start to read the transcripts of cross-examinations, (4) doing much reading of the parties' witness statements and EVJDs otherwise than during the hearing day, and (5) limiting the time for the cross-examinations of both parties, and

36.2 much hard work and co-operation on the part of all of the parties during the period from 6 March onwards,

the oral evidence of the parties was concluded by 16 May 2023. We then heard oral submissions on 23 and 24 May 2023.

Site visits

37 In addition, we carried out site visits on days which were not originally set aside as hearing days for the tribunal. On 22 February 2023, we spent a day visiting three of the respondent's stores at which some of the sample claimants worked. They were Watford Extra, Danbury Express, and Broomfield Road Express. The latter two were situated in Essex.

38 On 13 April 2023, we visited the respondent's Thurrock Distribution Centre and its Hinckley Distribution Centre, at which some of the comparators worked.

Translation issues

39 The time which we had to hear oral evidence was reduced by an application which was made by Mr Purchase on behalf of the respondent at the start of the hearing day on Friday 21 April 2023. That was the day after Mr Macko's evidence

had been given through an interpreter of the Slovak language. The application was for permission for the original versions of the witness statements of at least (see below in this paragraph) the other two comparators for whom English was not their first language, which were made in those witnesses' first languages, to be put before those witnesses while they were giving evidence. Those other two comparators were Mr Hornak and Mr Pustula, whose first language was, respectively, Slovak and Polish. We did not understand Mr Purchase to be asking for Mr Macko to be recalled and given a further chance to answer questions by reference to the original version of his witness statement and a translation of the EVJD for him, but it appeared when we reviewed the text which we have set out in paragraph 43 below that he was envisaging that as a possibility.

40 The EVJDs for all of those comparators had (understandably) been written on behalf of the respondent in English. Mr Purchase applied for permission for translations of those EVJDs also to be put before those comparators when they were giving evidence.

41 The stated justification for the application was that the comparator witnesses would be put at an unfair disadvantage if they did not have their original witness statements and the translations of the EVJDs prepared in respect of them (i.e. those witnesses) by the respondent before them when they were giving evidence.

42 The application was vigorously opposed by both sets of claimants' representatives.

43 The justification for the application was initially put in this way by Mr Purchase.

> "It's that the Slovakian versions of those documents should be used as the starting point for them, and I'll explain why. But before I do that, it's important to note first that Mr Macko's grasp of English is stronger than Mr Hornak's and, as I understand it, stronger than Mr Pustula's, who will also be giving evidence next week.
>
> We're in a position where necessarily significant passages of witness statements and job descriptions are being relied on, significant both in the sense that they're quite long and in the sense that they're quite dense, and in the sense that they're quite technical. The translation exercise is obviously far from straightforward for the interpreter as well. What we say is that that situation clearly puts these witnesses at a disadvantage compared to witnesses who speak English as their first language. Those speakers have the luxury of being able to read those documents when they're being asked questions, to go back to them, to remind themselves of them, to refer to them. The witnesses who don't speak English as a first language do not have that. The level of concentration required of those witnesses as well is necessarily that much greater because they're having to try to remember translations which have been given to them sometimes at considerable length. Obviously, the scope for misunderstanding is

> greater, partly through the process of interpretation, full stop. Partly because of those circumstances which I've just mentioned. So if I can turn, first, to the witness statements. There really ought, in my submission, to be no issue at all in terms of using the Slovakian versions of the statements or the foreign language of the statements as the starting point. In fact, arguably those should be used, because it is they that are the authentic document. The witness evidence was actually prepared in Slovakian and it's the Slovakian statements which are approved and relied on by the witnesses. It's the English versions which are the translations."

44 He added that "insofar as there is any difference of position in relation to the job descriptions and any basis for legitimate concern, the unfairness to the witness of being shown an English version of the job description, which they won't fully understand, and then having to answer questions based on a spoken translation of what is sometimes very dense and technical and long material outweighs any such concerns."

45 Mr Jones on behalf of the Leigh Day claimants pointed out that they were not in a position to accept that any translation of the EVJD was accurate, and that the witness statements of the relevant witnesses which we had read and on which the respondent placed reliance were in English and had been certified to be accurate translations of the original versions in the witnesses' native languages. Mr Hornak was expected to give evidence on that day. Mr Jones said that if the respondent were permitted to put before Mr Hornak a translation of the EVJD for him on that day, then the claimants would not be able to ascertain whether or not it was an accurate translation and therefore the claimants would not be in a position to deal with the evidence of Mr Hornak on that day.

46 We refused the application advanced by Mr Purchase. We did so because we concluded that it would be contrary to the overriding objective in rule 2 of the Employment Tribunals Rules of Procedure 2013 to grant it. That was for the following reasons.

46.1 Granting the application was not <u>required</u> by the interests of justice. That was not least because the witness statements of the witnesses who were being cross-examined and the EVJDs relating to those witnesses' work were being quoted to those witnesses only to help them to understand the cross-examination question which was about to be asked of them.

46.2 Those witness statements and the EVJDs were at the time of the cross-examinations prior statements which would be relevant only as prior inconsistent statements, and only if the witness said something that differed from those statements.

46.3 Those witness statements and EVJDs did not need as a matter of fairness to be read to the witnesses before the cross-examination question was put; they were being put to the witnesses in that way as a result of an agreement between the parties that the witnesses would be given more warning of the

reason for the question than was required by the common law. The main purpose of that agreement was to help those witnesses who could be regarded as vulnerable, to give reliable evidence.

46.4 While what was sought was said by Mr Purchase to be required out of fairness to the relevant witnesses, they were not accused of any wrongdoing, and the only potential unfairness, if such were caused, would be caused to the respondent.

46.5 Fairness to the respondent was in our view achieved here by the provision by His Majesty's Courts and Tribunals Service of an independent interpreter, at public expense.

46.6 If we granted the application then there would be a delay at that crucial stage of the hearing, when we already had a tight timetable for the completion of the oral evidence and submissions.

47 We could see no appellate authority for doing what was sought in the application advanced by Mr Purchase. While that factor was in no way determinative, it fortified our conclusion that the provision of an independent interpreter was sufficient to satisfy the requirements of fairness and the interests of justice.

48 As it happened, during the course of the hearing, the respondent added to the hearing bundle the original witness statements of Mr Hornak and Mr Pustula and translations of the EVJDs for them, and on several occasions when those witnesses were being cross-examined, we permitted (without objection by the claimants' counsel) them to look at those documents before answering a question. For the sake of completeness, we record here that during the making by the parties of closing oral submissions, Mr Purchase indicated that he would, if we had granted the application to which we refer in paragraph 39 above, have asked that those documents were put before those witnesses rather more frequently than he did in fact do so.

