Neutral Citation Number: [2024] EAT 83

Case No: EA-2024-000410-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 May 2024

Before :

THE HONOURABLE MR JUSTICE KERR

- -

Between :

TESCO STORES LTD **Appellant**

- and -

MS K ELEMENT & OTHERS

Respondents

- -
- -

Paul Epstein KC and **Mathew Purchase KC** (instructed by Freshfields Bruckhaus Deringer) for the **Appellant**
Keith Bryant KC and **Stephen Butler** (instructed by Harcus Parker) for the **Respondents (Harcus Parker Claimants)**
Sean Jones KC and **Rachel Barrett** for the **Respondents (Leigh Day Claimants)**

FULL HEARING & PRELIMINARY HEARING
Hearing date: 21 May 2024

- -

JUDGMENT

THE HONOURABLE MR JUSTICE KERR:

Introduction and Summary

1. This is a combined full hearing appeal on the first two grounds of the appeal and a preliminary hearing in respect of the third and fourth grounds. The appeal is against case management orders made in complex multi-claimant equal value litigation by a three person tribunal (Employment Judge Hyams, Mr R. Clifton and Ms S. Harris) in Watford, following an oral hearing on 13 March 2024. The decision was dated and sent to the parties on 21 March 2024.

2. In the first two grounds of appeal, the appellant (**Tesco**) challenges two disclosure orders annexed to the tribunal's "Case Management Summary" (**the March 2024 summary**): order 5 requiring standard disclosure in relation to material factor defence (**MFD**) issues, by 31 May 2024, eight days from now; and order 13.1, requiring issues-based disclosure in relation to MFD issues, by 2 December 2024. These grounds were argued before me two days ago at a full hearing directed by HHJ Auerbach.

3. In the third ground of appeal, Tesco seeks to challenge the tribunal's decision to direct that a hearing should be held to determine MFD issues before the final equal value hearing takes place. In the fourth ground, Tesco says the tribunal was wrong not to direct that the claimants plead their case on sex discrimination. Those two grounds of appeal were the subject of a preliminary hearing before me on the same occasion, as directed by HHJ Auerbach.

The Facts

4. A useful overview of the litigation is in the judgment of Eady P in *Abbey v. (1) Tesco Stores Ltd and (2) Element and others* [2024] EAT 76, at [4]-[6]:

> **"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 [Leigh Day], and are case managed in the ET under the title of the Element multiple; no claims have yet been determined.**
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> **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.**
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> **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 [Harcus Parker] 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)."**

5. In May 2021, Tesco voluntarily provided, in a nine page letter, a non-exhaustive list of their material factor defences which, it asserts, operate at a collective level across their distribution centre network.

6. On 11 November 2021, EJ Manley (then managing the claims, before her retirement from salaried sitting) made an order, recorded at paragraph 24 of the March 2024 summary:

> **"By 4 March 2022 the Respondent will provide details of material factors on which it relies as explaining the pay differences between the named comparators and the claimants with details of the time and factor applied and, if the factor has ceased to apply, the date it ceased to apply."**

7. On 4 March 2022, Tesco provided some further information in a seven page letter about the material factors on which it relied. These, Tesco describes in its chronology as a non-exhaustive list of material factors which operate at an individual level in relation to the comparators. The period covered is stated in the letter to be 18 February 2012 to 31 August 2018.

8. The stage 2 hearing from March 2023 then took place, as Eady P explained in *Abbey* (cited above). The tribunal was constituted then as now, Employment Judge Hyams having taken over management of the claims. According to the notice and grounds of appeal, the decision is expected in about June 2024. Tesco explains in its skeleton argument [footnote 2, paragraph 3] that the tribunal made a decision dated 12 July 2023 making certain "findings of fact", in a judgment that is the subject of a pending appeal to this appeal tribunal.

9. A preliminary hearing was held on 10 November 2023. The purpose was mainly to consider the sequence in which the issues ought to be determined. Case management orders were made by the tribunal on 16 November 2023 following that hearing. A copy of those orders is before me. Their effect was summarised by the tribunal in the March 2024 summary (paragraph 15).

