Neutral Citation Number: [2024] EAT 76

Case Nos: EA-2022-000398-AT
EA-2022-000962-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16 May 2024

Before:

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

Between:

(1) MS J ABBEY
and others

Appellants

- and -

(1) TESCO STORES LIMITED
(2) MS K ELEMENT and others,
represented by Leigh Day and
Harcus Parker (previously Harcus Sinclair)

Respondents

- -
- -

Rachel Crasnow KC and **Tom Brown** (instructed by KP Law Limited) for the **Appellants**
Paul Epstein KC and **Louise Chudleigh** (instructed by Freshfields Bruckhaus Deringer LLP) for the **Respondent Tesco Stores Limited**
Keith Bryant KC and Stephen Butler (instructed by Harcus Parker Employment) for the **Harcus Parker Respondents**

No attendance for the **Leigh Day Respondents**

Hearing date: 17 April 2024

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JUDGMENT

SUMMARY

Practice and procedure

In making case management orders relating to the stayed claims of one group of claimants in large-scale, complex, equal pay proceedings, the Employment Judge had permissibly exercised his discretion in declining to lift the stay to require the respondent to file its responses and in not making an entirely open order for disclosure of documents. The stayed claimants' appeals were dismissed.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. This appeal gives rise to questions as to how an Employment Tribunal ("ET") is to case manage large multiple claims; in particular, as to how it is to exercise its powers under the **Employment Tribunal (Constitution and Rules of Procedure Regulations) 2013** (the "ET Rules") in relation to cases within a larger multiple that have been stayed pending determination of sample claims.

2. For convenience, in giving this judgment, I refer to the appellants as the "KP claimants" (that is, the 6,000 odd claimants represented by KP Law ("KP") in these proceedings); to the first respondent as "Tesco" and to the remaining respondents (who respond only to the appeal in EA-2022-962-AT) as the LD/HP claimants (being the claimants represented either by Leigh Day ("LD") or by Harcus Parker ("HP")). For the purposes of this hearing, LD have not been separately represented and have adopted the submissions made on behalf of the HP claimants.

3. This is the full hearing of the appeals pursued by the KP claimants against two case management orders ("CMO"s) of Employment Judge Hyams sitting at Watford ET, as follows: (1) the CMO sent out to the parties on 6 April 2022, made after a preliminary hearing on 29 March 2022; and (2) the CMO sent out to the parties by email of 19 July 2022, as subsequently clarified by the ET's email of 18 August 2022.

The procedural history

4. The underlying claims form part of long-running equal pay litigation, pursued mostly by female shop-based employees, against Tesco Stores Limited. I understand there are over 47,000 claimants involved in the proceedings, in the ET and/or the High Court. Such claims were commenced in February 2018 (at that stage, the claimants were all represented by LD), and are case managed in the ET under the title of the **Element** multiple; no claims have yet been determined.

5. It has been explained to me that the Tesco equal pay claims have been divided into three tranches according to job role. The first tranche consists of three claimant job roles, with two sample claimants having been selected for each of the three roles, and their equal value claims (in comparison with a number of named comparators) have progressed to a stage 2 hearing which took place over approximately seven weeks from

March 2023. At the stage 2 hearing, the ET was invited to make findings in relation to 14 jobholders (six sample claimants and eight sample comparators); after the ET makes its findings, a team of three independent experts appointed by the ET will prepare a report on the respective value of the work of those jobholders. The ET will then conduct a final hearing (not yet listed) at which it will determine whether any or all of the sample claimants were performing work which was of at least equal value compared to the work which was being performed by any or all of the sample comparators. The ET has also listed a separate hearing (in September 2025) to determine Tesco's material factor defences to the claims.

6. Pursuant to a Presidential Case Management Order ("PCMO") dated 3 April 2018, all claims brought against Tesco in England and Wales raising "*the same or similar*" allegations to those in the **Element** multiple were combined and transferred to the Watford ET. Thus, pursuant to the PCMO, claims also brought by HP claimants from August 2018 were combined with the LD claims, and have been case managed by the Watford ET, along with any other claims raising the same or similar allegations (whether brought by LD, HP or any other representatives, or by claimants acting in person).

7. By a consent order approved by EJ Manley (the Employment Judge who was initially given the task of case managing the **Element** multiple) on 20 April 2021, a cut-off date of 1 May 2021 was agreed in respect of all claims brought on the basis of "*the same, or substantially similar facts*" to those in the **Element** multiple; as the order (made pursuant to rule 29 **ET Rules**) provided:

> "1 From 1 May 2021 (the "Cut-off Date"), any claims issued by any new claimants against [Tesco] on the same, or substantially similar facts, shall be automatically stayed for an initial period of 12 months from the date of this order. Prior to the expiry of the stay, the parties shall review the terms of this order and seek to reach agreement between themselves as to whether to extend or lift the stay.
> 2 [Tesco] shall be required to file any responses to any claims issued after the Cut-off Date within six months from the date on which the stay is lifted.
> 3 Any claims that are stayed pursuant to this order will remain in the Element multiple (case 3304495/18 and others)
> 4 Individual claimants may be released from the stay by agreement, in writing, between the parties. Any request for such a release, provided it is reasonable and proportionate, shall be agreed by the party to whom the request is made. In the event of a dispute arising in relation to a request for a release from the stay, the matter will be referred to the Employment Tribunal for a determination.
> …
> 6 A party may apply for the order to be varied or revoked by writing to the tribunal and copying in the other parties."

8. For completeness I note that, for claims presented prior to 1 May 2021, no formal stay is in place, although the only claims that have been considered at individual level are those of the sample claimants. At this stage, the ET has made no decision about the extent to which the decisions in relation to the sample

claimants will apply to the claims of other claimants and no order has been made for formal lead claimants pursuant to rule 36 **ET Rules**.