The witnesses from whom we heard oral evidence

49 We heard from the following witnesses, in the following order. In each case, we state on whose behalf the witness was called and the day, or days, when they gave oral evidence.

49.1 **Mrs Carol Worthington**. She was one of the sample claimants. She gave evidence on 8 and 9 March 2023. At all material times (i.e. throughout the period from 18 February 2012 to 31 August 2018, to which we refer from now on as "the relevant period") she worked as a "Customer Assistant – Replenishment" in the dairy department at the respondent's Woolton Superstore ("Woolton").

49.2 **Mr Colin Richardson**. At the time of giving evidence to us he was the Manager of the respondent's Church Road Haydock Superstore

("Haydock") and had been the manager of Woolton from July 2014 until the end of the relevant period. He gave evidence on behalf of the respondent in relation to the work done by Mrs Worthington. He did so on 10 March 2023.

49.3 **Ms Rebecca Thompson**. She was a sample claimant. She worked as a customer assistant in the non-food department of Haydock, replenishing from 4.45pm to 10pm on Friday and Saturday evenings between 13 October 2017 and 31 August 2018. She gave evidence on 13 March 2023 and for most of 14 March 2023.

49.4 **Ms Abbie Parkin**. She was the respondent's "F&F Clothing and General Merchandising Manager" at Haydock. She gave evidence on 14 March and for most of 15 March 2023 on behalf of the respondent in relation to the work done by Ms Thompson.

49.5 **Ms Charlotte Pilling**. She was employed by the respondent as a Team Manager during the period from 13 October 2017 to 31 August 2018 at Haydock. She gave evidence on 15 March 2023 on behalf of the respondent in relation to the work done by Ms Thompson.

49.6 **Mrs Roxanne Garrod**. She was a sample claimant. She worked at the respondent's Danbury Express Store ("Danbury") and the respondent's Broomfield Road Express Store ("Broomfield") throughout the relevant period as a customer assistant. She gave evidence on 16 March 2023 (when we started the hearing with the parties present at 11.00am) and until lunchtime on 17 March 2023.

49.7 **Mr Matt Diment**. He was the manager of Danbury and subsequently Broomfield during the relevant period. He gave evidence on behalf of the respondent about the work done by Mrs Garrod. He did so in the afternoon of 17 March 2023 and in the morning of 20 March 2023. (We then adjourned the hearing to the start of the next hearing day, 21 March 2023.)

49.8 **Ms Siobhan Williams**. She worked throughout the relevant period as a customer assistant at the respondent's Kingstanding Express Store ("Kingstanding"). She was a sample claimant. She gave evidence on 21 and 22 March 2023.

49.9 **Ms Catrina Jemmett**. She was the manager of Kingstanding from 1 May 2017 to 31 August 2018 and gave evidence on behalf of the respondent about the work done by Ms Williams. Ms Jemmett gave that evidence on 23 March 2023 (when we commenced the hearing with the parties present at 11.00am) and for the first part of 24 March 2023.

49.10 **Mr Andrew Woolley**. He was employed as the Deputy Manager of Kingstanding from 5 August 2013 to 8 August 2016. He gave evidence on behalf of the respondent about the work done by Ms Williams. He did so

on 24 March 2023 from 11:31 to 13:16, when we adjourned the hearing until Tuesday 28 March 2023.

49.11 **Ms Toni Oz**. She was a sample claimant and during the whole of the relevant period worked as a "Customer Assistant (Nights)" at the respondent's Wisbech Superstore and then, when it closed and was immediately replaced by the respondent's Wisbech Extra store ("Wisbech Extra"), at the latter store. She gave evidence on 28 March 2023.

49.12 **Mr Richard Priest**. He was employed by the respondent as a "Night Line Manager" in the respondent's Wisbech Superstore from June 2013 to April 2014 and then, when Wisbech Extra opened in April 2014, he transferred to that store and worked as a "Night Team Manager". He gave evidence on 29 March 2023 on behalf of the respondent about the work done by Ms Oz.

49.13 **Mr Matthew Rouse**. He was employed by the respondent as "Lead Night Manager" at Wisbech Extra from March 2017 to 31 August 2018. He gave evidence on behalf of the respondent about the work done by Ms Oz. He did so during the final part of 29 March 2023.

49.14 **Mrs Janice Cannon**. She was a sample claimant. She was employed throughout the relevant period as a "Customer Assistant – Nights" in the respondent's Watford Extra store ("Watford Extra"). She gave evidence on 30 March 2023. She worked in the clothing department at Watford Extra during the relevant period. That department was known as "F & F", having previously been called "Florence & Fred".

49.15 **Ms Alison Humphreys**. She was the manager of the F & F department at Watford Extra from June 2014 to 31 August 2018. She gave evidence on behalf of the respondent about the work done by Mrs Cannon during that period. Ms Humphreys gave evidence on 31 March 2023.

49.16 **Mr Christopher Gleiwitz**. He worked at Kingstanding from August 2012 to February 2013. He gave evidence on 17 April 2023. He did so on behalf of the respondent about the work done by Ms Williams.

49.17 **Mr Paul Evans**. He was employed by the respondent as a shift manager at the respondent's Magor DC throughout the relevant period. He gave evidence on behalf of the respondent about the work done by two of the eight comparators. Those two were Mr Wayne Jones (who, alone among the comparators, did not give evidence to us) and Mr Ernest Davis. Mr Evans gave evidence on 17 April 2023 and for most of 18 April 2023.

49.18 **Mr Michael Rogers**. He was employed by the respondent as a "People and Safety Trainer" ("PST") at Magor DC from 2017 to 31 August 2018, but also doing the work described as "assembly" and "loading" which were the core of the work done by a number of the comparators. From the start

of the relevant period until the time in 2017 when Mr Rogers became a PST, Mr Rogers trained colleagues on those tasks of assembly and loading at Magor as well as doing those things himself. Mr Rogers gave evidence on behalf of the respondent on 18 April and during the morning of 19 April 2023. His evidence related to the work done by Mr Ernest Davis.

49.19 **Mr Paul Matthews**. He was employed throughout the relevant period as a Warehouse Operative at Magor DC, doing assembly for about 60% of his time, and as a Trainer for the rest of the time, giving training on various things including the operation of fork lift trucks, health and safety, and assembly. He gave evidence on behalf of the respondent. He did so on 19 April 2023. His evidence related to the work done by the following comparators: Mr Wayne Jones, Mr Ernest Davis, Mr Martin Hornak and Mr Vlastimil Macko.

49.20 **Mr Vlastimil Macko**. He worked as a Warehouse Operative at Thurrock DC throughout the relevant period. He gave evidence (through an interpreter of the Slovak language) on behalf of the respondent on 20 April 2023.