10. Neither party was arguing for the MFD issue to be determined before the final equal value hearing for the "tranche 1" (**T1**) claimants. The issue was (see paragraph 15) "whether or not we should consider at the final hearing…. in addition the question whether [Tesco] could rely on any MFDs". The tribunal decided (see the March 2024 summary, paragraph 16):

> **"… (1) there should be a final hearing of the T1 sample claimants' claims without there being any further stage 2 hearings before those T1 sample claimants' claims were the subject of a final hearing, and (2) the question whether there were any MFDs should not be determined at that final hearing."**

11. However, in an email dated 28 November 2023, the appointed independent experts (**the IEs**) "informed the tribunal and the parties that the IEs would be unlikely to be able to start their report until January 2025 given their commitments, which include a three-month final hearing starting in September 2024, and that their report would take eight months to prepare." (March 2024 summary, paragraph 11 quoting Tesco's then skeleton argument).

12. The claimants were concerned that this would mean the final equal value hearing could not take place until 2026. The Leigh Day claimants asked for a hearing to invite the tribunal in the changed circumstances to direct a hearing of the MFD issues in 2025, before the final equal value hearing, so that progress would be made in 2025. The parties were unable to agree directions for the way forward; hence the hearing on 13 March 2024.

The Tribunal's Decision

13. The tribunal decided that it had not, in November 2023, ruled out a separate MFD hearing in respect of the T1 claimants; and anyway, the circumstances had materially changed. It would be in the interests of justice to direct such a hearing. They rejected Tesco's submissions to the contrary. The tribunal heard further submissions on what other directions should be given. They directed that the MFD hearing should take place in September and October 2025 and gave directions for the purpose of the parties preparing for that hearing.

14. The directions given were detailed. They included, so far as material for this appeal, the following, using the tribunal's numbering.

15. By order 1, the claimants had until 30 April 2024 to serve an "identification of terms schedule" explaining which claimants' terms were less favourable than their comparators' terms; which comparators' terms were more favourable; and the period during which the claimants' employment contracts should be modified accordingly. That has since been done.

16. By order 4, Tesco was given permission to add to its pleaded case on MFDs and was required by 31 May 2024 to provide its amendments, which would respond to the "identification of terms schedule", including provision of any MFD defence and "if [Tesco] seeks to justify the material factor, setting out the particulars on which [it] relies to show that the material factor was a proportionate means of achieving a legitimate aim".

17. By order 5, Tesco:

> **"must by the same time, i.e. by 4pm on Friday 31 May 2024, disclose to the claimants all documents which are at that time in its possession, power or control relevant to its case in regard to MFDs and which have not already by that time been disclosed. The respondent must afford inspection of those documents by providing copies of them at the same time (unless, for the avoidance of doubt, the respondent claims that they are covered by legal professional privilege)."**

18. By 28 June 2024, the claimants are required (orders 6 and 7) to respond to the information provided by Tesco under order 4; and to give disclosure of their documents relating to the MFDs. The claimants also have to, by the same date (order 8), state what further disclosure they seek from Tesco in a draft list of issues called "the list of issues for further MFD disclosure".

19. By 12 July 2024 (order 9), Tesco must respond to that draft list of issues and identify any further disclosure sought from the claimants. By 26 July 2024 (order 10), the parties must state what agreement has been reached in relation to the list of issues for further MFD disclosure. Within four weeks of that list of issues being settled, Tesco has to respond (see order 11) with a proposal for further disclosure on MFD issues, giving details of

custodians, their job role, platforms, databases, search terms, date ranges, search methods and so forth.

20. The parties then (still under order 11) have to seek to reach agreement on the scope of further disclosure on MFD issues and if necessary seek directions from the tribunal. That hearing would take place on 30 September 2024 unless otherwise directed. Meanwhile, order 12 also pencilled in a further preliminary hearing on 29 July 2024 which could be vacated if not needed, before EJ Hyams, no doubt to check disclosure progress and for any further directions.