9. On 10 September 2021, the first of the KP claimants' claims was lodged with the ET. On 14 September 2021, EJ Manley directed that copies of the pleadings and copies of the most recent orders made at private preliminary hearings should be provided to KP. Subsequently, on 14 December 2021, having considered correspondence on the point, EJ Manley wrote to the parties, addressing the question as to how the balance was to be struck between protecting the interests of the KP claimants and allowing the active claims in the **Element** multiple to progress:

> "It is clear that the Presidential Order of 3 April 2018 applies to the [KP] claims. Those claims must be part of the combined proceedings. It is also clear that the Stay order of 20 April 2021 would also have the effect of staying the [KP] claims. The fact that an extension of time was granted for responses to be presented does not mean that the Stay was lifted but was to allow time for consideration of the letters from the respondent's representatives and [KP]. If [KP] wish the Stay to be lifted for consideration of their claims, they should make an application to that effect.
> Having said that, Employment Judge Manley appreciates that [KP] need more information to decide how to properly represent their clients and believes that it would assist all parties, the tribunal administration and judiciary if they could be supplied with the most recent case management orders. EJ Manley suggests that copies of the orders from the last two preliminary hearings are sent to [KP] as soon as possible so that any decision on whether to apply for lifting of the stay can be taken with better information. Unless any of the representative firms provide reasonable objections to this course of action by 21 December 2021, they will be sent then."

Further claims were filed by KP claimants in February and March 2022.

10. On 11 March 2022, KP applied for the following CMOs:

> "(i) Any stay imposed on the [KP] Claims pursuant to the consent order dated 20 April 2021 in the Element Multiple (a copy of which is enclosed) ("Consent Order") is hereby lifted for (and only for) [Tesco] to provide a response to the [KP] Claims.
> (ii) [Tesco] shall provide its response(s) to the KP Claims by [date of Tribunal's order + 28 days]."

11. By letter of 18 March 2022, Tesco resisted KP's application and sought an extension of the stay. The ET directed that KP's application was to be considered at a private preliminary hearing listed for 29 March 2022.

12. In preparing for the ET's consideration of its application, on 22 March 2022, KP wrote to those acting for Tesco asking for a draft index for the hearing bundle. By further letter of 24 March 2022, KP set out its position as follows:

> "… we are permitted to attend the Preliminary Hearing and make submissions on the subject of stay. In order for us to do that on an equal footing we ought to be provided with the full hearing bundle. We reserve our right to make submissions to

> Employment Judge Hyams on these points, either in writing before the hearing or at the hearing itself …
> … you agree that we should be provided with the bundle relating to our Application."

13. On 28 March 2022, skeleton arguments were filed by the KP claimants and Tesco relating to the application for the partial lifting of the stay to require Tesco to file ET3 responses to the KP claimants' claims.

The case management preliminary hearing of 29 March 2022

14. At the case management preliminary hearing on 29 March 2022, EJ Hyams (who had taken over conduct of the proceedings from EJ Manley on her retirement from salaried sitting) noted that, subject to the application for Tesco to be required to respond to the KP claims, it was common ground that the stay should be continued. Satisfied that the stay struck a balance between ensuring there were sufficient claims presented before the cut-off to enable the relevant issues to be determined, while avoiding unnecessary ET administrative costs and time in dealing with other claims; EJ Hyams considered that to be:

> "24.3 (1) consistent with the overriding objective stated in rule 2 of the [ET Rules], in particular (but not limited to) the desirability of dealing with the case in a way which was "proportionate to the complexity and importance of the issues" and of "saving expense", and (2) both just and fair."

15. Turning to the application that Tesco should nevertheless present responses to the KP claims, EJ Hyams rejected the submission by Mr Brown of counsel, for the KP claimants, that, without such responses, his clients could not know whether or not their claims were caught by the stay. Relevantly, as EJ Hyams recorded, counsel had accepted that:

> "… if one just looks at the details of complaint … there is substantial similarity between the details of complaint in the Element multiple claims and in the [KP] claims"

16. Considering whether the KP claimants might nevertheless be prejudiced by the fact that Tesco would not be required to provide a detailed response to their claims until the stay was lifted, EJ Hyams reasoned:

> "19 … it was in my view almost (but of course not completely) inconceivable that [Tesco] would in the future seek to advance a response which was not to substantially the same effect as the case which it eventually advanced at trial, and in any event all of the other claimants whose cases were stayed were going to be subject to precisely the same disadvantage (if there was one) as that to which the [KP] claimants would be subjected if I refused to lift the stay to the limited extent of requiring the respondent to present ET3 responses to the claims of the [KP] claimants."

17. Accepting that, because the stay had not been imposed pursuant to rule 36 **ET Rules**, the stayed claims would not be formally bound by the determinations made in the sample cases, EJ Hyams further reasoned:

> "20 … in practice it was difficult to see how [Tesco] could, after those determinations, credibly advance an argument in response to the stayed claims which was inconsistent with its approach to the (by that time determined) "lead" claims. In addition, if [Tesco] sought to advance an argument which it had not advanced in response to the now-determined "lead" claims, then it might well (albeit that it would not necessarily) receive short shrift from the judge to whom the argument was now advanced."

18. In circumstances in which KP had already had sight of the existing ET3 responses, EJ Hyams considered it would be inconsistent with the purpose of the stay that Tesco should be required to present responses to the claims of the KP claimants. Finding there was no justification for treating the KP claimants any differently from any other claimant whose claim was subject to the stay, EJ Hyams refused the application.

