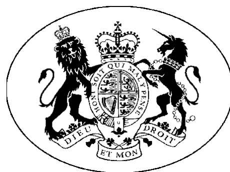

# EMPLOYMENT TRIBUNALS

**Claimants:** Miss M Thandi and others

**Respondents:** 1. Next Retail Limited
2. Next Distribution Limited

**Heard at:** Leeds **On:** 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24 May 2024.
26 July 2024.

**Before:** Employment Judge D N Jones
Mr W Roberts
Ms G M Fleming

**REPRESENTATION:**

**Claimants:** Mr A Short, KC, Mr G Baker, counsel
**Respondents:** Mr P Green, KC, Ms K Donnelly KC, Ms C Campbell, counsel and Mr T Mallon, counsel

# JUDGMENT

1. The material factor defence is not upheld in respect of the following terms:
    1.1. Basic pay (term 1);
    1.2. Unconsolidated awards (term 2);
    1.3. Sunday pay premium (term 4);
    1.4. Night time premium (term 5);
    1.5. Overtime premium (hours worked over full time equivalent) (term 13A);
    1.6. Paid rest breaks (term 16);
    1.7. Long service awards (term 17).

2. In respect of these terms:
    2.1. The respondents have shown that the differences between the terms of the lead claimants and their comparators are because of one or more material factors reliance on which did not involve treating the lead claimants less favourably than the comparators because of their sex.

2.2. The lead claimants have shown that as a result of the factors they and women are put at a particular disadvantage when compared with men doing equal work to theirs.
2.3. The respondents have not established that the factors were a proportionate means of achieving a legitimate aim.
2.4. The sex equality clause in the contracts of the lead claimants has effect.

3. The material factor defence is upheld in respect of the following terms:
   3.1. Covid 19 and furlough (term 1);
   3.2. Peak premium bonus (term 1);
   3.3. Attendance bonus (term 3);
   3.4. Productivity bonuses (terms 6, 7 and 8);
   3.5. Public holiday premium (term 11);
   3.6. Notional holiday premium (term 12);
   3.7. Additional hours premium (term 13B).

4. In respect of those terms:
   4.1. The respondents have shown that the differences between the terms of the lead claimants and their comparators are because of one or more material factors reliance on which did not involve treating the lead claimants less favourably than the comparators because of their sex.
   4.2. The lead claimants have shown that as a result of the factors they and women are put at a particular disadvantage when compared with men doing equal work to theirs.
   4.3. The respondents have established that the factors were a proportionate means of achieving a legitimate aim.
   4.4. The sex equality clause in the contracts of the lead claimants has no effect.

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# REASONS

**Introduction**

1. If a claimant and comparator of the opposite sex do equal work, an equality clause is implied by law. It has the effect of modifying the contractual terms. The claimant's contract is to be treated as equivalent to that of the comparator; her terms are as favourable and beneficial. The mechanism by which this is achieved is contained in section 66 of the Equality Act 2010 (EqA). That is addressed in our decision which was sent to the parties on 27 April 2024.

2. That is subject to an exception. If an employer establishes that there was a material factor which caused the difference, and that factor was neither directly or indirectly discriminatory, the sex equality clause has no effect[1]. The legislation describes this as the defence of material factor, but it is more commonly referred to by practitioners as *the material factor defence*.

3. There are 3,540 claimants in these proceedings. The Tribunal has found that their work as retail consultants in the stores is of equal value to the warehouse operatives who work in the warehouses where the goods are processed and sent to the stores for sale or to customers who have made purchases online, either to their addresses or for collection by them in the stores. Our ruling concerned three lead claimants. Alison Milton worked for the first respondent from 24 February 1998 until 25 November 2021 at the Bristol Cribbs Causeway store. Amanda Cox worked for the first respondent from 18 November 2000 until 20 January 2020, also at the Bristol Cribbs Causeway store. Helen Cherry worked for the first respondent from 30 September 2002 until 2015 at the West Quay store in Southampton and from 2015 has worked at the Hedge End store in Southampton.

4. There are four comparators whose work has been considered with reference to that of the lead claimants. They are Steven Oliver who worked for the first respondent from 15 April 2002 until September 2008 at the Elmsall complex and from September 2008 has worked at Dearne Valley Boxed (DVB). Richard Parker worked for the first respondent from 31 October 2005 to date at the Elmsall complex. Calvin Hazelhurst worked for the first respondent from 25 September 2011 to date at the Elmsall complex. Andrejs Zale worked for the second respondent from 28 August 2015 to date at DVB.

5. No application has been made by either party to the effect that the decision on the issue of equal value does not apply to any related cases under rule 35(3) and the decision is therefore binding on all parties pursuant to rule 35(2).

6. This hearing concerned whether the respondents have established the material factor defence. The relevant period is from 2012 until 2023. The first complaints were issued in 2018. They can extend back as far as 6 years before their presentation for those employed for that long. The period after the claims were issued has been extended by way of agreed amendment.

7. The structure of this decision is apparent from the Table of Contents. We start with the agreed List of Issues and then summarise the evidence which was adduced for this hearing. The law is set out in the legislative materials. Separate sections then review judicial consideration of the previous and current legislation. A section relating to background takes an overview of the history over the relevant period. There are 17 terms, or categories, which we consider separately. These were drawn from a table of terms for comparison prepared by the parties. The 17 categories were reviewed and revised during the hearing. The productivity bonuses were originally 3 terms but are considered together, following our earlier ruling. There are 3 different aspects of basic pay, which had been categorised as

[1] Section 69 EqA. ***McNeil v Revenue and Customs Commissioners [2020] ICR 515,*** para 9, per Underhill LJ

one term. Overtime was categorised as one term but covers two types. A number of terms do not affect the lead claimants and so do not fall for our consideration. The majority of facts are not in dispute and, where there was an issue, we address it in the background or other relevant sections. Mr Short invited 18 findings of fact, although some were not strictly findings of disputed facts, but interpretations to be placed upon the facts. We have addressed all issues and findings which were necessary, but not by cross reference to each paragraph in the list of issues or written submissions. We have rounded up or down some of the numbers and statistics for ease of processing.

## The Issues

8. At a preliminary hearing on 11 December 2023 the Tribunal approved a list of issues submitted by the representatives of the parties for this aspect of the case. They are, with some slight modification:

 8.1. In relation to any less favourable term, is the difference because of one or more of the material factors identified by the respondents, namely:

 Factor 1: *Market forces and market price*;
 Factor 2: *Recruiting and retaining sufficient warehouse labour;*
 Factor 3: *Maintaining 24/7 work in the warehouse, including night shifts, overtime, Sundays and public holidays*;
 Factor 4: *Incentivising high productivity within the warehouse, generally and during peak periods of demand*;
 Factor 5: *Incentivising consistent and high attendance in the warehouse, in particular during peak periods of demand*;
 Factor 6: *Business viability, resilience and performance of the NEXT Group and subsidiaries*?

 Direct discrimination

 8.2. Have the respondents shown that the factors relied upon do not involve treating the lead claimants less favourably because of their sex than the respondents treat the comparators?

 8.3. Where the differences are because of a reliance upon factor 1 (market forces and market price) does this involve treating the lead claimants less favourably than the comparators because of their sex? Specifically:

 8.3.1 Do the differences that arise because of 'the market' reflect the lead claimants' roles being seen as women's work and comparator roles being seen as men's work and is the differential between the market rates 'inherently discriminatory'?

 8.3.2 If so, did this amount to the respondents treating the lead claimants less favourably because of their sex, so as to constitute direct discrimination?

 8.3.3 Did the respondents 'know of this perception and/or the impact it had as to the pay differentials' and was the respondent 'content to take advantage of it'?

 8.3.4 If so, did this amount to the respondents treating the lead claimants less favourably because of their sex, so as to constitute direct discrimination?

8.4 Do the differences that arise from reliance upon factor 4 involve treating the lead claimants less favourably than the comparators because of their sex? Specifically:

8.4.1 Was the payment of bonuses to the comparators based on an assumption that to persuade male dominated job groups to improve poor performance or maintain required performance it was necessary to pay them additional sums whereas it was assumed that female dominated job groups would complete such tasks without requiring additional payments?