49.21 **Mr Clive Pilley**. He was employed as a Night Shift Team Manager at Thurrock DC from the start of the relevant period until 2014. He gave evidence on behalf of the respondent about the work done by Mr Macko and Mr Hornak. Mr Pilley gave evidence on 21 April 2023.

49.22 **Mr Ernest Davis**. He was employed by the respondent as a Warehouse Operative at Magor DC throughout the relevant period, working nights. He occasionally worked during that period at an adjacent DC operated by the respondent, Magor Trunk DC. He gave evidence on behalf of the respondent during the morning of 24 April 2023.

49.23 **Mr David Jonathan Todd** (known as “John”). He worked as a Checker at the Hinckley DC throughout the relevant period. He was a comparator. He gave evidence on behalf of the respondent. He did so in the afternoon of 24 April 2023 and during the morning of 25 April 2023.

49.24 **Mr Anthony White**. He was employed by the respondent as a Shift Manager at Hinckley DC from 2015 until the end of the relevant period. He gave evidence on behalf of the respondent in relation to the work done by Mr Todd. He gave that evidence in the afternoon of 25 April and the first part of the morning of 26 April 2023 after we had resumed the hearing at 11.00am with the parties present.

49.25 **Mr Kevin Bates**. He gave evidence for the rest of 26 April and during the morning of 27 April 2023. He did so on behalf of the respondent. He was a manager at Hinckley DC. His evidence related to the work done by Mr Shawn Pratt and Mr Robert Pustula, both of whom were comparators.

49.26 **Mr Robert Pustula**. He worked at Hinckley DC during the relevant period as a Warehouse Operative. He gave evidence (through an interpreter of the Polish language) on behalf of the respondent in the afternoon of 27 April and in the morning of 28 April 2023.

49.27 **Mr Martin Hornak**. He worked at Thurrock DC during the whole of the relevant period as a Warehouse Operative. He gave evidence (through an interpreter of the Slovak language) on behalf of the respondent during the afternoon of 28 April 2023 and during the morning of 2 May 2023.

49.28 **Mr Shawn Pratt**. He was employed as a Warehouse Operative (Nights) at Hinckley DC throughout the relevant period. He gave evidence on behalf of the respondent for most of 2 May 2023 and the first part of 3 May 2023.

49.29 **Mr Richard Yates**. He was employed as a Warehouse Trainer and an Assembly Trainer at Hinckley DC in the relevant period up to 2016 when he became a full-time People & Safety Trainer there. He gave evidence on behalf of the respondent in the middle of 3 May 2023. His evidence related to the work done by Mr Pratt and Mr Pustula.

49.30 **Mr Christopher Bumpass**. He worked at Didcot DC as an Operative Team Manager during the relevant period. He gave evidence on behalf of the respondent about the work done by Mr Leslie Young, who was a comparator. Mr Bumpass gave evidence in the afternoon of 3 May and during the morning of 4 May 2023.

49.31 **Mr Leslie Young**. He gave evidence on behalf of the respondent during the afternoon of 4 May and the morning of 5 May 2023. He worked at Didcot throughout the relevant period principally as a forklift truck driver but also doing assembly.

49.32 **Mr Carl State**. He gave evidence on behalf of the respondent for part of the morning and all of the afternoon of 5 May 2023. He worked during the relevant period at Didcot DC. For part of that period, he worked as a forklift truck instructor and examiner and as a trainer, training staff on assembly. His evidence related to the work done by Mr Young.

Some salient aspects of the evidence before us and our findings of fact on those salient aspects

(1) Time pressures imposed by the respondent on the claimants

50 When being cross-examined, Mr Gleiwitz said that "We generally expect people to be working around 30 to 40 minutes a cage", but that it depended on the circumstances and the person. He clarified that that was per cage of what the respondent called "ambient" goods, so that what he was saying was that the

respondent expected shop floor staff to be able to put out on display the contents of a cage containing ambient goods within a period of 30-40 minutes. That was contrary to the stance which had before then been taken by the respondent's counsel in their cross-examination of the sample claimants (and, as shown by that which was said in paragraph 25(1) and (5) of the opening skeleton argument for the Leigh Day claimants, which we have set out in paragraph 28 above, generally), which was that they were under no particular time pressures. While the latter proposition was difficult to accept or understand, so that (as we, through EJ Hyams, pointed out at the time) it had an air of unreality about it, this evidence of Mr Gleiwitz was a new statement on behalf of the respondent about a matter which was of considerable importance. It was to the effect that the sample claimants were indeed under time pressures when doing at least one major part of their work.

51 In addition, we record here that Mr Richardson said on the fourth day of the hearing before us, i.e. 10 March 2023, at internal page 27 of the transcript for that day:

> "Yeah, I can recollect the team being asked to speed up. The delivery needed to be on a bit quicker. There was a lot to be done."

52 Mr Richardson then acknowledged that the staff of which Mrs Worthington was a part were not able to "pace" for themselves, i.e. determine for themselves how fast they would do, their work, and he said that if they were not moving quickly enough then he, for example, would tell them so. In addition, Mr Richardson said that the target time for getting a dairy delivery out on the shop floor was 11.00am. We understood that to be a target to get out onto the shop floor all of the dairy and related "fresh" items which had been delivered that day for which there was at that time room in the chilled cabinets on the shop floor.

53 There was too a document copied at page 109 of the EVJD for Mrs Cannon, which Ms Humphreys, her line manager, accepted she (Ms Humphreys) had created and put on the Watford Extra noticeboard. That had the following text in it.

> "**F & F Productivity Timings – Delivery & pre-sort**: **Productivity Timings**
>
> In order to manage workload please use the timings below as a guide for how long it will take colleagues to carry out certain tasks and routines.

Boxed delivery – 35 minutes a dollie	
Average delivery size	**Average time to complete**
5 dollies	3 hours
10 dollies	5 hours

15 dollies	8 hours
20 dollies	10 hours
25 dollies	13 hours

Hanging cage delivery – 23 minutes a cage	
Average delivery size	**Average time to complete**
5 cages	2 hours
10 cages	4 hours
15 cages	6 hours
20 cages	8 hours
25 cages	10 hours

Did you know: Boxed blue tray deliveries currently make up around 80% of your total delivery. Hanging cage deliveries make up approximately 20% of your total delivery throughout the week.

If you have more than one colleague working delivery the timings should reduce. For example, two colleagues working 5 dollies should take 1.5 hours whereas one colleague working 5 dollies would take 3 hours on average.

RFID Delivery receive scan	
Average delivery size	**Average time to complete**
5 dollies	2 minutes 30 seconds
10 dollies	5 minutes
20 dollies	10 minutes

If your portals do not work then make sure that you are completing the delivery receive scan function on the RFID handheld. It should take you 30 seconds per dollie to do so this."