21. Order 13 then provided as follows:

> **"Simultaneous further disclosure**
>
> **13 By 4pm on Monday 2 December 2024,**
>
> **13.1 the respondent must disclose by list and provide to the claimants copies of documents on that list such further documents as are in its possession, power or control in relation to the respondent's MFDs (including, for the avoidance of doubt, any documents that relate to the issues stated in the List of Issues for further Disclosure), and**
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> **13.2 the claimants must disclose by list and provide copies of the documents on that list such further documents as are in their possession, power or control relating to the respondent's MFDs, including any documents relating to the issues stated in the List of Issues for further Disclosure."**

22. In a letter of 25 March 2024 to Employment Judge Hyams, Tesco's solicitors sought clarification of the orders on certain points. The judge responded by email on 28 March 2024. I need only set out what he said at paragraphs 9-14 of his response, which was as follows:

> **"9. The second paragraph of the letter of 25 March 2024 under the heading 'Order 5' starts with this sentence.**
>
> > **'As the respondent understands it, this order was intended to provide for a form of initial disclosure of key documents which, by that date, the respondent had identified as being relevant to its MFDs.'**
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> **10. Order 5 was made by the tribunal for the reasons stated in the case management summary dated 21 March 2024, including in paragraphs 64.5 and 64.6 of that summary. The order was not for 'the respondent to disclose key documents which it has already identified are relevant to its MFDs or which it identifies are so relevant during the process of particularisation of its MFDs, which particulars will be provided by 4pm on 31 May 2024'.**
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> **11. We the tribunal believed it to be clear from paragraphs 64.5 to 64.10 of our reasons in our case management summary dated 21 March 2024 that order 5 does not require the kind of digital search which would reveal a possible 16 million potentially relevant documents. That search is catered for in orders 8-11 of those made on 21 March 2024. Order 5 (read in the light of paragraphs 64.5 and 64.6 of our case management summary of 21 March 2024, but in any event we now say for the avoidance of doubt) requires that (1) a reasonable search within the meaning of CPR r 31.7 is carried out and (2) the results of that search are stated by way of standard disclosure within the meaning of CPR r 31.6 by 31 May 2024. 1 note that that date is even today more than 2 months away.**
>
> **12. 1 add that for the avoidance of doubt, the words 'possession, power or control' are to be read in the light of CPR r 31.8.**

> **13. In fact, there was, I now see, an unintended omission from order 5. As stated in paragraph 64.5 of the case management summary of 21 March 2024, we intended the respondent when complying with order 5 'at the same time [to] give the information required to be given in an N265 form about that separate exercise of disclosure.' I now state for the avoidance of any doubt that such information must be given by the respondent when complying with order 5.**
>
> **14. Given that any omission from the search to be carried out by the respondent before 31 May 2024 (with the results to be disclosed by way of standard disclosure by that date) will be remedied when orders 8-11 are complied with, the respondent may say that a reasonable search in the circumstances, including the existence of orders 8-11, does not extend to one for the documents which will be revealed when those orders are complied with. If the respondent does say that, then it will do so when complying with the additional part of order 5 which I have stated in the preceding paragraph above."**

23. Against that background, I come to the four grounds of the appeal.

Grounds 1 and 2: the appeal against the standard disclosure order (order 5) and the issues-based disclosure order (order 13.1) (full hearing)

24. These two grounds are closely interlinked and can be taken together. Quotes are from the skeleton arguments unless otherwise indicated. I do not accept Tesco's submission that to order standard disclosure and issues-based disclosure at the same time was "duplicative and unnecessary". There is no objection to staged disclosure *per se*, as Mr Epstein KC made clear. The objection is to this particular combination of disclosure orders.

25. Staged disclosure is permitted under the CPR, which the tribunal is entitled but not bound to follow. There is no reason why a tribunal should not make a preliminary disclosure order to flush out documents central to the issues in so far as they are already defined; and to enable a more refined definition of those issues, followed by focussed and targeted issues-based disclosure to fill any gaps or, indeed, eliminate unnecessary custodians and classes of documents.

26. Here, the two stage disclosure orders seem to me to be a pragmatic and sensible course, promoting continued liaison, refinement of the issues, the prospect of agreement on some disclosure issues and continuing supervision by the managing employment judge in the run up to the MFD hearing. It is a useful part of the case management exercise and was properly open to the tribunal in the exercise of its discretion.

27. Mr Epstein submitted that an acceptable staged disclosure regime here would have involved an "initial" disclosure order of key documents already obtained by Tesco. Neither party had sought a standard disclosure order at the hearing; the claimants would have been content with a more limited order for disclosure of Tesco's key documents already obtained for the purpose of pleading its case on MFD issues and providing further information about its MFDs in May 2021 and March 2022.