8.4.2 If so, did this amount to the respondents treating the lead claimants less favourably because of their sex, so as to constitute direct discrimination?

<u>Indirect discrimination</u>

*Enderby type discrimination*

8.5 Where the difference arises because of a reliance upon one or more of the factors identified by the respondents, does that put the lead claimants and persons of the same sex doing work equal to the lead claimants at a particular disadvantage when compared with their comparators by reason of the application of the principles in *Enderby* and subsequent caselaw? Specifically:

8.5.1 What are all the relevant statistics? The claimants rely on the proportion of those carrying out lead claimant roles compared with the proportion of those carrying out comparator roles at Elmsall Drive and DVB; the overall breakdown of all those carrying out comparator roles employed by the respondents before and during the Relevant Period; and the pattern amongst the workforce generally. The respondents additionally rely on statistics to the effect that 99.8% of Sales Consultants (both male and female) are uninterested in working as Warehouse Operatives and/or are unwilling to do so, and the proportion of men and women working as Warehouse Operatives.

8.5.2 Do the relevant statistics, considered in any relevant context, establish the necessary *Enderby* type particular disadvantage for the purposes of section 69(1)(b)?

*PCP Discrimination (1) (PCP1 and PCP2)*

8.6 Do any of the factors identified by the respondents put the lead claimants and sales consultants at a particular disadvantage when compared with their comparators by reason of 'PCP Discrimination (1)', namely:

> *'The warehouse roles were, or were largely, full time roles or roles that required periods of full time work (PCP1) and/or roles that required shift work (including nights) (PCP2).' For these purposes, the reference to shift work is to work that would or would usually require an early shift (i.e. shifts starting at or before 7am), a late shift (i.e. shifts finishing at or after 9pm), night shift or a mixture of different shifts.*

8.6.1 Were the warehouse roles, or were they largely, full time roles or roles that required periods of full time work?

8.6.2 Did the warehouse roles require shift work (including nights)?

8.6.3 If PCP1 and/or PCP2 applied, did they put the lead claimants and sales consultants at a particular disadvantage when compared with their comparators?

*PCP Discrimination (2) (PCP3)*

8.7 Do any of the factors identified by the respondents put the lead claimants and persons of the same sex doing work equal to the lead claimants at a particular disadvantage when compared with their comparators by reason of 'PCP Discrimination (2)', namely:

*A PCP of fixing retail pay unilaterally by reference to market rates, or alternatively, market rates adjusted by the national minimum wage and of fixing warehouse pay through collective bargaining (PCP3)*'

8.7.1 Was retail pay fixed unilaterally by reference to market rates, or alternatively, market rates adjusted by the national minimum wage?

8.7.2 If PCP3 applied, did it put the lead claimants and sales consultants at a particular disadvantage when compared with their comparators?

*Objective Justification*

8.8 If and in so far as any of the factors identified by the respondents put the lead claimants and persons of the same sex doing work equal to the lead claimants at a particular disadvantage when compared with their comparators (by reason of issues 8.5, 8.6, or 8.7 above), was the factor a proportionate means of achieving a legitimate aim, as pleaded by the respondent, namely:

8.8.1 Viability, resilience and successful business performance;

8.8.2 Maintaining 24/7 Warehouse work;

8.8.3 Incentivising Warehouse productivity; and

8.8.4 Incentivising consistent and high Warehouse attendance.

<u>Key Factual Issues</u>

8.9 Was the market price for the lead claimant and comparator roles different and specifically was it higher for comparator roles?

8.10 Was it necessary to pay the market price for comparator roles in order to recruit and retain sufficient warehouse labour?

8.11 Was it legitimate and proportionate not to pay sales consultants a rate which was above that required to sufficiently staff retail stores?

8.12 Does the rationale for paying premium pay to warehouse operatives who work night shifts, Sundays and public holidays apply in the same way to sales consultants?

8.13 Were the bonuses paid to the comparators linked to the productivity of the recipient?

8.14 Are the matters alleged by the claimants as to the market rates being affected by gender breakdowns of the relevant job groups and being 'sex tainted' and allegedly 'inherently discriminatory' 'differentials' relevant considerations as a matter of law and if so how do they affect the legitimacy or proportionality of any of the matters relied on by the respondents in respect of objective justification?

9. In closing submissions, the claimants withdrew the invitation to find there were 3 PCP's in paragraphs 8.6 and 8.7 above. They rely on the statistical differential. We address the proper approach in paragraph 184 below.

**The Legislation**

10. Part 5, Chapter 3 of the EqA concerns equality of terms. The principal statutory provision with which this case is concerned is section 69:

**Defence of material factor**

> *(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.*
>
> *(3) For the purposes of subsection (1), the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim.*
>
> *(6) For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's.*

11. The reference to *A* in this section is to a person who is employed on work that is equal to that of a comparator of the opposite sex and that comparator is the person referred to as *B*, see section 64(1) EqA.

12. Section 66(1)(a) of the EqA is intended to capture the principles of direct discrimination, which is defined in section 13 of Chapter 2 of Part 2 of the EqA. That Part deals with *Key Concepts*. Sections 66(2) and 66(1)(b) relate to indirect discrimination. That is defined in section 19 of the EqA.

13. Section 13 of the EqA states:

> **Direct discrimination**
>
> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

14. Section 19 of the EqA states:

> **Indirect discrimination**
>
> *(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*

*(c) it puts, or would put, B at that disadvantage, and*
*(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*
*(3) The relevant protected characteristics are—*
*age;*
*disability;*
*gender reassignment;*
*marriage and civil partnership;*
*race;*
*religion or belief;*
*sex;*
*sexual orientation.*

15. Section 23 is a supplementary provision which addresses comparisons which are to be used for the purpose of defining when discrimination has occurred. It states:

**Comparison by reference to circumstances**
*(1) On a comparison of cases for the purposes of section 13, 14, 19 or 19A there must be no material difference between the circumstances relating to each case.*

16. Chapter 5 of Part 9, which concerns *Enforcement,* includes a provision about the burden of proof. Section 136 states:

**Burden of proof**
*(1) This section applies to any proceedings relating to a contravention of this Act.*
*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
*(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*
*(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*

17. The Commission for Equality and Human Rights was created under the Equality Act 2006 and it may issue a Code of Practice in connection with any matter addressed by the Equality Act 2010, by section 14. Such a Code is designed to ensure or facilitate compliance with the Equality Act 2010 or to promote equality of opportunity. The Equality and Human Rights Commission: Code of Practice on Equal Pay (2011) is one such Code. It has two parts, the first with respect to the law and the second with respect to good equal pay practice.

## Evidence

18. The respondents called Mr Lionel Mason, Group Human Resources Director (formerly Head of Human Resources for Next Retail from 2000 until 2020), Mr Neil Mollison, HR Systems Product Owner, Mr Simon Kelly, Director of Warehousing from 2006 to 2022, Mr Richard Churchill, Productivity Support Department Manager from 2011, Mr Simon Navarro, Recruitment Manager from 2022, and Mrs Gail MacIntyre, Head of HR People Development. A witness statement from Mr Mick Jones, Assistant Manager at the DVB warehouse in Rotherham was provided but his statement was not challenged.

19. The lead claimant, Ms Helen Cherry, gave evidence. A witness statement of Ms Natasha Sherry, solicitor for the claimants was submitted, but she was not called to give evidence.

20. The parties submitted a file of documents running to 15,625 pages. This included the witness statements, expert evidence and academic materials from which the experts had drawn. In addition a supplemental bundle of 694 pages and a file of further expert evidence of 38 pages was provided.

21. The respondents sought permission to submit further documents for the purpose of cross examination of the claimants' expert witnesses. This was opposed in part. The Tribunal granted permission for a number of those documents to be admitted, with the qualification that the experts should be entitled to have time to consider them before they gave evidence.

22. The Tribunal gave permission for the hearing to be transcribed at the expense of the parties and a copy was provided for the Tribunal at the conclusion of each day. This is not the official transcript. A small section of authorised transcript was obtained by the parties because part of the hearing had not been picked up by their audio equipment.