54 It was put to Mrs Cannon in cross-examination (recorded at line 13 of page 11 of the transcript for 30 March 2023) that "there was no pressure from Tesco for [her] to work at anything other than a pace that was comfortable to [her]". She agreed

that she had not been taken to task expressly by Ms Humphreys in regard to the speed at which she worked but said (as recorded at line 15 on page 14 of that transcript) that she thought that "questions would have been asked" if she had not finished the task which was referred to by the parties as "availability" as "that might have been a disappointment" to her line manager. There was then this exchange.

> "Q. Okay. But you were never challenged by your manager about not doing availability , were you?
>
> A. I was never challenged by my manager. I did a really good job to the best of my ability , and if that .... if that meant missing a break and staying on, then I would do that for her.
>
> Q. Okay. Would you accept that in fact the only time your manager would even question a position was if there really was a lot of work that she'd left for somebody and it hadn't been done?
>
> A. I've never been in that position to have anything questioned, so I couldn't really tell you. And I don't know of anyone that has been in that position.
> Q. Okay.
>
> A. But I never, ever wanted to be in that position, purely the fact that I work very fast, very hard and .... and I do the best I can, and I know what the standards are on our department. So I'm .... I'm trying to achieve those standards every time I'm in, and it can be very, very challenging on our department."

55 Given the evidence to which we refer in the preceding paragraphs (50-54) above, and given the fact that it was highly unlikely that an employer such as the respondent would impose targets on its distribution centre (or central warehousing) staff but not expect its shop floor staff to work under any kind of time pressures, we came to the firm conclusions that

55.1 the claimants were put under time pressures in the same way that the respondent's DC staff were put under time pressures, and

55.2 the only material difference in this regard between the two sets of staff was the fact that some of the DC staff wore arm-mounted computers or terminals about which we heard much oral evidence, as a result of which it was possible to monitor more effectively their use of time.

(2) The relevance of some of the evidence adduced by the respondent, including the statistics which were included in the respondent's witnesses' witness statements

56 A second salient feature of the evidence before us was that on many occasions during the cross-examinations of the respondent's witnesses, it became clear that they had attested to things about which they had no knowledge, such as statistics or percentages about relevant things. The Leigh Day claimants referred to this as "an exercise in ventriloquism". That was done in the following passage of their written closing submissions:

> '24. ... Rather than rely on the evidence of the job-holders, the Respondent called 12 DC Management witnesses and 10 Store Management witnesses (a further witness, who had never met the Claimant his statement purported to speak to, was not called). It will not have escaped the Tribunal's notice that whereas the Store Management witnesses were keen to diminish the work (and the value of the work) done by the Claimants, the DC Management witnesses, by contrast, were there to talk up the jobs done by the Comparators. Mr Roux came to talk about the risks of working in DCs, no-one came to talk about the risks of working in stores. Many paragraphs of the witness statements simply asserted that the EVJDs were accurate: something which the witnesses frequently had to admit in cross-examination was not correct. Some witnesses were ultimately driven to admit that the language in their witness statements was designed to give the Comparator tasks a spurious complexity (see for example {Day24/125:5}, Ernest Davis agrees that to say counting between 5 and 15 items requires "a heightened and sustained focus" was "over-egging" it. It is unlikely that that phraseology originated with him); others that they had little direct knowledge of what the Claimants were doing whilst working on shift (see for example Catrina Jemmett's evidence at {Day13/58:2} and {Day13/63:21} or Christopher Gleiwitz's evidence at {Day19/44:23} to {Day19/45:6}); and still others that the figures they were attesting to were not ones they could verify from their own knowledge (Mr Black's evidence being the standout example, but see also, for instance Mr Hornak on the question of how many times he got on or off his LLOP).
>
> 25. These were not occasional failures to come up to proof, there was a consistent pattern. The Tribunal may find it difficult to avoid the conclusion that much of the Respondent's witness evidence was an exercise in ventriloquism. One very clear example was Mr Black who had been put forward in a manner which, putting it at its lowest, left the impression that he had performed analyses of data that he had not in fact performed (see {B/3/15} 45 and {Day2/65:14}). On it becoming clear that the Respondent would have to acknowledge that it was lawyers and not Mr Black who had done the relevant analysis, he was made to "check their homework" in an effort to give him some sort of standing as a relevant witness. Even then it was first suggested that he had checked everything {Day33/135:15} only for him to have later to accept that he had not.'

57 There might be thought to be in that passage a degree of inconsistency with the submission that a sample claimant's or a comparator's job should be determined by us by reference in part, if not in large part, to the respondent's training documents or documents recording safe ways of doing things. We refer further to that submission in paragraph 76 below. As we record there, that submission was advanced in written closing submissions most clearly by the Harcus claimants, but it was advanced also on behalf of the Leigh Day claimants in oral submissions. It had in fact been foreshadowed by what Mr Jones said at the hearing of 19 December 2022 which led to the order set out in paragraph 84 below, as recorded in paragraph 10 of EJ Hyams' record of that hearing. The possible inconsistency to which we refer in the first sentence of this paragraph arose from the fact that if the training materials were paramount then by implication what a manager was able to say about the work in fact done by a sample claimant or a comparator was of significantly less importance than what was in those materials. However, taken in isolation, what was said in paragraphs 24 and 25 of the Leigh Day claimants' written closing submissions was entirely apt, and we accepted it. We concluded that the respondent's legal representatives had compiled evidence at least in part with a view to supporting the respondent's intended submissions to this tribunal, and then asked the witnesses who were called to give evidence to us to approve a witness statement (or statements) which was (or were) intended to support those submissions. Those witnesses had then felt obliged if at all possible to agree to those statements, and in at least some cases they had not read them properly before doing so.

58 The most important factual issue arising from what the Leigh Day claimants said was to an extent an "exercise in ventriloquism" was whether or not we should accept the statistics on which the respondent relied (and those statistics changed during the hearing when the respondent's legal team and those providing instructions to it provided new statistics via spreadsheets). We ourselves raised the question whether or not there was any evidential basis for those statistics. No witness was called to attest to the statistics by saying (1) that they had been drawn from the respondent's computer network and databases, and (2) in what way they had been extracted from that network and those databases. In the end, we were forced to conclude that there was no evidential basis for the statistics.

59 However, the respondent did, in documents such as that which was at G/363, which was a 41-page letter dated 1 May 2023 from Herbert Smith Freehills, solicitors representing the respondent, explain (albeit only through those solicitors) the manner in which the statistics had been created. As we ourselves (through EJ Hyams) observed during oral submissions, rule 41 of the Employment Tribunals Rules of Procedure 2013 permits a degree of latitude in relation to the admission of evidence in an employment tribunal. That rule is in these terms.

> "The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that

> general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts."