28. I reject the submission that the standard disclosure order was not open to the tribunal. In a staged disclosure exercise, it was for the tribunal to decide what the form of preliminary disclosure order should be. As both parties accepted in this appeal, the tribunal below was not bound to make an order within the scope of suggestions from the parties. It was entitled to make an order not advocated by any party, including one more onerous than the claimants were seeking.

29. Next, it is said that the tribunal erred in law by making the standard disclosure order without elaborating on what steps were required to comply with it. I do not agree with Mr

Epstein that the tribunal was bound in law or on pain of perversity to spell out in detail what compliance would require, i.e. what detailed steps would amount to a "reasonable search" (which Tesco's solicitors would be required to verify by signing a document containing information of the kind found in an "N265" form in litigation governed by the CPR).

30. Mr Epstein submitted that in a digital age and with a vast array of electronic documents (estimated at about 16 million) being potentially disclosable, if the tribunal intended to make an initial disclosure order going beyond disclosure of initial key documents already obtained, it should have made an order of the complex and detailed kind discussed by Marcus Smith J in *Sportradar AG v. Football Dataco Ltd* [2022] CAT 37, dealing there with what Marcus Smith J described at [Paragraph 1] as, in effect, an application for specific disclosure.

31. The tribunal was bound to make a detailed order of that kind, Mr Epstein argued, because otherwise Tesco and its solicitors would not know what it had to do to fulfil the requirement to undertake a "reasonable search". While accepting that the period allowed for the search and the existence of a later issues-based disclosure exercise were relevant to what degree of searching would be "reasonable", he submitted that Tesco and its solicitors could nonetheless be exposed to sanctions if (as in *Digicel (St Lucia) Ltd. v. Cable & Wireless plc* [2009] 2 All ER 1094) their efforts were later found wanting.

32. I do not accept that submission. Standard disclosure orders are commonplace in courts and tribunals. They leave it to the good judgment of solicitors to determine, in the first instance, what their obligations are under the order (see *Digicel*, per Morgan J at [51]). An ordinary CPR type standard disclosure order was among the options properly open to the tribunal. In *Digicel*, the adequacy of the defendant's search was successfully challenged but no one suggested that meant the original order for standard disclosure was defective: see Morgan J's judgment at [17]:

> **"On 6 February 2008, Lindsay J ordered each party by 27 June 2008 to give standard disclosure by list. I am told that there was no discussion at the hearing on 6 February 2008 as to any particular points relating to such disclosure."**

33. Specific disclosure applications are less common than they used to be but are still a normal response from a party who considers that a search has fallen short of reasonableness. That is what happened in *Digicel*. Morgan J made clear that the court was the ultimate arbiter of what was a "reasonable" search, rejecting a suggested judicial review standard. To rectify the position, he ordered certain keywords to be added and certain additional email accounts to be searched. There was no question of sanctions such as striking out the defence.

34. The spectre of exposure to sanctions here is equally unreal, if Tesco and its solicitors perform their obligations professionally and in good faith. I am confident that they will do so. If the adequacy of their search under the standard disclosure order is challenged, that is likely to be through the issues-based disclosure process later this year. If criticised, Tesco would be able to point to the absence of detail in the order and to the relatively tight timetable. A genuine difference of opinion about what is a "reasonable" search is always possible, but that does not mean every detail must be spelt out in advance.

35. Mr Epstein submitted orally that time should not be the "primary driver" of the disclosure exercise; the time allowed should be determined by how long is reasonably required to do

the necessary searches. I accept that fairness requires that enough time is allowed for a party to collate its documents; but it is for the tribunal to balance that against the claimant's right to resolution of this dispute within a reasonable period. Some claimants will have to wait eight years or more for a remedy if their claims are well founded. The disclosure process tolerates the risk that proportionality may mean documents are missed, even a "smoking gun" document (per Morgan J in *Digicel* at [46]).

36. Tesco then complains that the standard disclosure order is perverse; the timetable is too tight, there are too many documents and the litigation is of immense compass and the issues of daunting complexity. But Tesco had already identified, in outline at least, the scope of its MFDs and has known what they are since May 2021 and probably earlier. I reiterate, as did the judge in his clarificatory email, that the preliminary standard disclosure order does not require disclosure of the estimated 16 million documents. That is for later, if ever. The tribunal was entitled to decide there is still time enough to do it.