19. During the course of the discussion regarding KP's application for the partial lifting of the stay, EJ Hyams raised a question as to how the proceedings were to be run for the future (that is, in terms of KP's attendance at future private preliminary hearings and so on), albeit he acknowledged this was "*not on the agenda*" (p 42 of the transcript of the 29 March 2022 hearing). After EJ Hyams had given his ruling on KP's application, there was then a discussion regarding whether the KP legal team should be permitted to remain as observers for the remainder of the private case management preliminary hearing listed for that day. For KP, Mr Brown is recorded (pp 63-64 of the transcript) as making the following points:

> "… my position is that the question whether the [KP] team are allowed to observe today's hearing should be decided today. So I'm maintaining my request to be allowed to remain to observe for the remainder of the hearing … there is no desire to participate.
> …
> [Observing that participation without documentation would be ineffective] … my request would be that we be permitted to be sent the materials which the parties have sent to the Employment Tribunal for today's hearing, …"

20. For Tesco, these suggestions were resisted on the basis that this would effectively amount to a "*sea change*" (transcript p 67) in the way in which the private hearings were run, which was something that should only be allowed in response to a considered application. While Mr Brown did not disagree with that for the future, he maintained that he should be entitled to stay for the remainder of that particular hearing.

21. Ultimately, EJ Hyams agreed with Tesco, ruling that KP would need to make a formal application for observer status, if so advised, and that the *status quo* of non-attendance should be preserved in the interim; as Tesco had identified the issue:

> "29. … what [KP] should do was to make a formal application to be permitted to watch (meaningfully, i.e. in possession of the documents referred to during) future private hearings concerning the Element multiple, …"

22. In EA-2022-000398, the KP claimants have sought to challenge the decisions made at the hearing on 29 March 2022. Grounds (1) and (2) (which sought to argue that the ET erred in holding that the KP claims were subject to the underlying stay) were abandoned at an earlier hearing under rule 3(10) **EAT Rules 1993**; grounds (3)-(6) relate to the refusal to order that Tesco file responses to the KP claims; grounds (7) and (8) to the refusal to grant to allow KP to remain as observers for the remainder of the private preliminary hearing on 29 March 2022 (also suggesting that this extended to future private preliminary hearings).

The application for observer status and documents; the ET's decision of 19 July 2022

23. Notwithstanding grounds (7) and (8) of the appeal in EA-2022-000398, by application of 11 May 2022, KP duly applied under rule 35 **ET Rules** for the following CMOs:

> "a. Confirming that we may attend as observers (by counsel and/or solicitors) all future private preliminary hearings in the Element proceedings unless in relation to any particular hearing we are expressly prohibited from doing so by order. Any application for such an order should be made by way of a written application on notice from another party and affording us the opportunity to make representations; and
> b. Requiring the other parties/representatives to the Element proceedings … to serve on us any document (including email correspondence) which is served on the other parties to the Element proceedings."

24. Those acting for Tesco responded to that application by letter of 17 June 2022, resisting the CMOs sought, but further contending that the application should be stayed pending determination of KP's appeal.

25. Dealing with this matter on the papers, by decision emailed out to the parties on 19 July 2022, EJ Hyams ordered that KP's application should be allowed in the terms sought, both as to attendance ("*the attendance order*") and documents ("*the documents order*"), further directing that KP should now also be sent any correspondence sent out by the ET itself concerning the **Element** multiple.

26. Having received EJ Hyams' order, on 25 July 2022, HP wrote to the ET seeking "*clarification (or if necessary a minor variation)"* of the documents order. Concerned about the practical implications of the order, it was observed that it might seem that:

> "… we are to copy [KP] in on, for example: negotiations about the agenda or timetable for each hearing; detailed negotiations about the timing of round-table meetings; detailed correspondence posing and answering queries on the job descriptions, or cooperating to draw up detailed lists of factual issues for the stage 2 hearing; and even any without prejudice correspondence. That cannot be in anyone's interests."

It was instead proposed that it be made clear that:

> "… the parties are required to send to [KP] only the materials that are put before the tribunal for each private hearing."

The request for such clarification was supported by both LD and those acting for Tesco.

27. In response (on 27 July 2022), whilst accepting:

> "… correspondence which is properly confidential to a *sub-set* of the parties and their representatives … is not and should not be caught by the terms of the order … [and that] the order does not purport to abrogate without prejudice privilege …"

KP contended that:

> "… the [proper and intended] effect of the order … is that where a party corresponds with the other parties to the claim, we should be copied to that correspondence …"

28. It was KP's submission that the circumstances identified by HP should be within the order:

> "… these being material events in the litigation which are helpful for us to understand contemporaneously …"

It was further objected that being provided only with the same documents as the ET would not adequately remedy the KP claimants':

> "… significant disadvantage as compared to the stayed claimants represented by [HP] and [LD] who have constructive access to the documents …"

29. As for the practical implications, it was submitted that there could be no real difficulty, pointing out that the parties had already been complying with the order since receiving the ET's email of 19 July 2022.

30. By further email to the parties of 18 August 2022, EJ Hyams stated that, having:

> "… considered the correspondence from the parties' solicitors concerning the order which he made on 19 July 2022 …
> [He] now confirms that he understood the word "served" in the [documents order] … to make it clear that the documents to be sent to [KP] … were only those which were to be put before the tribunal for the purposes of the hearing in private to which the documents related."

Explaining:

> "That understanding was drawn from the context, which included the fact that [KP] were going to be attending the hearings only as observers. …"

31. It is the decision of 19 July 2022, as clarified on 18 August 2022, that is the subject of the appeal in EA-2022-000962-AT.

The grounds of appeal and the KP claimants' submissions in support

32. In advancing her clients' case, Ms Crasnow KC accepts that both decisions under challenge involve the exercise of a judicial discretion in the context of the ET's broad powers of case management. As such, it is not in dispute that it would not be open to the EAT to interfere with the ET's decisions unless they revealed an error of principle, or had been reached taking into account irrelevant matters or failing to take into account relevant matters, or were properly to be characterised as perverse.