23. The Tribunal gave permission to a number of named individuals to view and hear the proceedings remotely having had regard to the provisions of the Remote Observation and Recording of Proceedings (Courts and Tribunals) Regulations 2022.

24. We summarise the evidence of each witness.

25. Ms Cherry has worked for the first respondent for 22 years, with a variety of weekly hours, ranging from 12 hours, initially, to 37.5, in 2008 and 2009. During the relevant period they varied between 12.25 and 35.5. Ms Cherry initially took the job because the hours fitted with her main child-caring responsibilities but during the relevant period her children were adults. She took the opportunity to study garden design when her hours reduced in 2010. Ms Cherry took a second job working at the cruise terminal in Southampton in 2014/2015 which she has maintained. Ms Cherry had not applied to work in warehouses nearby, of which there were a number, albeit not of the second respondent. The work did not particularly appeal to her. She preferred the role with her customer service skills but if she had been offered more money to work at one of the second respondents' warehouses locally, she would have considered it. Later in her evidence she said for a lot more money.

26. She described the majority of customers as women, even in the menswear department. She said there were full length mirrors for women who wanted to see their outfits whereas not for men who were thought to be less bothered. She drew attention to an email in 2017 "*in which we (the female staff) are referred to 'ambassadors' that women liked to be able to look at and be inspired by the more exciting items*". Ms Donnelly submitted that the use of this quotation was selective and out of context. Ms Cherry had not seen it at the time. It was shown to her by her solicitors for this part of the hearing. It came from feedback of a customer focus group and was one of several matters they had discussed. This one related to uniform. It said, "*Females in particular. Feeling that it is ok, but not particularly*

*memorable and women like to be able to look to staff as ambassadors and be inspired by the more exciting items in the range. Happy that this was even in a more casual manner, doesn't need to be smart as long as it's presentable and looks good"*. We accept the criticism made by Ms Donnelly. Here it is the customers not the employer that used the phrase 'ambassadors'.

27. Ms Cherry portrayed the warehouse environment as sexist and disagreeable to women, with reference to a patronising gender remark made on a visit to the DVB warehouse, some smutty images and sexual comments on tubs of stock which had been sent from the warehouses, and a record drawn to her attention by her solicitors about male managers using CCTV footage to look down women's tops. The first point was not pursued, as Ms Sherry to whom the alleged remark was made did not give evidence. The second was not direct evidence and cross examination drew out that it was based on a series of assumptions. The third appeared to relate to an incident before the relevant period, was not a document to which our attention was drawn and only came to the attention of the claimant for the purpose of writing her witness statement. This selective presentation of a typical working environment in the warehouses was not persuasive. The reality was Ms Cherry had no direct experience of the warehouse workplace.

28. Mr Mason was the principal witness in respect of retail work of the first respondent. His evidence described this market before and during the relevant period, with detail about how it has declined and how the first respondent managed that decline.

29. Mr Mason was responsible for recruitment and provided the workplace demographics. There was a high turnover of short-term workers who were recruited for seasonal periods. There was no particular difficulty in finding sufficient staff given the decline in the retail market generally and a consistently high number of candidates for vacancies.

30. In respect of the setting of retail pay, in his position as Head of HR, he had taken a primary role in the decisions which were taken. The increase in the national minimum wage, which became the national living wage, was a principal influence. There was consistent pressure to minimise labour costs with the consequence that a number of bonus schemes were altered over time and then sacrificed to fund the national minimum wage increases.

31. Mr Mollison had compiled and collated statistical data which was presented in tables and graphs of retail and online sales performance, recruitment channels, retention rates with some limited breakdown of the reasons for staff leaving, lengths of service and contractual hours, gender and age of the workforce and the use of staff discounts. Mr Mollison explained the systems which enabled retail staff to arrange flexibility to their shifts.

32. Mr Kelly's evidence addressed the rapid expansion of online sales and the demands on warehouses leading to their expansion over the relevant period. He had a leading role in recruitment. The challenges arising from the greater demand for staff were dealt with by a number of initiatives. There was use of agency staff including workers from the EU. The situation was exacerbated by the expansion of competitor warehouses in the region who were chasing the same labour market.

33. With respect to pay and remuneration, he managed the negotiations with USDAW and was instrumental in setting the respective proposals. The use of benchmarking was a part of the process and was deployed in discussions by Mr Kelly as well as by the union representatives. Cost control was permanently expected of the labour budget.

34. Mr Navarro had initially worked for the first respondent. He had started as a sales assistant in 1998. He became a manager in several retail roles. He moved to the second respondent in 2006 when he became a warehouse operative. He became a team leader, warehouse manager and then regional manager for the south in 2012. He became site manager at Elmsall in 2016.

35. In 2021 Mr Navarro became directly involved in recruitment and implemented a number of initiatives, which included measures to stem the high levels of attrition of new starters. He provided data and statistics in a number of tables and graphs in respect of headcount, retention, the number of offers made and the use of agency workers.

36. Mr Navarro was a helpful witness because of his experience of both retail and warehouse work; as a sales consultant, warehouse operative and manager in both sectors. He rejected the portrayal of warehouses as sexist by Ms Cherry. His evidence about that was more reliable, given his work experience and we accepted it.

37. Mr Churchill was the manager of the department which continually oversaw and developed the bonus scheme. He was responsible for a team of 23 others. He explained the rationale behind the setting of standard minute values (SMVs) for tasks and introducing incentivised productivity bonuses by reference to these. Mr Churchill provided data on the percentage of employees who achieved performance levels and consequent bonus payments. He explained the impact of the bonus scheme on efficiency which was demonstrated by cost per unit processed.

38. Mrs MacIntyre's evidence supplemented that of Mr Kelly with respect to the negotiation of terms and conditions with USDAW. She addressed the different elements of remuneration, the proportions of full time and part-time work undertaken, the gender makeup of the warehouse staff and the hours worked by the comparators.

The expert evidence

39. By an order of 22 December 2023, the Tribunal allowed an unopposed application of the parties to adduce expert evidence in respect of:

39.1. What the market price was for retail sales consultants and warehouse operatives over the relevant period.

39.2. If and the extent to which sex, sex composition of a job group, collective bargaining, worker productivity and/or part time status impacts market rates for retail sales consultants and warehouse operatives.

39.3. If, and the extent to which, there is any perception of retail work as being women's work and/or warehouse work as being men's work

and if so whether and to what extent it impacts market rates for retail sales consultants and warehouse operatives.

40. In respect of the first issue, this generated an extremely detailed report from Mr Dominic Miles who was instructed by the respondents. He is a senior partner with LEK marketing, a global strategy consulting firm. The report, including appendices, runs to 378 pages.

41. In respect of the second issue Mr Alex Bryson, a professor of quantitative social science at University College, London, who was instructed by the claimants submitted a report of 41 pages.

42. In respect of the third issue, Dr Lynne Pettinger, associate professor of sociology at the University of Warwick, instructed by the claimants prepared a report of 29 pages.

43. Each expert answered written questions from the other party. Professor Bryson and Mr Miles produced some further written short comments. All experts attended to give evidence and were cross examined.

44. At the commencement of this hearing the Tribunal invited the parties to consider whether there was any scope for agreement. We made an order that Mr Miles and Professor Bryson should have a meeting to identify any areas on which they may be able to reach agreement under CPR 35.12(4). They prepared a joint report of 12 pages. There was a limited area of common ground.

45. The Tribunal recognises the substantial effort and energy which the experts invested in preparing their reports. These draw on years of study and research. It is not possible in these reasons to do them justice. In determining the factual and legal issues which this case threw up they were of some, but limited, assistance.

<u>Mr Miles</u>

46. Mr Miles used information on wages of the Office for National Statistics (ONS) (Annual Survey of Hours and Earnings) and data from Adzuna, an online job advertiser. Other materials included a review of academic materials of economic principles and research of recent trends in the retail and warehouse markets. He had seen the witness statements of the respondents for this hearing.