37. Mr Epstein makes further criticisms of less weight. He complains that the tribunal failed to factor in the time it takes to redact out irrelevant or commercially confidential material from disclosable documents. That is an objection of little force; some redaction before disclosure is permissible but not indispensable. It is not a practice generally to be encouraged but it does happen. As the claimants pointed out, the disclosable documents can be disclosed without redaction and later redacted when bundles are prepared so that properly excludable material does not enter the public domain.

38. He submits that the tribunal should not have relied on "the experience of one of us, Mr Clifton", to conclude that Tesco's "central human resources department was likely to have kept full records of [annual negotiations about pay]" (paragraph 57 of the March 2024 summary). However, as Mr Jones KC for the Leigh Day claimants pointed out, that observation was made in the context of considering what evidence Tesco would need to adduce at the MFD hearing and the length of witness statements. It was not directly about the scope of the disclosure Tesco should be required to give. I do not think this point has merit.

39. Nor do I accept that the tribunal misunderstood the demarcation of roles between solicitors and custodians. A passage in the transcript of the hearing on 13 March 2024 was cited, where the judge said "it is possible for the individual to go through the process and do the work in the first place". In context, the judge was saying that custodians can inform what discussions, negotiations and communications took place and it is for the party disclosing to undertake the process properly. He did not say the client could usurp the solicitor's role of deciding what documents are relevant and disclosable. He did say, correctly (and Mr Epstein agreed) that the obligation is on the party.

40. Turning to the second ground, Mr Epstein submits that 2 December 2024 is too soon to complete the second phase of disclosure, the issues-based disclosure exercise. He repeats the points already made under the first ground about the vastness of the disclosure exercise and the complexity of the issues. He took me through the steps in orders 8 to 11 and complained that only about two months might be available to carry out the second phase of the exercise, involving agreed custodians, search terms and so forth.

41. I think the contention is much overstated. The deadline is still several months away and it is quite possible that the process of agreeing what the issues are may not greatly increase and could even reduce the scope of required disclosure. That remains to be seen. The

exercise of obtaining documents relevant to Tesco's MFDs is one that must have started several years ago. It needs to finish within a reasonable time. Tesco can apply to the judge (not that I am encouraging it to do so) for an extension of time if it really needs one.

42. In conclusion, I do not find merit in the contention that the tribunal's two disclosure orders, orders 5 and 13.1, were legally erroneous or perverse. They were case management orders made after hearing the parties' arguments and considering them. They were well within the scope of the tribunal's discretion to manage the litigation as it thought fit. I therefore dismiss the first and second grounds of the appeal.

Ground 3: the appeal against the "MFD hearing first" order (preliminary hearing)

43. Mr Epstein seeks to challenge the decision of the tribunal to direct that the MFD hearing should precede the final equal value hearing, having in November 2023 directed that both issues should be tried together. It is said that the decision "was an error of law and / or [the tribunal] failed to take into account relevant matters and/or took into account irrelevant matters and / or was perverse".

44. The first argument is that the start date in September 2025 is unrealistic because it was driven by the disclosure timetable imposed by the tribunal, which is the subject of the first two grounds of appeal. As I have upheld the lawfulness of the orders which are the subject of those grounds, that argument falls away.

45. Tesco's next contention is, then, that the "MFD hearing first" order is nonetheless perverse. Part of the tribunal's reasoning, it is said, is that hearing the MFD issues first might help because "some or all equal value comparisons might no longer be pursued by the claimants". That means, Mr Epstein argues, that "[a]n implicit part of that reasoning is that there may be a saving in costs".

46. Yet, says Mr Epstein, the tribunal has not directed that work on equal value should be "paused". Ergo, says Tesco, there will be no saving in costs; the IEs' work will continue to generate the costs of work that may not be needed. To require that work to be done simultaneously with the MFD hearing process is wasteful of costs, Mr Epstein argued. The MFD issues might fall away, wholly or in part.