33. In appeal EA-2022-000398, by grounds (3)-(6), it is contended that, in refusing the application that Tesco should file responses to the KP claims, the ET failed to take into account relevant matters, as follows:

> "(3) … failed to take into account how the [KP] claims were to be determined in future, the relationship between the live claims and the stayed claims, and the relevance of this relationship for the case management of [those claims];
> (4) … failed to consider and weigh the disadvantage to the [KP claimants] were their claims stayed for an indefinite period without a response;
> (5) … wrongly concluded that the [KP claimants] would be subject to no greater disadvantage than other stayed claimants by the absence of a response, in circumstances where: a. the other stayed claimants are represented by solicitors with conduct of active claims, and b. the [KP claimants] and the Tribunal had no understanding of any assurances or representations between [Tesco] and other claimants' representatives, in the context of agreeing a consent order or as otherwise relevant to the future management of those claims;
> (6) The decision not to declare or determine the [KP claimants'] representatives' entitlement to attend the remainder of the hearing or permit them to do so, was also relevant to the Employment Judge's decision whether to require responses to the [KP claimants'] claims, but was not taken into account by the Employment Judge in reaching his decision on the partial lifting of the stay"

34. By grounds (7)-(8), it is further contended that the ET:

> "(7) … wrongly refused to acknowledge [KP's] right, alternatively permit [KP], to: a. attend the remainder of the preliminary hearing (and future preliminary hearings) where the representatives of other stayed claimants were permitted to remain, and where attendance would reduce the prejudice to the [KP claimants] arising from the stay of their claims before presentation of a response by [Tesco]; b. have access to the same documentation as the other parties to the combined proceedings in circumstances where: i. the representatives of other stayed claimants have access to all documentation in the proceedings, and ii. access to full documentation would reduce the prejudice to the [KP claimants] from the stay of their claims before presentation of a response by [Tesco];
> (8) … failed to take into account that a stay of the [KP] claims without access to full documentation and attendance at hearings would make the period of the stay illusory, in that it would withhold from the [KP claimants] information which could be relevant to the question whether the stay should be lifted."

At the oral hearing of the appeals, Ms Crasnow clarified she was not seeking to pursue the suggestion at ground (7) that the ET had refused to permit KP to attend future (private) preliminary hearings; the appeal was limited

to the decision taken in relation to that hearing.

35. By appeal EA-2022-000962-AT, the KP claimants seek to challenge EJ Hyams' further case management decision, communicated to the parties in writing on 19 July 2022, but as clarified on 18 August 2022, that the KP claimants should be provided with copies of documents put before the ET and not copies of other communications between Tesco and the LD/HP claimants not put before the ET. This appeal is put on two grounds: by the first, it is again contended that the ET's decision is vitiated by its failure to take into account relevant matters; by the second, it is said that the decision was perverse. Thus the grounds provide:

> "(1) … failed to take into account: a. The materially adverse effect on the [KP] Claimants' ability to understand the proceedings of not being provided with documents beyond those put before the Tribunal; b. The ability of the other parties to the litigation, as a result of his order, through deciding/agreeing what to put before the Tribunal, to control and determine the [KP] Claimants' access to documents; c. The unequal access to information resulting from his order as between: i. claimants whose claims are stayed who are represented by [LD and HP] (who would have access to all documentation through their lawyers), and ii. claimants represented by [KP] (who would not); d. The risk that the order made would delay [KP's] access to documents until a short time before Tribunal hearings (i.e., that documents would be served on [KP] at the same time as on the Tribunal, and necessarily only when the parties had agreed what documents to put before the Tribunal); e. The proportionality of allowing the [KP] Claimants access to the same documents as the other parties to the claim, including other claimants whose claims were stayed (i.e., that there would be no real additional effort or expense required in serving documents on [KP] at the same time as other parties); f. The absence of prejudice in all the circumstances to the other parties to the proceedings in making the order which [KP] sought to be served with all documents served on the other parties;
> (2) Further or alternatively, the … decision to restrict [KP's] access to documents to those put before the Tribunal at hearings was perverse in that: a. It leads to irrational inequality in access to information between stayed claimants simply by virtue of who represents them; b. It frustrates the effect of the Employment Judge's order that the [KP] Claimants may observe private case management hearings (as well as public hearings), since it limits the understanding of the [KP] Claimants at such hearings, and limits their time to consider documents before a hearing; c. It frustrates the [KP] Claimants' ability to understand what is happening in litigation to which they are parties and take any appropriate steps in response to events in the litigation—in other words, there is an absence of open justice in respect of the [KP] Claimants - both because the decision : i. limits the documents to which the [KP] Claimants have access; and ii. leads to delay in access to information."

36. In their submissions, the KP claimants have sought to expand the matters relied on as circumstances relevant to the ET's exercise of discretion in both decisions, contending that these include (I summarise): (a) the fact that their claims are part of the **Element** multiple and they are thus parties to the proceedings; (b) that they form a substantial part of the overall group of claimants; (c) the value of their claims is potentially significant; (d) there was likely to be a significant delay before the active claims were resolved; (e) they had unequal access to information as compared to the stayed LD/HP claimants; (f) Tesco had declined to confirm

that it would defend the KP claimants' claims on the same grounds as the other claims (and there was no guarantee that the issues would be the same), with the potential prejudice for the KP claimants in relation to potential amendments, and/or the availability or cogency of evidence, and/or the steps that might be taken to secure relevant evidence; (g) there was no procedural mechanism directly equivalent to a Group Litigation Order ("GLO") in the High Court; (h) there was a potential catch-22 for the KP claimants in that they were unable to obtain information without application but would not know to make an application absent that information; (i) the provision of information shortly before a hearing might adversely impact upon KP's ability to make an application; (j) it was no answer to say KP could rely on the steps taken by other legal representatives; (k) should there be a material change in circumstances, any order could be varied/revoked.

37. Having regard to those circumstances, the KP claimants contend that, absent good reason otherwise, the ET was required to apply the following principles: (1) equality of access to information as between parties; and (2) provision of sufficient information to enable any party to consider/take appropriate steps in the proceedings. The KP claimants say they are seeking equal treatment *in substance* with other claimants, either with active claims (to which responses had been entered) or with stayed claims but where the other claimant solicitors had had an opportunity to protect the position of their stayed clients' claims.