47. He reached 20 key conclusions, which were not subject to any serious challenge. We accepted them. In summary:

47.1. Retail and warehouse were separate markets. They had faced markedly different trends over the relevant period; a fall in demand of 18% for retail sales consultants and an increase of 23% for warehouse operatives. Warehouse work required more staff for online sales than for in-store sales because of the need to pick and pack each customer order. The first respondent’s fall in demand over the relevant period for sales consultants was greater than the fall in the overall labour market for sales consultants in apparel retail. The second respondent’s demand for warehouse operatives was greater than the growth in the overall labour market for warehouse operatives in Yorkshire.

47.2. Between 2017 and 2022 the vacancy rate for warehouse posts was double that for retail. There was a high number of applications (28-33) per vacancy at the first respondent.

47.3. The market price across the UK for retail sales consultants was £6.19-£9.27 in 2012, rising to £10.42-£14.37 in 2023; and for warehouse operatives was £6.19-£12.15 in 2012 rising to £10.42-£16.41 in 2023. This reflected pay across apparel, grocery and other retail sectors and encompassed basic pay, shift premium, bonus and incentive payments and overtime pay. Additional pay (that is pay other than basic) was a more important component of remuneration for warehouse operatives and not commonly included for retail consultants. Its relative importance has reduced over the relevant period because of increases in basic pay to exceed the national minimum wage. Our table and graph at para 198 includes the figures from the ONS and the rates paid by the respondents.

47.4. The median differential reduced from 23% to 10% over the relevant period. The narrowing gap was counterintuitive, given the diverging demand trends in the respective markets but was because of the national minimum wage. It operated as a wage floor with the consequence that the market price for retail rose faster than warehouse because the wages of retail workers were closer to the national minimum wage than warehouse workers.

47.5. For basic pay the first respondent pays at the low end of the market rate for sales consultants which was comparable to Debenhams, Primark and Sports Direct. Mr Miles did not have the data to assess the value of any other aspects of remuneration such as the various bonus schemes which came and went or the discount on purchases including the working wardrobe.

47.6. The overall remuneration the second respondent paid its warehouse workers was close to the market average for Yorkshire and at or just above the median for the UK. The basic pay, night shift and overtime premium fell in the lower quartile of the market and bonus in the higher.

47.7. Had the first respondent provided a greater level of remuneration for sales consultants it may have increased the number of applications per vacancy and had the second respondent reduced the level of remuneration for warehouse operatives it could have reduced the number of applicants per vacancy.

Professor Bryson

48. Professor Bryson believes that three factors affect the levels of pay in retail and warehouse labour such that the going rates are not derived from what is a neo-classical economic concept of a demand and supply free market. Those factors are monopsony power of the employer with respect to sales consultants, occupational segregation and union representation.

49. Monopsony is an economic term describing a marketplace in which a single buyer dominates and so can use its bargaining power to set the price. Professor Bryson says this may extend beyond the dominance of one employer in a particular geographical marketplace to circumstances in which some workers find it difficult to travel to any extent or because they may only be able to offer themselves for jobs which offer flexible or shorter-term hours. He relies on

sociological research suggesting women are offered lower rates of pay for work of equal worth, because women tend to be less mobile in the labour market than men. This and reliance on short hours contracts by retail consultants to combine with their social responsibilities would permit an employer to exploit its monopsony bargaining power to pay wages that are lower than the true worth of sales consultants. In short, the job seekers' options are more limited and this can be taken advantage of in the form of the price paid for their service.

50. In respect of sex segregation, Professor Bryson says that male dominated jobs may be better paid when there is a more abundant supply of labour for female dominated jobs. In addition the stereotyping of work by gender may lead to pricing it below its value for women, because a lack of visibility of skills which are less tangible mean they are harder to enumerate and reward and not adequately recognised in classification or grading systems. Examples are caring, nurturing, mediating, organising, facilitating, supporting and managing multiple demands. Interpersonal and emotional skills may be expected to come more naturally to women and so not thought to merit monetary reward. Reasons for how a job become defined by one gender ("men's work" or "women's work") may arise from social expectations of the roles men and women play or barriers to occupations, typically arising from balancing family and work demands. Compensation for working long or antisocial hours may be a pay advantage which is not open to those who cannot offer them and they may seek employment in other work which becomes dominated, typically, by women rather than men. Career opportunities and training may be restricted for those who do part-time work. If there is a high concentration of part-timers they may become branded as low skill workers. Women make up the majority of part time workers in the UK. Employers do not usually have an evidence-base to value the productivity of particular types of work, often those dominated by women.

51. Professor Bryson said that the biggest departure from the standard economic theory, whereby the going rate was arrived at the intersection between supply of and demand for labour in the market, was the impact of trade union bargaining and the recommendations of 8 public sector pay review bodies. He drew on data with respect to the wage premium of unionised labour, of between 5 and 10%, and the UK Government's analyses of a raw gap of 3 – 4% of gross hourly wages post pandemic. He stated the union premium was twice as large in the public sector and that it was considerably higher when union density was 50% or more.

52. An additional section to the report addressed the effect of productivity in determining market price. This covered a broad area of considerations which extended beyond the circumstances relevant to this case such as with respect to the effects of educational attainment and career progression. In some types of work, productivity is more difficult to evaluate than in others, such as where individual contributions to output are hard to identify. Professor Bryson observed that for a pay performance structure to be viable the employer must have a means of tracking the worker's productivity, identifying the contribution the worker makes to output and how that changes over time. He observed that only a small part of the first respondent's pay was linked to performance; one of the metrics being customer service ratings and another store targets. He considered that it was unlikely their wages reflected their productivity but that the sex of the workers and

the sex composition of the occupation was likely to have a substantial impact on their wages.

53. Professor Bryson understood from discussions with the claimants' representatives, which had been fairly summarised, that the warehouse operatives' performance was measured by individual and team level outputs with a weight depending on the job, underpinned by a set of metrics which denoted standard performance. Payments above these triggered bonuses. The incentive pay system meant that the warehouse operatives could substantially increase their earnings by producing more output. He expressed the view that even if the respondents had put in place a fairly elaborate system for monitoring and rewarding the productivity of sales assistants like that of the warehouse operatives, it would not be possible directly to compare the productivity of warehouse operatives and sales consultants. He stated that the only way to establish the relative value of the occupations would be to undertake a job evaluation.

54. The respondents challenged Professor Bryson's conclusions and approach. This was extensive and it has been necessary for us to be selective.

55. Professor Bryson was said not to have properly understood the nature of his duty as an expert witness in civil proceedings. This included the requirement to consider material facts which could detract from or adversely affect his opinion. An example was said to be his failure to draw attention to a conclusion in an article he had cited in favour of the proposition that social scientists emphasised the importance of childhood and adolescent exposure to gendered norms in influencing occupational preferences and thus occupational sorting in adulthood. The academic article was *Kuhn and Wolter* published in 2023. Mr Green pointed to its conclusion that local gender norms had practically no effect. Professor Bryson challenged the conclusion which *Khan and Wolter* reached whereby the partial association between occupational aspirations and local gender norms shrink to zero when controlled for parental occupations, saying he did not think one should control for parental occupations. Mr Green's proposition was that an expert witness should not have cited in support of his proposition an article which included material which undermined it, without drawing attention to that. It was a valid criticism.

56. Another example was an article written by *Nafilyan*, 2020, to support the proposition at paragraph 58 of his report, that the age pattern in commuting time between women and men mirrored the age pattern of the gender pay gap, consistent with women - especially those most likely to have caring responsibilities – choosing jobs with shorter commutes, even if they are paid less. Professor Bryson acknowledged that *Nafilyan's* finding, that there were no gender differences in the effect of commute time for respondents aged below 30, did not sit with the hypothesis but he presumed it had been discussed and this was probably a paper inserted by his colleague Professor Joshi. More significantly, Professor Bryson was criticised for not having included in his report the finding by *Nafilyan* that gender gaps in earnings may arise even in the absence of gender discrimination in the labour market. Professor Bryson said that was important and referred directly back to why there could be a wage gap over and above taste-based or statistical discrimination by employers which could include non-wage component amenities. This was not a satisfactory reason for not including in his report the fact that the

article identified that differences in pay between men and women may not be because of gender discrimination.