47. In my judgment, there is no arguable merit in the contention that this consideration makes the decision perverse. With respect, I find the argument difficult to understand. It could equally be put the other way round: why incur the costs of the equal value exercise when the employer may have a material factor defence? Tesco's previous position was that both exercises *should* run simultaneously and be dealt with at the same hearing. That would have involved the costs of both exercises being incurred.

48. The submission that the tribunal was bound, on pain of perversity, not to order the MFD to be tried first, simply does not add up. Everyone agrees that the procedural rules permit sequential as well as simultaneous trial of the issues and that it is for the tribunal to determine, if the issues are tried sequentially, in which order they should be tried. Cost is one aspect of the consideration. Delay is another. These are for the tribunal to weigh, as it did. There was no arguable flaw in deciding that progress on the MFD front should be made in 2024, in the absence of IE availability for much of the year.

49. Other "make weight" points (with respect), are made. It is said that the tribunal misinterpreted rule 3(3) of the Equal Value Rules of Procedure 2013. However, it is clear from the transcript that any error about the scope of that provision was of no materiality and it is not even clear that the error was made.

50. And, it is said that the tribunal erred by describing MFDs as "one issue" when there were many different jobs and material factors to consider, not just one. There is nothing in this point. The tribunal was obviously aware that the MFDs would raise many factual issues. The reference to "one issue" was made to point out that MFDs are only one part of an equal value claim; there are others, not least whether the jobs of claimant and comparator are of equal value.

51. For those brief reasons, I find no arguable merit in the third ground of the appeal and I direct that it should not proceed to a full hearing and that no further action should be taken on the appeal based on that ground.

Ground 4: the appeal against the decision not to require claimants to plead their case on discrimination (preliminary hearing)

52. The fourth ground is that the tribunal "erred in refusing to require the claimants to set out their case on discrimination". Tesco says that to know the case it has to meet in relation to the MFD issues, the claimants must in respect of each material factor relied on by Tesco provide particulars of which such factors are directly discriminatory, i.e. involve them being treated less favourably because of their sex; and particulars of which such factors are indirectly discriminatory, i.e. place women at a particular disadvantage compared to men, stating what the disadvantage is and the pool for comparison purposes.

53. In oral argument, in the case of alleged direct sex discrimination, Mr Epstein gave the example of a market forces MFD of the type commonly relied on by employers. The tribunal was bound, he said, to order the claimants to plead now how they sought to rebut that defence by stating what the relevant market was and how (if so alleged) it operates in a manner tainted by sex (rather like, as it struck me, in a complex competition law claim, a person alleging market distortion must plead the relevant market and how it is being distorted).

54. Mr Epstein pointed to the wording of the MFD provision, section 69(1) and (2) of the Equality Act 2010:

> **"(1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which—**
>
> **(a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and**
>
> **(b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.**
>
> **(2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's."**

55. Mr Epstein's submission is that if the claimants make any positive factual assertions seeking to rebut a material factor defence on the basis that it is tainted by discrimination,

they must plead and prove those facts in the normal way, with the burden then moving to the employer under section 136 if a *prima facie* case is shown.

56. The tribunal, he said, had failed to provide for such a pleading obligation on the claimants in its orders made on 21 March 2024 and as such had erred in law. The tribunal was bound as a matter of fairness to order the claimants to plead out their case in that regard now, not later. He relied on a dictum of HHJ Tayler in *CSC Computer Science Ltd v. Hampson* [2023] EAT 88, at [21]. The summary stating the *ratio* of that decision is pithy:

> **"The employment tribunal failed to find the facts necessary to determine whether the claimant and her comparators were engaged in like work. The appeal was allowed."**

57. After setting out the material factor defence provision at section 69 and noting that it should be "approached with care" ([18]), the judge said at [20] and [21]:

> **"20. Potentially, there is an interesting issue about the burden of proof when considering the material factor defence. It is clear that it is for the employer to establish that the factor relied on is the real reason for the difference in pay. In this case there was no assertion of indirect discrimination. If direct sex discrimination is asserted, Mr Cooper suggested that, once it has been established by the employer that the reason for the difference in the terms is the material factor, section 136 EQA should be applied, first considering whether there is a prima facie case of direct sex discrimination; only if a prima facie case is established is the respondent required to disprove direct sex discrimination.**
>
> **21. I accept that there must be some evidential basis for an assertion of direct sex discrimination, but, in the absence of full argument on that point, I do not consider it appropriate to give a final view as to the interrelation between sections 69 and 136 EQA. In many cases there will be no issue about the burden of proof, but I can see that there would have to be some evidential basis for any assertion of direct discrimination."**