38. More specifically, in relation to the stay appeal (grounds (3)-(6) EA-2022-000398), it is complained that the ET had failed to consider the comparative inequality between the KP claimants and those represented by HP and LD, and had failed to consider the interrelated nature of that inequality (KP not having access to the same documentation, either historic or future). Moreover, it is submitted that the ET's decision failed to provide adequate assurance to the KP claimants and was not consistent with the purposes of the stay (which could not be to leave the stayed claimants with a continuing risk).

39. As for the decision on KP's continued presence at the hearing on 29 March 2022 (grounds (7)-(8) EA-2022-000398), although in one sense academic, this again evinced a failure to see the position holistically: given that responses had not been entered in the KP claims, and they had had only limited access to documents, KP's continued presence was all the more important. More particularly, there was no good reason for not permitting KP's legal team to remain: the point had previously been raised in correspondence (Tesco was not ambushed) and there was no relevant custom in the proceedings to justify a different view.

40. Turning to the documents appeal (EA-2022-000962-AT), in oral argument the focus of the KP

submissions was on what was put as an absence of reasons; although the appeal had not included an inadequacy of reasons challenge, this was said to be encapsulated within the complaint of failure to take relevant factors into account. It was KP's case that the ET's email of 18 August 2022 failed to demonstrate engagement with the parties' correspondence, in particular the points made in KP's email of 27 July 2022; the order of 19 July 2022 had accepted KP's reasoned application and there was no explanation for the variation. There was no sign that the ET had had regard to the inequality between claimants (emphasised in the 11 May application), or had taken account of how the disclosure process had worked since the 19 July 2022 order. As parties, there was no good reason to treat the KP claimants unequally in relation to the provision of information; the less information provided the less informed they would be about the litigation – all the more so given the absence of responses to their claims. Given those points (and accepting the reference to open justice in ground (2) added nothing further), the decision of 18 August 2022 was perverse: any departure from the starting point of equal access required the ET to consider: (a) which documents were not needed to provide sufficiency of information; (b) specific objections or prejudice (for the other parties to identify), not generalities; and (c) to what extent such prejudice outweighed equal access and sufficiency of information.

The respondents' submissions

The case for Tesco

41. By way of general submission, Tesco makes the point that the determinations under appeal were case management decisions, in respect of which the applicable test, pursuant to the overriding objective in rule 2 **ET Rules**, was the balance of justice and fairness having regard to all relevant circumstances. The bar for challenging such decisions was high, particularly in the context of large and complex litigation; these appeals did not come close to reaching that bar. As for how KP's case was put in argument, this represented a shift from the grounds of appeal, which should not be allowed (permission had not been given in respect of all the circumstances now relied on as relevant; there was no reasons challenge in appeal EA-2022-000962-AT). Moreover, on the question of equality with other claimants, to the extent KP genuinely considered there was any meaningful detriment to its clients in not being represented by LD/HP, it would have been bound to so advise prospective claimants prior to its engagement, who could thus be taken to have made an informed choice, accepting any such limitation (see paragraph 15 **Aird and ors v Asda and ors** [2024] EAT 52).

42. Addressing grounds (3)-(6) EA-2022-000398-AT, the ET clearly had in mind each of the

circumstances identified (even as expanded in oral submission); it had given close consideration to the proposed future involvement of KP claimants in the proceedings (noting counsel's acknowledgement that they were not seeking to participate actively in the sample claims) and permissibly (and correctly) concluded: (i) there was a sound purpose to an ongoing stay by reference to the overriding objective; (ii) there was no justification for treating the KP claimants differently from any other claimant caught by the terms of the stay (no prejudice having been identified, it was not perverse for the ET to conclude there was no, or no sufficient disadvantage (and the position would be no different under a GLO in the High Court)); and (iii) no value was served by requiring Tesco to take time and expend cost by responding to further claims. More particularly, having considered the implications of (i) the stay not being made under rule 36 and there being no formal lead claimants, but (ii) the fact that the KP claimants had access to the pleadings already filed, the ET permissibly rejected the suggestion that Tesco had preserved substantial flexibility to reframe its case. This was a reasoned decision as to where the line should be drawn, and fell well within the broad discretion afforded to the ET.

43. As for grounds (7) and (8), the only issue before the ET at the 29 March 2022 hearing was whether KP's legal team could remain at the private preliminary hearing; questions of future attendance and of access to documentation (other than as required for the hearing of KP's application) were not before the ET and could not have been relevant considerations. As for KP's continued attendance on 29 March, that had not been properly identified as an issue and the ET did not err in its approach; in any event, the point was academic given the ET's subsequent decision of 19 July 2022.

44. Turning to the appeal in EA-2022-000962-AT, Tesco points out that the ET's email of 18 August 2022 expressly stated that consideration had been given to the parties' correspondence; there was no basis for inferring that it had failed to have regard to KP's letter of 27 July 2022. As for the correspondence between 19 July and 18 August 2022, most was related to KP's applications (albeit some related to some draft equal value job descriptions). In any event, Tesco submits that, taken together with the ET's earlier reasons (of 19 July 2022), it was apparent that regard had been given to all relevant factors; this was a permissible exercise of the ET's discretion in case managing large group litigation, in circumstances akin to those in **Aird** and the appeal should similarly be dismissed.

The case for the LD/HP claimants

45. The submissions of the LD/HP claimants are limited to the appeal in EA-2022-000962-AT, on which

they formally adopt the arguments of Tesco. In addition, it is observed that, to the extent that the KP claimants were permitted to complain of inadequacy of reasons in relation to the 18 August 2022 email (albeit not a point raised by either ground), it was necessary to bear in mind: (i) this was not a variation of the ET's earlier order, merely a clarification; (ii) in the circumstances (i.e. clarification of an earlier case management order), the reasons provided (which needed to be read along with the earlier reasoning, and which expressly referred to the parties' written representations) were adequate to the task.