57. Professor Bryson accepted that the passage at paragraph 46 of his report should have been attributed to an article from which it appeared to have been taken, *Blau and Khan*, 2017. The passage was about workers in male jobs enjoying a relative wage advantage if the supply of labour is more abundant relative to demand for female than male occupations. Professor Bryson was criticised for not including a part of the *Blau and Khan* article which stated that if segregation occurred it may or may not be associated with gender pay differentials, to provide balance. Professor Bryson said that there were theoretical reasons to suspect that there were conditions under which occupational segregation will impact on the pay of individuals who are in female and male dominated occupations with empirical evidence for and against. The respondents submit Professor Bryson was identifying correlations and not causations and should fairly have acknowledged that other influences than gender may explain the pay differential. We accept the point.

58. Mr Green also challenged Professor Bryson in respect of a number of the articles he had relied upon to support his three principal premises. This included whether he had relied upon the input and opinion of his colleague, Professor Joshi, who did not give evidence, without having full command of the topic. The respondents accepted that it was common for experts to receive assistance in writing their reports and Professor Bryson had expressly identified Professor Joshi in that regard. The criticism was that it was incumbent on any expert to ensure it was their own opinion and to understand what was in their own report. It was said Professor Bryson did not have familiarity with parts of his own report to meet that requirement. In some of his answers Professor Bryson did not seem to have as comprehensive a grasp in areas which had been the expertise of Professor Joshi as we might have expected.

59. In their closing written submissions, counsel for the claimants submitted Mr Green's concerns were being overstated in a number of the examples. We were asked to recognise that, notwithstanding the new language of such concepts of monopsony, tribunals had become very familiar with the problems childcare bring to work, which will influence such matters as travel to work times, availability for part time work and work friendly hours. The fact that the average number of hours worked over the relevant period by a retail worker was 14 hours per week was reflective of this. Although we observe the demand for this type of work was popular with others such as students, we accepted the essence of this submission.

60. Otherwise we treat the expert evidence with some caution. The disciplines by which social scientists operate and reach their opinions is different to the evidence-based determination of legal disputes in courts and tribunals. The use of experts has evolved and is now subject to permission and control. The academic research reveals that reasons why pay in particular occupations varies is attributable to more than one factor and finding clear explanations on causation rather than correlations is difficult. In his evidence Professor Bryson acknowledged this. Professor Bryson was an intelligent and articulate witness who raised interesting, thought-provoking and some persuasive contributions to the extent to which sex, sex composition of a job group, collective bargaining, worker

productivity and/or part time status may impact upon market rates for retail sales consultants and warehouse operatives. The extent to which we were able to rely on those to determine the issues in this case is, however, limited. That is not because many of the considerations may not be valid, but because we are not satisfied they probably are. The hypothesis on monopsony in the retail sector was an example. Some of the research on which it was based was somewhat removed from the situation of the retail wage we were considering. Professor Bryson had not given evidence in court before and was not fully familiar with the duties in the Practice Direction. The evidence from the witnesses who have worked in these settings, and the extensive documentary materials, provided a more reliable footing upon which to answer the questions raised in this case.

Dr Pettinger

61. Dr Pettinger is an economic sociologist. She specialises in the study of contemporary work. She prepared a report based upon academic research. She expressed the opinion that retail and warehouse were "gendered" forms of work.

62. Dr Pettinger identified the male dominated workforce in warehouses in the UK of 80% and female domination of sales assistants of 62%. She stated this emerged from ideas about gender held by the workers, the managers and within wider society about what is men's work and women's work. These are rooted in history, society, culture and in economic practices.

63. With respect to warehouses, it had similarities to other male dominated labour such as manufacturing and heavy industry. She stated this was work involving physical labour with limited scope for autonomy and judgement. She believes men reject interactive service type work because they regard it as requiring feminised relational skills.

64. Retail work may be compared with care work, another feminised occupation, where workers are skilled in managing feelings and able to harness personal and relational skills, such as empathy, in the provision of customer service. In addition, she said there is historical and contemporary gendering of consumption and branding in marketing. The workers will contribute to the production of brand value including by modelling the stock purchased with a discount.

65. Dr Pettinger explained that retail work contributed to brand value but was invisible at the point of wage setting. She stated that the technical and relational skills and competencies were mis-recognised as natural, innate or easy. The promotion of stock by wearing it is taken as consumer practice not a work task.

66. Many criticisms were made by the representatives of the respondents of Dr Pettinger's conclusions, her approach in the preparation of her report and giving of evidence as an expert. We cite only a number of those.

67. Dr Pettinger accepted that she had no expertise in warehouse work or in wage setting. She was asked about the *Rydstrom* 2023 article which she had cited. It reported that picking was generally assigned to women with men assigned more physically demanding tasks and described picking work in e-commerce warehouses as feminised. It was put to Dr Pettinger that, on her own

categorisation, this would mean it was women's work and she agreed. At a later stage in her evidence, she resiled from that.

68. Ms Donnelly stated that Dr Pettinger had misrepresented part of the research on which she relied, for example the ethnographic research of *Johansson* where it was said gendered assumptions were used to defend work which should be in the province of men such as butchery, in a rural supermarket in Sweden, rather than work on the checkout. The men were in fact arranging exotic fruit.

69. In respect of a series of observations, that temporary workers were used as a filtering device to find permanent workers, that deep acting (smiling and really feeling it) was generally expected as part of the gendered performance of retail work and that the retail sales assistant's role was to embody and reflect gendered aesthetics of the brand, Dr Pettinger cited her own papers and ethnographic research. In preparing her PhD Dr Pettinger had undertaken work covertly, that is under an assumed name, for a retail store. Her experiences had fed into her conclusions. She used fictitious names for her co-workers and the store.

70. In preparing for cross examination, the likelihood of the store being NEXT had become apparent to the representatives of the respondents. In answer to a direct question about this Dr Pettinger declined to say. This was not out of disrespect to the Tribunal but because of a professional ethic. Undercover research is undertaken in this way to reveal work practices which corporations might be happier to conceal. The Tribunal ruled that Dr Pettinger would have to answer the question, it was relevant and she agreed that it was the first respondent who had employed her.

71. The respondents say this was a serious departure from the duties of independence of a witness who gives expert evidence and that Dr Pettinger had failed to disclose a potential conflict. Ms Donnelly asked the Tribunal to discount or exclude her evidence entirely. She draws reliance from the Court of Appeal decision of ***EXP v Barker [2017] EWCA Civ 63,*** Irwin LJ said:

> *"In considering Grounds 3 to 5, the starting point is to identify what the judge decided. He considered that the witness had so compromised his approach that the decision to admit his evidence was finely balanced, and that the weight to be accorded to his views must be considerably diminished. In my view he was fully entitled to take that view. Indeed, had he decided to exclude Dr Molyneux's evidence entirely, it would in my view have been a proper decision. Our adversarial system depends heavily on the independence of expert witnesses, on the primacy of their duty to the Court over any other loyalty or obligation, and on the rigour with which experts make known any associations or loyalties which might give rise to a conflict. Dr Molyneux failed to do so here, despite an express direction to that effect. Indeed, the omission of mention of papers co-authored with Dr Barker points in the other direction",* [emphasis added by counsel for the respondents].

72. The respondents submit Dr Pettinger lacked objectivity and that this was apparent from the way in which she had given evidence. She spoke of 'arguing'

her point of view and on one occasion apologising for starting to 'rant' and 'ride my hobbyhorse'.

73. Dr Pettinger had not properly understood the duties of an expert witness and her connection with a party in the case should have been disclosed at an early stage so that the parties could have made representations as to whether there might have been a conflict precluding her evidence from being admitted. Counsel for the claimants acknowledged that, but said it was explained by Dr Pettinger's inexperience in acting as an expert in litigation, the limited guidance she was given, a desire to maintain anonymity of those observed, the fact that her research dated back more than 20 years and that she was giving evidence in relation to the market generally and not specifically NEXT. They submitted there was no actual conflict.