58. The transcript of the hearing on 13 March 2024 shows that the claimants (or at least the Leigh Day claimants) do intend to assert in rebuttal of any "market forces" MFD that the market is "tainted" by discrimination. Mr Jones explained to the tribunal that:

> **"… because we are tremendously reasonable people, we have already said … that we will do our best to help out and it is likely, I think, that we will say, if they rely on a pure market forces argument, that it is a market which is tainted itself by discrimination and that they have helped create that market and they are continuing to keep that discriminatory market in existence. So that may well arise…."**

59. Mr Jones submits that, as to direct discrimination, there is "no burden on the Claimants to identify reasons why they consider that the material factor does involve less favourable treatment because of sex". Mr Bryant KC for the Harcus Parker claimants pointed out that HHJ Hand QC had, in *BMC Software Ltd. v. Shaikh* [2017] IRLR 1074, (approved and not disturbed on appeal on this point; see [2019] ICR 1050, per Underhill LJ at [19]), stated at [89]:

> **"Ms Shiu argued that the absence of any findings as to discrimination in relation to the system of granting pay increases meant that there was no prima facie case of discrimination and therefore no burden shifted to the appellant to disprove discrimination. It seems to me that in cases where a woman engaged on like work with a man is paid at a lesser rate of remuneration the presumption of sex discrimination has already arisen and it can only be displaced by proving a non-discriminatory material factor has caused the difference. Proving good faith on the part of the employer and proving that there is no obvious direct discrimination in general terms will not be enough in many cases. If it was enough I am fearful that there would be a serious danger of the equal pay provisions of the EqA being rendered less effective…. ."**

60. In relation to indirect discrimination, the claimants do accept (in the Leigh Day skeleton and supported by the Harcus Parker claimants) that "in relation to indirect discrimination, the burden is on the Claimants to show a particular disadvantage". The disparity in sex between predominantly female claimant store workers and predominantly male distribution centre workers gives rise to *prima facie* indirect sex discrimination (*Enderby v. Frenchay Health Authority* (Case C-127/92 [1994] ICR 112). The sample pleading already so asserts:

> **"13. A clear majority of staff employed at the Respondent's (and its associate companies') distribution centres are male. In particular, the overwhelming majority (alternatively the majority) of staff employed in the Comparator job roles are male. The Respondent's retail stores, and in particular the role(s) in the Respondent's retail stores held by the Claimant, are staffed predominantly by women or are mixed and staffed approximately equally by men and women.**
>
> **14. Accordingly, lower pay for staff in the Claimant's roles indirectly discriminates against female staff. Any explanation given by the Respondent for the purposes of the claim either under domestic or European law must be objectively justified."**

61. I do not find it necessary, any more than HHJ Tayler did, to embark on an analysis of the interaction between section 69 and section 136 of the 2010 Act. I accept, as the claimants do and did below, that the claimants will need to provide to Tesco particulars of the facts relied on to support their likely contention that the relevant market is "tainted". However, Mr Jones is right to submit that such an obligation should arise once the employer has identified the market or markets whose forces result in the pay inequality, unconnected with sex, between a particular claimant and her particular comparator.

62. Moreover and crucially, in order 6, the tribunal required the claimant to set out their "response to the respondent's case on MFDs" (the tribunal's heading). The claimants were given until 28 June 2024:

> **"… to the extent that they are able to do so on the basis of such documents as have by then been disclosed by the respondent, respond to the respondent's further information given in accordance with order 4 above, specifying which term(s) in the Identification of Terms Schedule remain in dispute (i.e. the term(s) on which the claimants continue to rely) and the claimants' reasons for this."**

63. In my judgment, the claimants' submissions are incontestably correct. It is not remotely arguable that the tribunal here was bound in law to make an order now going beyond what it directed in order 6. A riposte to an MFD such as a "market forces" defence is a reply point, not a point to be pleaded in advance of particularised MFDs. There is no basis for asserting that Tesco would be subjected to an "ambush" (Mr Epstein's word) at the September 2025 MFD hearing. If Tesco is dissatisfied with the claimants' response when it comes to comply with order 6, it can apply to the tribunal to remedy that.