60 However, as EJ Hyams also pointed out, we had to act lawfully. When reflecting on this issue, we concluded that there had been nothing to stop the respondent from adducing evidence from one or more witnesses about the manner in which it had extracted the statistical evidence on which it relied from its network databases. Rather, we thought, it would have been fairly straightforward to have done that. If it had been done, then the claimants could have asked questions about the manner in which the statistics were derived and (if appropriate) compiled. It was also the case that the respondent had been somewhat selective in its approach to statistical evidence (if we can call it "evidence"), since, as recorded by the Leigh Day claimants in paragraph 24 of their written closing submissions, which we have set out in paragraph 56 above, the respondent had called a witness to put before us statistics related to accidents in DCs but no witness to do the same thing relating to accidents in stores.

61 After much careful thought, we initially concluded that we should admit the statistics on which the respondent relied at the end of the hearing before us, but treat them with considerable caution, and accord to them only such weight as appeared to us to be appropriate. However, when we were deliberating on the factual issues relating to the work of the first sample claimant from whom we heard evidence, Mrs Worthington, we came to the conclusion that we could not fairly accept any of those statistics, or alternatively that in the circumstance that the claimants had not been able to challenge in any way the manner in which those statistics had been derived and formulated, they did not constitute reliable evidence and for that reason alone we should not admit them.

62 Nevertheless, given the fact that we have (as we have stated in our above judgment, for the reasons stated in paragraphs 89-93 below) concluded that the parties must reformulate their cases on the factual issues before us, we have concluded that if the statistics are relevant then the respondent will be able to put new oral evidence before us about those statistics and the claimants will be able (unless they accept that new evidence) to cross-examine the giver(s) of that new oral evidence. We add, however, that if there are in existence statistics which were compiled or created by the respondent for purposes other than those of this litigation, then those statistics are likely to speak for themselves. We note in this regard that there was already in the papers before us at the time when we arrived at our above judgment at least one document which contained some potentially relevant statistics relating to accidents in stores and which appeared to have been created otherwise than for the purposes of this litigation. That document was drawn to our attention by the Leigh Day claimants. It was at C7/9.

(3) A salient inconsistency in the respondent's case

63 Finally here, we record that there was at least one salient example of a failure by the respondent to see an inconsistency in its case which could be regarded as resulting from a focus on the intended submissions of the respondent rather than on the facts. That example is that the sample claimants were repeatedly cross-examined on the basis that the cages which contained the goods which they were putting out on the shop floor were only rarely dangerous in that they only rarely had faults which might scratch the user if the user were taking proper care (for example it was said by Mr Purchase to Mrs Worthington on 9 March 2023, as recorded in lines 3-4 on page 90 of the transcript for that day, that "[if she had been] taking proper care [then she] could have avoided that, couldn't [she]?"), but the evidence of the respondent about those cages when they were in the DC and being filled with the goods which were subsequently delivered to the respondent's stores was (as stated most clearly in paragraph 6.183 of the EVJD for Mr Hornak and paragraphs 6.194 and 6.195 of the EVJD for Mr Pratt) that they had faults which "sometimes … caused lacerations" to the user's hands. That fact appeared to have escaped the notice of the respondent's legal team.

Submissions which we heard on the manner in which we should make our findings

64 One major issue on which we heard submissions was to what extent we should state in any document or documents recording our determinations those things on which the parties agreed. Initially, in part because we could see that we were (assuming that the parties had advanced their cases on the facts in an appropriate way) going to have to determine a large number of factual disputes, even if we confined our stated conclusions only to those things that we concluded were in fact relevant rather than just ones which might reasonably be regarded as relevant, we were inclined not to record those things which were agreed. However, after we were told that the parties might (and were likely to) spend a very long time disputing the manner in which those things which were agreed should be put before the independent experts, and after starting to record our conclusions on the relevant facts relating to individual employees, we concluded that we should record those things that were agreed in the same documents as those in which we recorded our conclusions on those facts. Having then taken a number of days to come to conclusions on the factual issues put before us in relation to the job of Mrs Worthington and having (1) started to do the same in regard to the job of Ms Williams and (2) looked at the Harcus claimants' submissions in regard to the job of Ms Thompson, we came to the conclusions stated in our above judgment. One of the things which should result from the parties complying with the orders which we have described in paragraphs 6 and 7 of our above judgment is that there will be no need for us to record the agreed facts.

Our conclusions on points of principle

65 We now state our conclusions on the points of principle which led to that judgment.

Relevance

66 We concluded that we had to decide what was relevant at this stage, and that if we merely decided what "might reasonably be relevant for the purposes of the later assessment of value by the IEs or party experts", as the respondent urged on us (as we record in paragraph 29 above; that position was maintained during closing submissions), then we would not be doing the job which the legislative framework, and the interests of justice, required of us. That was almost self-evident, but if there were any doubt about it, it was removed by rule 6(3) of the EV Rules (which we have set out in paragraph 30 above), which showed in our judgment that (a) we had to decide what was relevant, and (b) if the independent experts thought that we had failed to make a finding on or in relation to something relevant, then they could ask us to make a finding on or in relation to that thing.

Relevance of potential consequences for an employee if he or she did not do something

67 Time and again, it was put on behalf of the respondent in cross-examination to sample claimants that there was no suggestion of a negative (meaning disciplinary) consequence for them if they did not do something and then it was said in closing submissions that the absence of such a consequence meant that doing that thing was not part of a claimant's job. For example, in regard to one of the respondent's critical policies, which was known as its "Cold Chain" policy, this was said in the row numbered 67 in the ROD relating to Mrs Worthington:

> "There would be no consequences for the JH if the 20 minute guidance was exceeded."

68 However, there was nothing in the case law to support the proposition that there had to be a consequence for an employee arising from a failure to do something before it could be part of the employee's job for equal pay purposes to do that thing. Rather, the case law showed the opposite: see paragraphs 11-26 above. The opening words of paragraph 32 of Lavender J's judgment in *Beal* (which we have set out in paragraph 19 above) were the most clear authority for the proposition that the absence of a potential consequence for not doing something was irrelevant to the determination of whether doing that thing was part of the employee's job for equal pay purposes.

69 For the avoidance of doubt, we saw the reference in the part of Lord Denning's judgment which we have set out in paragraph 13 above to consequences as a reference to the consequences to the employer of a decision made by an employee, rather than to the disciplinary consequences to the employee.

Measures of performance and working conditions

70 Much reliance was placed by the respondent on the fact that it had a performance management regime in place at its DCs which entailed the application of performance indicators which were derived from the use of information and

communication technology by the comparators. That regime was the subject of the witness statement and oral evidence of Mr French. In paragraph 4 of his witness statement, he said that he had been 'asked to address the Claimants' proposed description of the Performance Index ("PI") i.e. the measure used by Tesco DCs to measure the productivity of its warehouse operatives, including the comparators.' That measure was referred to by the respondent as the "PI rate". The respondent applied different PI rates to different sets of employees, and it was Mr French's evidence (which we accepted in this regard) that those rates were measures of effort and were determined in part by reference to the physical layout and conditions of the workplace in question.