74. We accept that this had arisen through naivety of her obligations and inexperience, but it had an impact on the weight we could give to the evidence. Dr Pettinger felt passionately about treatment of retail workers but this presented a level of subjectivity which raised a concern that she might have been more enthusiastic to find and interpret material which supported her view than challenged it. The detachment required of a dispassionate analysis was absent. We have given little if any weight to a number of her conclusions.

75. We do not exclude the evidence, as invited. That is because some of Dr Pettinger's views about why people choose certain occupations rather than others are valid, such as physical work being undertaken largely by men and care and retail work by women. This falls within the experience of the Tribunal as an industrial jury. Part of the evidence of Dr Pettinger supported the respondents' arguments such as her comment, which she subsequently retracted, that picking work, which involved fine motor skills, could be categorised as women's work.

76. That reflects how the classification of jobs or labour into *men's work* and *women's work* is a complex and difficult one. Insofar as it is simply about a breakdown of the proportions of men and women in particular occupations, what Mr Short described as segregation, it is more straightforward; but the conclusions which may be drawn from that are less than clear. Dr Pettinger had opinions as to why this was the case and the consequences for the female workforce. These were the aspects of her evidence on which we could not place reliance because of the criticisms made by Ms Donnelly about her lack of objectivity.

77. The different constitution of e-commerce warehouses and more classical/traditional warehouses where heavy lifting was required illustrates the dangers of conclusions drawn from broadly based statistics. Furthermore, societal attitudes change and what was the case 20 years ago, when Dr Pettinger prepared for her PhD, may not reflect the views of a younger generation of workers and managers. Mr Navarro is a useful example of why it is difficult making broad assumptions and categorisations about why people choose or are chosen to do particular work or why particular managerial decisions about terms and conditions are reached. He had worked as a retail assistant and warehouse operative and progressed to managerial levels in both but fell into none of the stereotypes in the articles.

78. A number of the articles relied upon by Dr Pettinger were of many years standing, there was little germane to the UK other than her own work and other studies were of very small samples in northern Europe, the United States and Australia. The implication that women were exploited by being obliged to model brands for marketing purposes for no reward was an example of a strong opinion of Dr Pettinger. It had been influenced by her time when working for the first respondent. That characterisation did not reflect the NEXT working wardrobe discount over the relevant period, which was optional, spanned a broad range of clothing and was popular with staff.

79. In the final analysis, we do not find a simple categorisation of the two occupations as *men's work* and *women's work*, or the perception of that, as particularly helpful. It is an imprecise label and risks misinterpretation. That is not to say that the gender breakdown of a workforce is not an important aspect of discrimination law. For example, indirect discrimination is about trying to level the playing field. It is about rules and practices which are not directed at, or against, people with a particular protected characteristic, but have the effect of putting them at a disadvantage. Part-time and flexible hours are popular whereas anti-social hours less so. That would be one reason to explain why the former command lower rates of pay and the latter higher, on a free market concept of supply and demand. That is not because of gender but because the purchaser of the labour can pay less. There is a more abundant supply for flexible work in the traditional working week. It affects women more than men because of their restricted availability in the marketplace; women take on more parental and other caring responsibilities and so are less able to offer additional hours or work outside the normal working week. We do not discount influences historical attitudes and perceptions about the value of physical work in contrast to personal and relationship skill can have, but such qualitative judgments about decision making processes over very many years may be speculative and difficult to draw in particular cases.

## Background

### The stores

80. The first respondent currently operates 466 stores in the UK. They are located in the high street, shopping centres and retail parks. Over the relevant period the number of stores reduced by 74. In 2012/2013 there were 540 stores. They sell principally fashionwear for women, men and children. There is also a home and garden section in a number of stores.

81. The number of sales consultants currently employed by the first respondent is 22,873. That figure was 32,351 in 2013 and has reduced over the relevant period by 9,522. In 2021/2022 the number had fallen to 17,914, due to the impact of the lockdowns during the Covid pandemic, but it has recovered slightly since to stand at 22,873 in 2023. The hours worked by sales consultants were 23 million in 2013 and had reduced to nearly 16.5 million in 2023.

82. In 2013 retail sales were £2,191 million and in 2023 they were £1,865 million. In 2013 the retail profits were £331 million, £348 million in 2014, £384 million in 2015, £402 million in 2016, £339 million in 2017, £269 million in 2018, £212 million in 2019 and £164 million in 2020. In 2021 retail posted a loss of £206

million. Retail profits were £107 million in 2022 and for the year 2023 they were £241 million.

The warehouses

83. The second respondent operates 9 main warehouses, all of which are in Yorkshire. The four comparators worked at the Elmsall complex or DVB. The former has operated from 2019 as an online fulfilment centre for servicing customer online orders, but previously the Elmsall Way part of the complex serviced the retail parts of the business whilst Elmsall Drive was dedicated to mail order and then online orders. DVB supplies products to stores. There are also 6 regional service centres nationally.

84. The headcount of warehouse operatives was 3,550 in 2013 and is currently 6,478 and the hours worked increased from nearly 6.5 million in 2013 to just over 10 million in 2023. The use of agency workers has varied over the relevant period, being 16% of hours worked in 2013 and 8% in 2023. There has not been a consistent pattern, but for the years 2018 to 2021 agency workers accounted for 10% or 11% of hours worked.

85. During the relevant period online sales rose from £1,193 million to £3,007 million and online profit from £302 million to £467 million.

Setting remuneration and terms – retail

86. The mechanism for setting the terms of remuneration for retail staff involved the establishment of a retail budget by the Head of Human Resources for Retail, which was Mr Mason for the years 2000 to 2020 and the senior management team in retail. This was then submitted to the Finance Department which would prepare budgets for the forthcoming year for approval and sign off by the Board of Directors. The proposals for remuneration were included in those budgets.

87. Two other bodies were involved in the process. The Remuneration Committee had sight of and approved the overall proposal but, on the only evidence we heard from Mr Mason, it did not set the respective rates of remuneration. From 2017 the Remuneration Committee held responsibility for Gender Pay Gap reporting.

88. The other body which was most influential in the decision to set rates was the People Focus Meeting. That was a group comprising a number of managers and executives, typically the CEO, Lord Wolfson, the Director of HR, the Retail Sales Director and/or Head of HR for Retail and the Retail Finance Manager. Its involvement is reflected in minutes of the meetings, for example 24 March 2015 which includes a heading *Pay Review* under which a series of savings were proposed to pay for an increase of the basic pay rate.

89. In the years 2012 to 2015 the pay review was set in February of each year. Because national minimal wage rates took effect in October, rates would then be introduced midway through the year in Autumn to catch up with the national statutory minimum wage. In 2015, to avoid this, the first respondent moved the review date to October, but the following year the national minimum wage took

effect in April, so the first respondent changed the review date again to align with that.

Setting remuneration and terms - warehouse

90. On 23 April 2002 the second respondent entered into a formal recognition agreement with USDAW. It was the sole trade union for employees below supervisor level at the second respondent's distribution centres. It provided for the second respondent to negotiate with USDAW in respect of basic pay, weekly hours of work and holidays at specifically convened meetings. That has been renewed in subsequent years to date. It is a voluntary arrangement.

91. The Director of Warehousing, which was Mr Kelly between 2006 and 2022, had the principal responsibility of setting the operating budget and pay levels. Mr Kelly set the optimum target pay rates for any annual increase in conjunction with the Head of HR, Ms MacIntyre and the Head of Finance. Agreement with the CEO, Lord Wolfson and the Group Operations Director was then obtained with respect to the budget and target level of remuneration increase before the meetings with the USDAW negotiating committee commenced. These would typically take between 2 and 4 days, before a Joint Statement was agreed and voted upon by the union membership.

Recruitment - Retail

92. The primary method of recruitment of sales consultants during the relevant period was through the NEXT careers website. It accounts for 72% of applicants, 40% of whom directly navigated the site and 32% were directed to it from a search engine. 5% of candidates are received through other websites where the first respondent posts vacancies such as Indeed or Glassdoor. The remainder of applicants are from direct contact with a store or through referrals and social media.