64. A further point was relied on in the written argument of Mr Epstein, but not developed in oral argument. It was said that there was a "serious procedural error" in that a particular passage from *Harvey on Industrial Relations and Employment Law* had been quoted in the tribunal's judgment and that the parties had not been forewarned and other parts of the same section in *Harvey* had been omitted from the tribunal's citation.

65. I should say, for completeness, that this is a point without arguable force. The parties are always free to draw passages in that well known work to the tribunal's attention. They

should expect that a tribunal may refer to and draw on what, as Mr Bryant points out, is the most well-known text in the field. I agree with the submission of the Leigh Day claimants that the threshold of "seriously irregular and unfair" treatment, set by the Court of Appeal in *Stanley Cole (Wainfleet) Ltd v. Sheridan* [2003] ICR 1449 (per Ward LJ at [28]), is nowhere near being met.

66. For those reasons, while Tesco's arguments on the fourth ground were more detailed and sophisticated than they were on the third ground, there is no arguable merit in the fourth ground, to which the terms of order 6 are a complete answer. I will therefore direct that the fourth ground will not proceed to a full hearing and that no further action will be taken on it.

Tesco's application for a stay of the order requiring it to file and serve an amended MFD pleading by 31 May 2024

67. Tesco also made an application to stay the effect of certain parts of the tribunal's orders below pending the appeal tribunal's decision on the third and fourth grounds of the appeal. That application now falls away; it would only have been needed if the fourth ground of appeal had, contrary to my decision, been permitted to proceed to a full hearing. For completeness, the application for a stay is dismissed as it has now become academic.

Conclusion

68. For those reasons, the appeal on grounds 1 and 2 is dismissed. Grounds 3 and 4 do not raise any arguable error of law in the tribunal below and will not proceed further to a full hearing. I add some short general observations.

69. This appeal shows that in undertaking case management in equal pay litigation; there is nothing wrong with pressing ahead and forcing the pace; patience is not a virtue in equal pay litigation. The right of access to a tribunal and a remedy for any wrongs done within a reasonable time requires a continuing sense of urgency and momentum.

70. Tesco's submissions in this appeal do not fully recognise those propositions. The directions given by the judge do not impair its right effectively to defend itself against the claims, but Tesco's proposed recipe for delay would, if allowed, impair the claimants' right to have their claims determined within a reasonable time.

71. In group equal pay litigation such as this, there will often be a substantial overlap between determination of issues - and appeals against determinations of issues. That is a price that must be paid to avoid unacceptable delay. Respondents and indeed claimants cannot expect the luxury of awaiting the outcome of each issue sequentially, still less appeals on each issue.

72. Likewise, trials of issues out of the sequence in which they logically arise is a price that may have to be paid in order to achieve finality in the litigation within a reasonable time. Thus, the MFD issue only arises, in principle, if the jobs of claimant and comparator are of equal value. Yet the MFD defences often have to be tried on the *assumption* of equal value. This is not only permissible; it may become necessary in order to avoid unreasonable delay.

73. As for preparation, the need to "get on with it" in litigation such as this entails starting on tasks such as disclosure before knowing what its ultimate ambit may be or what the ultimate deadlines may be. Tesco's very experienced solicitors and counsel must know this. I would be surprised if the disclosure exercise internally is not already well advanced, given the raising since 2018 of MFD issues arising and their development from May 2021 onwards.

74. This appeal tribunal should be especially slow to interfere with case management decisions in substantial multi-claimant litigation such as this, given by an assigned managing judge with prior experience of the case and a consequent understanding of its dynamics and of the historical and litigious context in which particular case management decisions are being made.

75. Generally, where one party seeks delay and the other seeks to keep up momentum, the tribunal is likely to look with scepticism at proposals involving long delay, provided the party seeking to keep up momentum, is not trying to impose real unfairness through unrealistically short deadlines. That is nowhere near the position here.

76. I conclude by thanking the parties and their teams of solicitors and counsel for the helpful way in which they have arranged for the preliminary and appeal hearing to take place at short notice.