71 We posed the question of the relevance of those rates, and we heard submissions on that issue. After careful deliberation, we concluded that those rates were not irrelevant, since they were (for the reasons which we give in the following paragraph below) relevant to the time pressures on the comparators, and that at this stage, namely that of a stage 2 hearing, all we could do was to record our conclusions on (1) how those rates were decided on, (2) when they were relied on by the respondent in regard to each comparator (since the PI rate regime was not applied by the respondent to all of the tasks entrusted to the comparators), and (3) what those rates were in regard to each comparator. We also concluded, however, that the respondent's training documents relating to the work done by the sample claimants might (for the reasons which we given in paragraph 75 onwards below) be relevant in determining what time pressures were imposed on those claimants, such as in relation to the "cold chain" to which we refer in paragraph 67 above.

72 We concluded that the time pressures on sample claimants and comparators were relevant because the "demands" of a job within the meaning of section 65(6) of the EqA 2010 (which we have set out in paragraph 10 above) in our view had to be determined in part by reference to

72.1 physical conditions such as heat or cold,

72.2 dangers, albeit as mitigated by the taking of measures to reduce or eliminate those dangers, and

72.3 pressures of time.

73 We say "in part" not least because section 65(6) itself refers to "factors such as effort, skill and decision-making" (our underlining). However, we concluded that the three factors which we have set out in the preceding paragraph above would be relevant in determining what were the demands of the job in question.

74 Contrary to the respondent's submissions, what would not in our view be relevant at this stage was the physical location of the workplace as such, for example whether it was in a peaceful residential neighbourhood or an isolated industrial park. Nor would the relationships which the job-holder had with his or her colleagues be relevant at this stage.

Training documents and manuals

75 Before considering the parties' contentions on the factual issues before us, we came to a provisional conclusion that the respondent's training documents and related documents such as manuals (including safety manuals) or sets of instructions about how to carry out tasks safely were likely to be the best evidence of what the job in each case entailed. That was because of the case law to which we refer in paragraphs 11-26 above. It is true that (as it was emphasised to us by Mr Epstein in oral closing submissions) *Shields* concerned a claim for equal pay for like work, and not work of equal value, but in our judgment (for the reasons which we give in paragraph 12 above) *Shields* is authority for the proposition that in determining whether work was "equal work" within the meaning of section 65(1) of the EqA 2010, the question is what was the *job* of each person: not what was it that they did minute by minute when they were at work. That which they did which went beyond their employer's express written requirements might (given what was said in paragraph 32 of the judgment of Lavender J in *Beal*, which we have set out in paragraph 19 above, and what Bridge LJ said in *Shields* which we have set out in paragraph 18 above) have become part of their job for the purposes of an equal pay claim, but that did not in any way detract from the proposition that the best way to see what was an employee's job for those purposes was to see how the employer required the employee to work. That in turn could at least normally best be seen by reference to what was in the employer's training documents and (assuming that they were not a simple repetition of what was in the training documents) its instructions on how to do the things which the employee did, or was contractually required to do. Those documents and instructions would be likely to take a number of forms, and their precise format would not be important.

76 Having come to that initial conclusion, we carried out the exercise to which we refer in paragraph 89 below. We then came to a provisional conclusion that, given our conclusion stated in the preceding paragraph above, the parties had prepared and pursued their cases on the facts in a fundamentally erroneous way. We then reviewed the submissions of the parties about that issue. We were then reminded that the respondent's written closing submissions reflected at least broadly, and in some cases stated precisely, their stance that it was only if a claimant had actually received training of a certain sort that we could take into account the documents recording or imparting that training. We were also reminded of the Harcus claimants' submission in paragraphs 215 and 216 of their written closing submissions, which was this.

> "215. Second, information and evidence about training is relevant not because of the training per se, but because the training materials are excellent evidence of:
>
> a. what the jobholders actually did;
>
> b. how they did it; and

c. what the Respondent required/expected of the jobholders.

216. This second purpose is very important. In many instances, the training materials provide objective contemporaneous evidence of what the Respondent expected of its employees and, in most instances, the Tribunal may find that it can easily be satisfied that the jobholders were required to do their jobs in the way in which the training materials show, unless there is some specific reason to conclude that they did not. The training materials are evidence of what was required by the Respondent, even if the jobholders did not always do precisely what they had been trained to do. Moreover, the training materials are good evidence of what the jobholders did in fact do. It is a reasonable inference that, unless there is particular reason to doubt it, the jobholders did their jobs as they had been trained to do them."

77 We saw also that in that skeleton argument, this was said.

'Aspirational' training materials

228. One of the Respondent's surprising submissions during the Stage 2 Hearing was that the training material in relation to the Claimants' roles was merely '*aspirational*'. For example, the Respondent said that:

a. per Mr Purchase KC, '*A lot of training and policy material is setting out objectives or aspirations'* [reference given]*;* and

b. per Mr Epstein KC, *'Many of these training documents are aspirational and they don't reflect what was actually done in practice*'. [Reference given]

229. It was not entirely clear what the Respondent meant by that, but the submission always seemed to be aimed at trying to persuade the Tribunal that the Tribunal should 'water down' its findings in relation to the Claimants' '*work*' and not conclude that the training materials described what the Claimants did and/or were required to do.

230. The submission is surprising (and wrong) for a number of reasons.

a. First, it is entirely unsupported by any evidence, and is contrary to the evidence which the Tribunal has seen. The Respondent has not adduced a single bit of evidence, either in documentary form or from any of the tens of thousands of employees whom it could have chosen to call to give evidence, that Tesco employees were trained to a standard at which they were not expected to perform, or that the training contained anything other

than what management actually wanted employees to do. Instead, the evidence which the Tribunal has heard is that the Respondent (as one would expect) provided training to its employees using its training materials, and trained employees to do what was in the training materials in the expectation that the employees should do what they had been trained to do when they were doing their jobs. For example,:

i. Mr Bates acknowledged that loaders have to consider sticking to the rules they've been trained in to manage risk [reference given] and

ii. Mr Pustula accepted that he followed his training, and therefore would not have twisted his body. [Reference given]

b. Second, it is implausible that the Respondent's assertion could be correct. It would fly in the face of any commercial good sense for the Respondent to go to the time, expense and hassle of producing training materials which showed anything other than what the Respondent expected its employees to do and how the Respondent expected its employees to do it. Moreover, the Respondent appears to accept that all the training materials were materials which were used in training various employees, and so it would make even less sense for the Respondent actually to be providing training on anything other than that which the Respondent expected the employees to do.

c. Third, the use of the word '*aspirational*' / '*aspirations*' by both of the Respondent's leading counsel on separate occasions suggests that this is a deliberate position which is being taken by their client, rather than an 'off the cuff' remark. It is difficult to understand how the Respondent feels able to advance that position in circumstances where there is no evidential basis for it at all.