The legal framework

46. As is common ground, the orders under challenge in these appeals arise from the case management decisions of the ET. Aside from particular powers the ET has under schedule 1 of the **Employment Tribunal (Constitution and Rules of Procedure Regulations) 2013** (the "ET Rules") to (for example) make orders for the disclosure of documents and provision of information (rule 31), permit others to participate in proceedings (rule 35), order that claims giving rise to common or related issues of fact or law should be decided by way of lead cases (rule 36), the ET is given a general power to case manage the proceedings before it, as provided by rule 29 **ET Rules**:

> The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. … the particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.

47. Interim case management orders will standardly be made at a preliminary hearing conducted in private, pursuant to rule 56 **ET Rules**, albeit, pursuant to rule 41, the ET:

> … 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.

48. In exercising its powers under the **ET Rules**, an ET (assisted by the parties) is required to seek to give effect to the overriding objective, as provided by rule 2:

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

> shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

49. In the employment context, it is well established that:

> "44. … In relation to case management the employment tribunal has exceptionally wide powers … the tribunal's decisions can only be questioned for error of law. A question of law only arises in relation to their exercise, when there is an error of legal principle in the approach or perversity in the outcome. That is the approach, including failing to take account of a relevant matter or taking account of an irrelevant one, which the Employment Appeal Tribunal should continue to adopt …" (**O'Cathail v Transport for London** [2013] ICR 614 CA per Mummery LJ).

50. As for the reasons given for any case management decisions, rule 62(4) provides that these:

> … shall be proportionate to the significance of the issue and for decisions other than judgments may be very short.

51. In **Ma v Merck Sharp and Dohme Ltd** [2008] EWCA Civ 1426, Mummery LJ cautioned against being:

> "18. … hyper-critical or over-analytical … of tribunal decisions which … are closely connected to the practical management of complex or intractable litigation"

52. More generally, in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672, Popplewell LJ reiterated the importance of reading an ET's decision holistically and without being hypercritical, accepting that a failure to refer to particular evidence need not mean that such evidence did not exist or that the ET had failed to take it into account:

> "57 …
> (3) … What is out of sight in the language of the decision is not to be presumed to be non-existent or out of mind. …"

And,

> "58. … where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should … be slow to conclude that it has not applied those principles, and should generally only do so where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload."

53. Although the **Element** multiple is not subject to a group litigation order ("GLO"), such as may operate in High Court proceedings, and while the ET has not made a rule 36 order under the **ET Rules** (lead cases), the application of a stay pending the determination of sample claims is an established form of case management in large scale equal pay claims such as these; see **Ashmore v British Coal Corporation** [1990] 2 QB 338 CA. Moreover, as was made clear in **Ashmore**, where it is sought to use one of the stayed claims to re-litigate a case determined within a sample claim, that is likely to lead to a strike out, on the basis that this would be scandalous or vexatious and, as such, an abuse of the process of the ET (see per Stuart-Smith LJ at p 348H-349A and 352D-F). As the EAT recently observed in **Aird and ors v Asda Stores and ors** [2024] EAT 52, the same principle would apply to a respondent seeking to re-litigate a point lost in the earlier determination of a relevant sample claim (see below, per HHJ Shanks at paragraph 8).

54. In **Aird**, reference was made to the decision of Fraser J in **Lungowe v Vedanta Resources PLC** [2020] EWHC 749, where, in discussing the principles applied by the courts in this type of litigation, it was observed that:

> "55. … Parties to litigation are generally entitled to be represented by the solicitors of their choice, and to have their case argued by their own representatives. However, in group litigation, that entitlement is qualified. In order properly to achieve efficient conduct and case management of the group litigation, that basic right takes second place to the advancement of the rights of the cohort …"

Acknowledging that the High Court GLO regime would not apply to claims pursued in the ET, in **Aird**, HHJ Shanks went on to address the issue that had arisen in the large-scale equal pay multiple in those proceedings (the "**Brierley** Multiple"), in which (relevantly) LD were acting for the sample claimants and KP for a number of claimants whose cases had been stayed. Dismissing KP's appeal against the ET's rejection of the argument that the KP claimants had to be placed on an equal footing with the stayed LD claimants, HHJ Shanks explained his reasoning as follows:

> "8. Although there has been no formal rule 36 order, Leigh Day are the solicitors representing the claimants whose claims are being litigated as representative sample claimants and the claims of those represented by Keller Postman (which by definition give rise to the same or similar issues) are stayed pending the outcome of those claims. In the light of the Court of Appeal's decision in **Ashmore v British Coal Corporation** [1990] 2 QB 338 it is most unlikely that any party, including Asda, would be permitted to re-litigate issues resolved in the context of the sample claims being litigated in the *Brierley* Multiple. Leigh Day are therefore in practice in the position of "lead solicitors" with responsibility for running the claims and instructing counsel. The degree of consultation and liaison between them and other firms involved ought to be a matter of co-operation and agreement between the solicitors and

> the issue should not be a matter of concern for Asda and should only rarely involve the tribunal.
> 9. There is no dispute between the parties that, once faced with the issues arising from Keller Postman's application (which in effect arise from a failure of co-operation or agreement between the different firms of solicitors) the tribunal was required to reach a decision which balanced "justice and fairness to all, having regard to all relevant circumstances" (see the Appellants' skeleton argument at para 15). In other words, the judge was to give effect to the "overriding objective" in the context of large scale multi-claimant litigation.
> 10. Such a decision is a paradigm example of a case management decision and I was properly reminded of the limited scope for review of such a decision by the EAT. The first instance judge who is closest to the practicalities of the litigation has a wide ambit of discretion when exercising case management powers. This applies all the more so to a judge who has been specifically entrusted with the case management of complex large scale multi-party litigation as in this case. The exercise of case management powers is often a matter of finding "the least worst solution". …"

55. Finally, I am reminded that a perversity challenge on appeal faces a high threshold; as Mummery LJ observed in **Yeboah v Crofton** [2002] IRLR 634:

> "93. Such an appeal ought only to succeed where an overwhelming case is made out that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in cases where the Appeal Tribunal has 'grave doubts' about the decision … it must proceed with 'great care': British Telecommunications plc v Sheridan [1990] IRLR 27 at paragraph 34."