93. The number of staff required in stores is calculated by a formula which has been in use since 2015. It is based upon a projection of the demand for work generated by the number of customer visits expected to meet the store sales' target. The base point is 'Open Door Cover (ODC)', which is the number of staff needed to open the doors and secure each department. A formula for calculating demand by every quarter of an hour is used and then assessment of serving 95% of customers within 90 seconds. More staff may be required during opening hours for this purpose than ODC. Other than sales generated demand additional staff are needed for operational tasks of delivery, merchandising, stock movements and fulfilling online collections and returns.

94. Agency staff are not required. The business needs were satisfactorily met by permanent and fixed time staff who would cover additional shifts through a facility known as Shift Market Place which operated up until February 2022.This was a portal which allowed the staff to manage their own shifts on a week by week basis.

95. For the year to January 2015, there were 28 applications per vacancy for retail store workers and it had averaged 28 to 30 in the 4 years up to then. In 2019 the average number of applicants per vacancy was 33. There is a breakdown by

stores which shows wide variations from as low as 2 in St Peter Port in Guernsey to 258 in Oxford Street. Following the lockdown for Covid, there was an increase in the number of applications per vacancy. In a store which had previously had difficulty recruiting, the numbers of the applications rose from 2 per vacancy to 98. Over the relevant period the average number of applicants per vacancy across all stores was 30.

Recruitment – Warehouses

96. The second respondent uses recruitment platforms to recruit warehouse staff, the major one being Indeed. Although vacancies are also advertised through the NEXT careers website, it does not generate sufficient applicants. The cost of the use of Indeed since 2017 has been nearly £1.6 million, varying from £27,180 for the year 2017 to £582,148 in 2021. The cost of other recruitment was £145,000 over the same period.

97. The second respondent used agency workers to fill work demands. Over the relevant period the total agency hours including overtime was 10.2 million and directly employed warehouse operatives hours of 93.4 million, with respective headcounts of 6,063 and 55,146. At the Elmsall and DVB sites there was a significant increase in warehouse staff hours, from 2.9 million in 2012 to 5.6 million in 2023, an increase of 93%,. The increase in agency staff over the same period was 12.7%, being 741,909 in 2012 and 836,792 in 2023. This includes recruitment from EU countries, particularly Poland. At the Elmsall complex 591, 528 and 240 workers from the EU were recruited as agency staff in the years 2012, 2013 and 2014. Solsbury Solutions supplied workers from Poland: 62 in 2021, 52 in 2022 and 9 in 2023. Mach Recruitment provided workers from Bulgaria. Out of a target of 800, 553 workers were provided in the years 2022 and 2023 but the attrition rate was high, 93%: 513 had left by July 2023.

98. Other financial incentives were introduced to aid recruitment. These are addressed separately, under the subject of Recruitment and Retention under the Factors section below.

Gender breakdown - stores

99. Over the relevant period 77.5% retail consultants were female and 22.5% were male. In 2013 the split was 74.2% female to 25.8% male and in 2013 it was 81.7% female to 18.3% male. At Hedge End, where Ms Cherry worked, the gender split was 80% female to 20% male over the relevant period. At Bristol Causeway, where, Ms Cox and Ms Milton worked, the split was 71% female to 29% male over the relevant period.

Gender breakdown - warehouses

100. Over the relevant period an average of 47.22% of operatives were female and 52.78% male. At the Elmsall Complex an average of 48.25% of operatives were female and 51.75% male. At DVB, an average of 47.13% of employees were female and 52.87% were male. For most periods at Elmsall and DVB the gender split has been within 5%, for many years within 3% and a number of years within 1%.

<u>Part-time work – stores</u>

101. On average 96% of retail staff were contracted to work fewer than 30 hours and 4% over 30 hours. We were not provided with the statistics about any part time work between 30 and 39 hours and have therefore assumed that the above statistics reflect a part-time and full-time work division. 41% of staff were contracted to work between 6 and 12 weekly hours. In cross examination Mr Mason accepted Mr Short's calculation from the statistics that the average number of weekly hours per worker was 14.

<u>Part-time work - warehouses</u>

102. On average over the relevant period 53.65% of warehouse operatives worked part time and 46.35% full time roles; and from 2016 onwards, more warehouse operatives had part time roles than full time roles (ranging from 51.92% to 61.31% throughout the period 2016 to 2023). Within those 36.8% of warehouse operatives were working fewer than 30 hours and 26% fewer than 20 hours.

103. A document of the second respondents (Cost Peak Planning Review, dated 8 September 2018) which was to enhance recruitment included a breakdown of part time and full-time work by gender for one day. 47% of the female workforce worked part time. 21% of the male workforce worked part time.

## Factors

### *Market Forces - Factor 1*

104. In respect of all 17 terms for comparison, the respondents rely upon market forces as a factor, or explanation, for the difference in terms.

105. Essentially, market forces mean paying the going rate. Professor Bryson and Mr Miles agreed that there are two separate markets for sales consultants and warehouse operatives.

106. Mr Mason and Mr Kelly explained the approach to setting pay for those two groups of workers and the significance of the market rates.

107. A common feature in the setting of wage rates in both sectors was cost control. At Group level, six weekly Specific Cost Focus meetings were held at which the operational directors addressed controlling of cost and driving efficiencies in all areas including wage cost related savings.

108. Mr Mason described this as a constant theme. It was an ongoing feature throughout his working experience at the first respondent. It applied to all the retail operation but embraced payroll costs because they represented a high proportion of base costs.

109. Mr Kelly also spoke of the pressure to control costs as tightly as possible. They were closely scrutinised during the bi-annual seasonal budgeting process with regular updates required from the CEO and Group Operations Director. One measure of cost was the average cost per unit picked, which was the cost for processing an item. This was calculated by dividing the total operative labour costs in any given period by the total number of units picked. Mr Kelly was

required to challenge general managers on each aspect of cost to ensure they were at optimum levels and included in the budget. Deviations from budget would necessitate the budget holder explaining the variance and taking action to pull the cost back in line.

110. Little of this came as a surprise to the Tribunal. It is standard business practice to maintain cost controls to maximise levels of efficiency and ultimately profitability.

111. The setting of remuneration in both labour markets had to work within certain fixed parameters, the most notable of which was the national minimum wage which, from 2017, became the national living wage. However keen an employer is to minimise wage costs it cannot be suppressed below the statutory minimum requirement. One of the consequences was that over the relevant period the differential in pay between the sales consultants and the warehouse operatives reduced. This is most clearly demonstrated by the difference in basic pay rates reduced from 92p in 2012 to 38p in 2023, as can be seen for the graphic at para 198.

112. Another factor which influences the setting of wages is ensuring sufficient candidates of the appropriate calibre are recruited and remain for a sufficient length of time in the job. Mr Miles and Professor Bryson agreed that the interaction between individuals seeking employment (supply of labour) and firms seeking to hire workers (the demand for labour) constitutes a labour market. They also agreed that the laws of supply and demand help an understanding of how wages are set in a labour market. That said, a labour market is seldom a free market. Geographical restrictions may influence the market rate as will non-wage amenities. The substantial increase in demand for warehouse workers because of the shift in purchasing trends from the high street to online, illustrates the limitations of the supply and demand explanation of wage rates. This is considered further in respect of factor 2, retention and recruitment, but the wages of warehouse workers has not grown proportionately to the increase in demand for them. Nor has the reduced demand for sales consultants resulted in a fall in their wages, in all likelihood because of the interference with pure concepts of supply and demand from the obligation to pay the national minimum wage.

113. Mr Kelly, Mrs McIntyre and Mr Mason sought to address these issues by what they describe as benchmarking. They constantly had an eye on what other competitors were paying for the same jobs.

114. The first respondent would consider Income Data Research (IDR) reports and bulletins and was a member of the Alan Jones Retail Group to source information about what other retailers such as River Island, Debenhams and Arcadia were paying. Supermarket rates were also taken into account although they were not considered to be the same market as retail high street fashion. Marks and Spencer and John Lewis paid at a higher level and were considered to be attracting a ‘different staff’. Mr Mason said that he would have regard to what others were paying as part of a general benchmarking process.