231. The Tribunal should reject completely the suggestion that the contents of the training materials were merely '*aspirational*' and/or should be disregarded by the Tribunal for any other reason The training materials assist the Tribunal in the three ways identified at paragraph 215 above:

a. they are evidence of what the job holders are likely to have done and how they are likely to have done it, as a matter of fact;

b. they are evidence of what was required of the job holders by the Respondent, even if the job holders did not always do precisely what they had been trained to do; and

c. they are evidence of some of the skills which were necessary in order to do the jobs."

78 Having by then (as we describe in paragraph 89 below) spent over a week determining the factual disputes relating to the job of Mrs Worthington, we came to the clear conclusion that those submissions of the Harcus claimants were entirely correct.

79 We record here too that while the respondent made separate submissions in relation to the training which each sample claimant had received, that is to say submissions (1) about what the evidence was in that regard and (2) to the effect that we should make findings of fact about precisely what training the sample claimants actually received, those submissions were in our view based on a fundamentally flawed proposition. That proposition was that it was necessary for the independent experts to know precisely what training the respondent had actually provided to (or arranged to be provided to) the sample claimants. That proposition was asserted to have been soundly based on the fact that the independent experts had here stated a series of factors which they were proposing (they called them "provisional factors": see page G/11/3) to apply when assessing the demands within the meaning of section 65(6) of the EqA 2010 which had been placed on the sample claimants and their comparators during the relevant period, and that one of them was this (at G/11/4):

> "**Factor 2. Experience – Training and Education required**.
> Three elements are considered under this factor – experience required, formal qualifications as indicators of the training/education required and the requirement to enhance the knowledge base.
>
> It should be noted that is experience [sic] is not just a matter of recording the years etc. we do need to know the sort of experience required and how it is relevant to the job.
>
> Qualifications/educational requirements should be treated with care – essentially, we need to know if there are any mandatory requirements such as a driving licence or food hygiene certificate. Other qualifications should be recorded with a comment as to whether they are desirable, essential, expected, etc.
>
> Enhancement of the knowledge base deals with the requirement for on going training or updating the knowledge etc. This may include attendance at courses to familiarise the job holder with changes in technology, new techniques or methods of working."

80 We saw that that factor referred to what was "required" for the job by way of (1) experience and (2) formal qualifications, but only "as indicators of the training/education required and the requirement to enhance the knowledge base". We saw too that while "mandatory requirements" by way of "qualifications"

or "educational requirements" were implied by the experts to be of central importance in applying this factor, there was a need to refer to "other qualifications", which might or might not be merely "desirable". In addition, the experts were there saying that all "Qualifications/educational requirements should be treated with care".

81 In any event, the training which the sample claimants received while they were employed by the respondent could in our view only rarely be relevant to "mandatory requirements" by way of "qualifications" or "educational requirements". The only training which could be material in that regard was that which related to, for example, the driving of a forklift truck or a heavy goods vehicle. However, the key factor then would be the formal qualification or certificate which resulted from the training, from which the required training could be deduced. That was because while the precise training which the employee received would be evidence of what the job required by way of training and experience, the formal qualification or certificate would in all probability be the best evidence of what the job required in that regard.

82 Such training as the sample claimants received during their employment by the respondent which related to the jobs which those claimants did during the relevant period was going to be relevant to show what the jobs were, as we say in paragraph 75 above, but whether or not the sample claimants actually received all of the training of which there was evidence in the respondent's records and which related to those jobs was, for the reasons given in that paragraph, not determinative of what the jobs were for present purposes. Far from it. However, there was much documentary material in the hearing bundle showing what training the respondents had given to persons doing the jobs which the sample claimants did. It was referred to by the respondent in its closing submissions only with a view to showing wherever possible that the sample claimants had not received that training.

83 The respondent's separate submissions on the training which the sample claimants had (or as the case may be had not) received were in fact remarkably long: for example the respondent's submissions on the training which Mrs Worthington had or had not received and related matters were 80 pages long, albeit that they were in tabular form much of which consisted of text in red font and struck through to show that the respondent was contending that that text should not be included in our document recording what we regarded as the relevant facts on which the independent experts should base their opinion. That length had to be seen in the light of the fact that the respondent's submissions relating to the facts which we should find about the job of Mrs Worthington (which were also in tabular form) were 139 pages long, and there were within those pages a number of blank rows. (There was also a considerable amount of repetition, albeit that some of that repetition was the result of repetition on the part of the legal team acting for the sample claimants in the EVJDs, to which repetition the respondent was responding.)

84 The claimants' closing submissions did not refer to all (or even the majority) of the documentary evidence relating to the training which the respondent had given to employees doing the same job as the sample claimants. That was almost certainly because of the volume of that evidence and the difficulty for all parties of dealing with each and every factual dispute before us, whether in cross-examination or closing submissions. At least some of that documentary evidence had in fact been provided by the respondent only as a result of an order (1) made by EJ Hyams at the request of the claimants at the final preliminary hearing before the stage 2 hearing which we conducted and (2) recorded in writing in a document which was sent to the parties on 4 January 2023. That order was in these terms:

> "2 The respondent must by ... 4.00pm on Monday 16 January 2023,
>
> 2.1 state what training modules it would have expected a staff member in each sample claimant's position to have undertaken up to and during the Relevant Period of 18 February 2012 – 31 August 2018, and
>
> 2.2 provide copies of those modules if they have not already been provided to the claimants."

85 Thus, there was in the bundle before us a substantial number of documents which were evidence of the training which the respondent would have expected to be given to persons doing the jobs of the sample claimants, but we had not by the end of the oral hearing been referred specifically by any party (either in oral submissions or in the documents which we had by then read) to some of those documents. We, however, made it clear through EJ Hyams during the hearing that we regarded all of those documents as being potentially relevant at least to the question of what was the job of each sample claimant, and (1) no party asserted that we should not refer ourselves to those documents when deliberating, and (2) while we were making our determinations of the relevant facts, we referred ourselves to all of those documents and not just those to which we had been specifically referred by one or more parties.

86 In fact, when deliberating and considering with care the provisional factor which we have set out in paragraph 79 above, we realised that those documents would be relevant in addition to the "Enhancement of the knowledge base" to which the independent experts referred in that factor. However, we also concluded that such enhancement would be relevant only to the question of what was "the job" of the relevant person (here the sample claimant in question).