Analysis and conclusions

56. Before turning to the specific grounds of challenge raised by these appeals, it is helpful to reiterate that which is not in dispute. First, the staying of a large number of claims pending the determination of sample cases is a practical, and pragmatic, means of case managing what might otherwise be unmanageable litigation; it does, however, have the consequence that a significant number of those who are parties to the proceedings will find themselves in the role of interested observer rather than active participant. Second, in case managing such litigation a balance has to be struck between the protection of the interests of the stayed claimants and allowing the active sample claims to proceed. This was a point recognised by EJ Manley in making her initial case management directions in respect of the KP claims in these proceedings: on the one hand, the interests of the KP claimants required that the most recent ET orders should be provided to them; on the other hand, there was still a need to ensure that the demands then placed on the respondent, on those acting for the sample claimants, and on the ET itself, did not disproportionately impact upon their respective interests in progressing the active claims. Third, as a consequence, in such circumstances, those who are representing sample claimants will inevitably be privy to more information regarding the on-going litigation than lawyers who act only for

claimants whose cases have been stayed. In the normal course, that should not present any difficulties, and the ET is entitled to expect a high degree of co-operation between the firms involved. To the extent, however, that there is any disagreement, the ET's role as ring-keeper will require it to exercise its discretion, in accordance with the overriding objective, to achieve a fair and just balance, having regard to the relevant circumstances in the proceedings in question.

57. Turning then to the first appeal in EA-2022-000398-AT, and grounds (3)-(6) of that appeal; even allowing the KP claimants to rely on the expanded list of relevant circumstances identified for the purpose of this hearing (albeit that many of those circumstances were not foreshadowed in the grounds of appeal), I am not persuaded that there is any basis on which the EAT could properly interfere with the ET's case management decision to refuse the application for a partial lift of the stay, so as to require that Tesco file responses to the KP claims. Referring back to the various matters relied on by the KP claimants (at least, so far as they might be relevant to these grounds), the ET was plainly well aware that it was dealing with a large number of claimants (b), who were parties to the **Element** multiple (a), and who were pursuing potentially very valuable claims (c), in proceedings in which there was likely to be a significant delay before the active claims were resolved (d), and in which there was no equivalent mechanism to a GLO in the High Court (g); those matters had informed the way the ET had case managed the proceedings throughout, and I do not infer that it in some way lost sight of this context simply because it did not expressly set out in its decision that which was already known to everyone involved.

58. Equally, having referred back to the history of KP's involvement in the proceedings, and the earlier directions given by EJ Manley, it is apparent that the ET had well in mind the documents that had been provided to the KP claimants, and the difference in their position as compared to claimants represented by LD and HP (e), and that it expressly engaged with the question of the potential prejudice that the KP claimants might experience (f), permissibly concluding that, consistent with the overriding objective, the balance remained in favour of continuing the stay in relation to the filing of responses to the KP claims (ET, paragraphs 19-22).

59. In truth, the appeal pursued by the KP claimants in this regard is an expression of their disagreement with that conclusion. As, however, HHJ Shanks observed in **Aird**, the first instance judge, closest to the practicalities of the litigation, has a wide ambit of discretion when tasked with the case management of complex, large scale, multi-party proceedings such as these. Having formed a permissible assessment of the

very limited potential prejudice to the KP claimants (ET paragraphs 19 and 20, and see **Ashmore**), and plainly mindful of all the relevant circumstances, the ET was entitled to find that it remained just and fair to maintain a stay, the purpose of which was to avoid time and cost being expended unnecessarily (whether by Tesco or, in having to administer the process, by the ET itself), and to further conclude that it would be inconsistent with that purpose to require that Tesco file responses to the stayed KP claims. The grounds of challenge at (3)-(6) of EA-2022-000398-AT are duly dismissed.

60. As for grounds (7)-(8), it is clear that the issues raised have been rendered academic. To the extent that the complaints made initially related to KP's ability to attend future hearings, and have access to documentation that might inform future applications, the ET: (1) was clear that these were not questions that had properly been identified for determination at the hearing on 29 March 2022 and that it was making no ruling in these respects; and (2) subsequently made separate orders relevant to both questions. Indeed, given the ET's case management orders of 19 July 2022, the only questions that could possibly remain for consideration under these grounds are whether the ET erred in refusing to permit KP's legal team to remain in attendance for the rest of the private preliminary hearing on 29 March 2022, and/or as to whether it erred in declining to deal with the question of future attendance and/or future access to documents at that hearing.

61. Seeking to answer either of those questions can plainly serve no useful purpose at this stage of the proceedings. In any event, however, it is apparent that both decisions (albeit the second really represents the absence of a decision) fell firmly within the ET's case management discretion. The hearing on 29 March 2022 had been listed for case management purposes and was to be conducted in private pursuant to rule 56 **ET Rules**; the ET was entitled to conduct the hearing in the manner it considered fair (rule 41), and, in so doing, to decline to re-visit its earlier case management order (under rule 29), and thus to limit the attendance of the KP representatives to that part of the hearing dealing with the KP claimants' application. Equally, the ET was entitled to conclude that it would be unfair to make a decision on 29 March 2022 as to future arrangements; from reading the correspondence from KP prior to that hearing, it is apparent that the focus was on that which was necessary for its application, and not the general conduct of the proceedings for the future. For all these reasons, I therefore dismiss grounds (7) and (8) of appeal EA-2022-000398-AT.

62. The question of KP's continuing entitlement to documents in the proceedings is, of course, separately raised under the appeal in EA-2022-000962-AT. The focus of the first ground of challenge in this regard has, however, shifted, from a complaint of a failure to take relevant matters into account to a contention that the

ET provided inadequate reasons. While it is entirely reasonable for those having to respond to the appeal to object to this apparent moving of the goalposts, I have, in any event, considered the arguments raised in the round and have reached the conclusion that the challenge must fail on either basis.