87 In any event, given our conclusions stated in paragraphs 75-78 above, we saw no good reason to make determinations about precisely what training the sample claimants and their comparators had actually received, with one exception.

88 That exception was that the question whether an employee had received training would be material if the training had led to a determination (by whomever) that

the employee was competent to do the thing to which the training related and the respondent would (or could) not permit that thing to be done without such determination. We had in mind in this regard training to be a forklift truck driver. Thus, the question whether a comparator had received that training was material, but we could see no other training in regard to which we would need to make a specific finding of fact of that sort.

The way forward

Introduction

89 After we had come to provisional conclusions on the issues of legal principle to which we refer above (and in particular that which we state, as a firm conclusion, in paragraph 75 above), we started our deliberations on the factual issues which had been put before us. We first carried out a painstaking analysis of the parties' submissions on the facts relating to Mrs Worthington's job, and made findings of fact on all of the factual matters which were put in dispute by the parties in that regard. That took over a week, during the course of which we found ourselves looking at a number of points for, and finding, training documents of the sort to which we refer in paragraph 5 of our above judgment to which the parties had not referred but which were relevant to the job of Mrs Worthington. (We should say, however, that there was a considerable amount of overlap and repetition even in the documents of which there were already copies before us, and at least some of the documents to which we referred ourselves added little or nothing to those to which the Leigh Day claimants had already referred in their closing submissions.) We then turned to the parties' submissions on the facts relating to Ms Williams' job. We were dismayed by their length and complexity, especially, but not only, when it was borne in mind that her work was principally that of (1) replenishment and (2) operating a checkout. We then looked at the Harcus claimants' submissions on the job of Ms Thompson. We saw that they had not (despite their written submissions, to which we refer in paragraphs 76 and 77 above) referred there to very many of the respondent's training documents, although we did see that it was recorded in the respondent's closing submissions that the Harcus claimants had in communications with the respondent about the job of Ms Thompson relied on many training documents of the sort to which we refer in paragraph 5 of our above judgment. That led us to re-appraise the manner in which the parties had put their cases to us. Having done so, we came to the conclusion (to which we came reluctantly, and initially hesitantly but finally with certainty) that all parties had erred in the manner in which they had advanced their cases on the factual issues before us. We concluded that the respondent had prepared its case on the fundamentally erroneous basis recorded in paragraph 3 of our above judgment and that to the extent that the claimants had approached the factual issues in the same way, they too had erred. However, certainly by the time of closing submissions, the claimants were relying on the training materials which they had by that time been able to identify as being material to the jobs done by the sample claimants and their comparators, and both sets of claimants were saying to us that those training

materials were relevant in that they were at least good evidence of what those jobs were.

Possibly incomplete disclosure so far

90 In the course of our deliberations regarding the job of Mrs Worthington we referred ourselves to the document at C7/143. We saw that much of that document was not at that tab, but our searches suggested that it had been sliced up and put into the bundle as a series of documents. That possibility was apparent from the fact that at least the documents at C7/133, C/147 and C7/149 appeared to be part of the document the first part of which was at C7/143.

91 In any event, we concluded that the respondent might not have been able to locate (and had probably not been ordered to disclose: see the final part of this paragraph) all of the training documents to which we refer in paragraph 5 of our above judgment. The respondent's position had been that only documents relating to training which the claimants could show had been given to them should be taken into account, and given that the respondent's written closing submissions stated (in paragraph 286a) that the respondent was 'unable to say what training would have been given to "a staff member in the sample claimants' positions", only "what additional training was available and therefore might have been given to a different colleague doing the sample claimant's role with the sample claimant's job history"', it occurred to us that the respondent should be required to make a further search, carried out in the light of our conclusion stated in paragraph 75 above, for all documents of the sort to which we refer in paragraph 5 of our above judgment, and to disclose the results of that search in so far as the documents had not already been disclosed. We add here for the avoidance of doubt that the order which EJ Hyams made as recorded in paragraph 84 above was not as wide as the order which we have concluded should now be made, as the order set out in paragraph 84 above referred only to "training modules". The documents which should now be searched for and disclosed include for example (and we refer to this purely as an example; it is intended in no way to limit the breadth of the search) "safe systems of work", that is to say any documents recording safe ways of doing the things which the sample claimants and their comparators were required by the respondent to do as part of their jobs. We emphasise that the form of the document and its title will not be determinative of the question whether it should be disclosed. Rather, it will be the substance of the document that is important. By way of illustration, even a document stating guidance on how to do a task will fall within the scope of the description of a training document for the purposes of paragraph 5 of our above judgment.

New orders for the things referred to in rule 4(1)(d) of the EV Rules

92 We also concluded that we should make the orders which we describe in paragraph 7 of our above judgment. The reason for those orders should be apparent from what we say above, but the form which the new job descriptions should take may not be. We have it in mind that the new job descriptions (1) will

be such as have been agreed by the parties, (2) will not include statements of fact which are not about the tasks which the job-holder was required to do, and (3) will

92.1 state the tasks which the job-holder was required by the respondent to do, including their frequency and the length of time which they would typically have taken that job-holder to do;

92.2 state and append in respect of each such task the documents which (1) record or otherwise are the best evidence of the training, or (2) consist of the training, which a person doing that job would, or as far as the respondent was concerned should, have received; and

92.3 if it is contended that the job-holder carried out that task in a way which differed from the manner shown by that training, state

92.3.1 whether that manner was known about by the respondent, and, if so and it was correct to say it,

92.3.2 that the respondent had approved or at least knowingly tolerated that different manner.

93 We will on 19 (and if necessary 20) July 2023 hear submissions from the parties on the precise terms of the orders that we describe in paragraphs 6 and 7 of our above judgment, and in regard to consequential and related orders. One thing that we ought to say now is that we do not expect all of the documents evidencing or consisting of the training given to a claimant or a comparator to be appended to the agreed job descriptions. Rather, we envisage only enough documents doing those things to be so appended (so that we do not expect there to be any unnecessary repetition in that regard). We add that to the extent that working conditions are material at this (stage 2) stage, then they can be the subject of, or dealt with when complying with, the second and third of the three types of order to which we refer in paragraph 7 of our above judgment. We add too that the factual issues about which the parties disagree will need to be arrived at in the light of our above rulings on the law so far as relevant. Those issues may also need to be framed in the light of any comments made by any of the independent experts at the hearing of 19 and 20 July 2023. Finally, we record that we see a statement within the meaning of rule 4(1)(d)(iii) of the EV Rules as including a statement about things which would, if they had been agreed, have been dealt with in the job description within the meaning of rule 4(1)(d)(i) of those rules.

_____
Employment Judge Hyams
Date: 12 July 2023
Sent to the parties on: 12 July 2023

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For Secretary of the Tribunals