63. In considering the appeal in EA-2022-000962-AT, it has to be kept in mind that the ET's email of 18 August 2022 did not purport to vary the order of 19 July; EJ Hyams was seeking to clarify what he had meant by the word "*served*" in that earlier order. In simply adopting the terms proposed in KP's application of 11 May 2022, EJ Hyams had initially not defined what he meant by requiring disclosure to KP of documents "*served on the other parties*". In then explaining what he had understood by that phrase, EJ Hyams was entitled to consider that he had already provided sufficient reasons for the relevant decision (that of 19 July 2022).

64. Even if the email of 18 August 2022 is to be viewed as a variation to the earlier order, however, it was entirely permissible that the reasons provided were very short (rule 62(4) **ET Rules**). In granting KP's application on 19 July 2022, EJ Hyams had stated that he was persuaded that it was in the interests of justice to do so for the reasons provided in KP's letter of 11 May. That letter had referred back to the discussion at the hearing on 29 March 2022, at which the issue to be determined had been recorded as being whether KP should be permitted to observe future hearings "*meaningfully, i.e. in possession of the documents referred to during [future hearings]*"; although potentially ambiguous in its ambit, KP's letter of 11 May 2022 had thus drawn attention to that characterisation of the issue its application was seeking to address and could be read as referring only to documents to be relied upon for the purpose of hearings before the ET. In simply adopting the language used by KP in the draft terms of order, the CMO of 19 July 2022 did not, however, unpack what was encompassed by the reference to "*served*" documents. Seen in context, the email of 18 August 2022 thus permissibly addressed that question; in so doing, the ET did not err in failing to re-visit the basis for its order more generally.

65. Moreover, the ET's email of 18 August 2022 commenced by making clear that EJ Hyams had "*considered the correspondence from the parties' solicitors*". Far from failing to provide adequate reasons to demonstrate engagement with the points made in that correspondence, it was thus clear that the content of the communications had been taken into account, and that EJ Hyams had agreed that his earlier order needed to be clarified. The email then went on to explain that EJ Hyams had previously understood the application for disclosure of documents to be set within the context of KP's future attendance at the ET hearings; it was in that context that he had understood - and intended - the word "*served*" to refer to documents that were to be

relied on for the purpose of such hearings. In thus explaining what had been intended by the CMO of 19 July 2022, sufficient reasoning was provided.

66. As for what the ET did, or did not, take into account in making the order relating to disclosure, this also needs to be seen in context. The initial discussion relating to this issue had taken place at the hearing on 29 March 2022. As I have already stated, from the record of that hearing, it is apparent that the ET was aware of the relevant circumstances of this litigation and of the fact that, as KP were not acting for any of the sample claimants, the lawyers for the KP claimants were not in the same position as LD and HP. Equally, however, although parties to the proceedings, it was also common ground that the KP claimants were not in the same position as the sample claimants who were being represented by LD and HP; in that sense, they were not active participants in the proceedings and, as Mr Brown acknowledged in discussion on 29 March 2022, KP did not:

> "… want to actively participate in relation to issues which are common between our clients and others which are being dealt with by, clearly, some of the most experienced legal representatives" (see as recorded at paragraph 16 of the ET's decision)

67. In seeking to strike a fair and just balance in making its CMO of 19 July 2022 (as clarified on 18 August 2022), I do not infer that the ET somehow lost sight of that which was an obvious consequence of the stay; that is, the different position of KP as compared to LD and HP. Equally, however, it was entitled to take into account (as it plainly did) the different requirements of the lawyers involved: KP simply did not need to have contemporaneous access to all aspects of the party-party correspondence in the same way as LD and HP. Similarly, the timing of the disclosure that would thus be provided to KP would be an obvious point that the ET would clearly have had in mind: if the documents in question were to be those served on the ET, some of the disclosure would only take place at the point the bundle for the relevant hearing had been prepared. Equally obvious, however, would be the fact that KP would have at least as much time to consider those documents as the ET, and could, if necessary, ask for additional time to reflect on whether it might then be necessary to make any applications relating to the position of the KP claimants.

68. For the KP claimants, it is also objected that the ET failed to take into account the absence of prejudice to the other parties from allowing the order to encompass *all* documents passing between the parties (excluding without prejudice material) and thus failed to adopt a proportionate approach to the limitation introduced. The difficulty with this submission, however, is that it simply disregards the perspective of the other parties to the litigation - a luxury not afforded to the ET. Acknowledging that the parties would be entitled to exclude without prejudice correspondence from the disclosure (albeit this had not been made clear in the ET's original

order) underscores the fact that there would be a need for some kind of check to be carried out to ensure that which was provided to KP did not include material that should properly be excluded or redacted (with the potential for further applications to be made to the ET should such exclusions or redactions not be agreed). Whether or not such issues had already arisen in the period between 19 July and 18 August 2022, having considered the competing arguments of the parties set out in the correspondence, the ET was entitled to conclude that the additional material sought by KP had little or no potential value in the advancement of their interests, and that the CMO made (as clarified on 18 August 2022) provided proportionate protection for the KP claimants whilst having regard to the interests of the other parties and the effective case management of the proceedings.

69. As for the further objection, that the ET's CMO (as clarified on 18 August 2022) was perverse, I am satisfied this final ground must fail for the reasons already identified. In case managing large scale, multi-party litigation of this nature, it is inevitable that those who act for the sample claimants will be in a different - at times, better informed - position to those whose clients fall outside that group. Addressing that difference requires a balance to be struck. The result may not always provide a perfect solution; indeed, as HHJ Shanks observed in **Aird**, the exercise of case management powers is often a matter of finding "*the least worst solution*". The first-instance judge is, however, best placed to make the necessary judgement required and, in the present case, the balance struck by the CMO of 19 July 2022 (as clarified on 18 August 2022) provided a proportionate response to the competing interests to which the ET was bound to have regard. The perversity challenge does not begin to meet the high threshold required (**Yeboah**).

Disposal

70. For all the reasons provided, both appeals are dismissed.