115. Mrs McIntyre said that benchmarking was a consistent feature in preparation for pay negotiations. The information was used by the second respondent in negotiations with USDAW to demonstrate where warehouse pay sat

in comparison with others. The second respondent sourced information from IDR Paid Climate reports, Xpert HR Salary Surveys and internal pay reviews compiled by Mr Ward. The second respondent's compensation and benefits specialist made a bespoke survey from an external consultant, (David Whitfield "Next Reward Survey Report, December 2019)".

116. An analysis of data from Adzuna by Mr Miles demonstrated that, over the relevant period, the first respondent paid at the lower end of the market range, near the national minimum wage, in line with several of its peers, particularly Debenhams, Primark and Sport Direct.

117. An analysis of the ONS data by Mr Miles demonstrated that the total pay package for warehouse operatives was close to the average for Yorkshire at or above the average for the UK. His evidence confirmed that competitors' rates of pay reflected the same or similar rates paid by the respondents to sales consultants and warehouse operatives.

***Recruiting and retaining sufficient warehouse staff - Factor 2***

118. In respect of all 17 terms for comparison, the respondents rely upon recruitment and retention of warehouse staff as a factor, or explanation, for the difference in terms.

119. Mr Kelly, Mr Navarro and Ms McIntyre gave evidence about challenges faced by the second respondent in recruiting sufficient warehouse staff to meet their requirements. This arose from a substantial increase in online trade and the additional growth of other warehouses of competitors in the locality. In addition, Ms McIntyre stated that there had been problems retaining staff particularly in the years 2017 onwards, but this was challenged by Mr Short in cross examination.

120. As can be seen from the figures of warehouse staff in the background section above, the expansion of the warehouse operation was significant. There was an 82% increase in headcount and 54% in hours. During the relevant period the operating sites increased from 13 to 16 and their combined footprint increased from 6.8 million $ft^2$ to 10.4 million $ft^2$.

121. The second respondent has initiated a number of schemes within the NEXT Group to achieve its recruitment needs. In December 2017 an offer was made to 1,371 retail employees in stores within travelling distance of the warehouses. It was to work as warehouse operatives for a period of 4 weeks, later extended to 6, with terms which were more advantageous than the rates paid in stores and warehouses[2] and included travel time and expense. The scheme recruited 20 out of 60 vacancies for Elmsall of which only 14 completed the fourth week.

122. Another scheme in 2021 attempted to recruit retail staff to permanent or part-time warehouse roles. This was more extensive and the offer was made to 25,000 retail staff nationwide. It attracted interest from 44 staff, 9 attended a

[2] The hourly rate was £10 for day shifts or £20 for night shifts. The average warehouse day shift paid £7.96 hourly and retail paid £7.50 hourly. An additional 10% bonus was offered on completion of the contract.

taster week and 7 took up an offer and relocated to do so. 3 of those did not remain for the year.

123. Other measures were taken over the period including rewording the advert with Indeed in 2021, "*to work for a FTSE 100 company with earning opportunities of £30,000*"; extending the area to target for recruitment with good transport links; introducing a trial bus service for Wakefield, Doncaster and Pontefract; relocation packages; the use of Solsbury Solutions, a specialist agency, for promotions through social media and brochures on request; and flyer leaflets to postcodes within the area of the warehouses. Revisions were made to the interview and screening process in 2021 to reduce or revise questions which might be off-putting and streamlining interviews by telephone for which candidates could choose a time slot online. A dedicated recruitment space was introduced at Elmsall Gateway in 2021. An interview and assessment included practical experience of the work to manage expectation of the demands of the job and thereby limit attrition rates thereafter.

124. A review of the recruitment and induction process was undertaken in 2019 following a survey of all staff for feedback in 2018. A presentation from 2019 by Mrs McIntyre illustrated the situation. An exercise to recruit 100 new workers involved considering 850 applications, 250 interview invitations, 175 interviews resulting in 120 job offers. Within one month, of 100 new starters only 62 would remain; after three months 44 would remain; after six months 39 would remain; after 12 months 24 would remain. 76 of 100 new recruits would have left within 12 months. This was portrayed by Mrs McIntyre at the presentation as a leaking bucket. The recruitment process was reviewed by way of streamlining the application and interview process with a bespoke interview centre.

125. Mr Navarro produced a breakdown of data over the relevant period which reflected more broadly the position in respect of retention of new starters. Only 27% of those offered work remained after 12 months. The highest retention rate for new starters was 62% in 2013 and the worst rate was 6% in 2016. Looking at the warehouse workforce as a whole, the average annual retention rate was 77.62%. Therefore the attrition rate (or leakage from the bucket) per year was 22.38% of the workforce and that would require replacement. In 2023 that would create a need to recruit 745 new warehouse operatives.

126. Mr Kelly and Mrs MacIntyre said, in cross examination, that recruitment and retention had always presented challenges, but they had become more acute from about 2017. Mr Short suggested recruitment had not been the issue because contemporaneous risk analyses from 2012 and 2017 had identified them as low with respect to a category, "*Inability to recruit the appropriate establishment levels required to manage business demands*". Both said they had not written the document and thought it had probably been a team manager.

127. The picture presented from the statistics and the evidence of the witnesses was that whilst recruitment became a greater challenge in later years of the relevant period, pressures had always been there. The use of agency workers, which was temporarily reduced in 2015 following agreement with USDAW, reflected a situation whereby the second respondent could not attract a sufficient number of employees. Agency workers were generally not as efficient because they were not accustomed to the processes and attracted an agency fee. Ms

MacIntyre and Mr Kelly would not have chosen to use agency workers had they been able to recruit staff. The difficulties increased from 2017 when a number of measures were taken to try to reduce attrition of new staff and to broaden the pool from which recruitment could be drawn.

128. Within the same locality in the mid-to-late 2000's there were other warehouses operated by Netto, B&Q and Superdrug and two other small facilities. The Netto warehouse was purchased by Asda. In 2010 ASOS opened a warehouse near Barnsley and recruited a significant number of staff including several managers who had worked for the second respondent in 2010 and 2012. Amazon opened a warehouse in Doncaster in 2015 and now have three warehouses in the locality. Aldi, Matalan, Poundland, TK Maxx and Haribo have warehouses within the locality. In November 2020 Amazon advertised for staff using a large digital marketing screen mounted on a truck parked opposite the Elmsall warehouse.

129. In 2019 training was introduced to new recruits to maximise their opportunity of earning bonuses to reduce attrition. In 2020 following a two-week shutdown arising from the pandemic, a 10% enhancement of basic pay was offered for four weeks and then extended to 10. A golden Christmas incentive was introduced at the end of 2020 with enhanced premiums for those who worked additional hours between 27 September 2020 and 29 January 2021 if they had no unauthorised absence or sickness and achieved a minimal level of productivity. A £1,000 bonus was offered to new starters who joined between October 2021 and December 2021.

130. For those who were already employed, a £1,000 bonus was offered to those who had zero absences during this three-month period, October 2021 to December 2021 or, if they had 95% attendance, a £500 bonus. An additional £1 per hour on basic pay was awarded over the same period.

131. The cost of these incentives was £5 million.

132. In respect of retail consultants, the data with respect to retention was less clear. The average number of starters who had left after a year, over the relevant period, was 18%. However, Mr Mollison also included an analysis which omitted involuntary leavers which showed a retention rate of 39% over the relevant period. Involuntary leavers included those who were made redundant or left at the end of a fixed term contract. Voluntary leavers included retirement, resignation or a return to education. Without further detail on such factors as the average length of a fixed term contract which was a feature of the sales consultant job market, a comparison of the respective retention rates with warehouses was not satisfactory.

133. An analysis of the data by Mr Miles showed that the growth of operatives at NEXT had been greater than in the overall warehouse labour market over the relevant period and demand for warehouse operatives overall grew over the claim period.

134. Mr Miles found that in the period between 2019 and 2022, on average 2.5 to 2.7 applications were made for warehouse operative vacancies in contrast to 33 per vacancy for retail consultant vacancies in 2019.

135. The overriding impression was that there were significantly greater difficulties in maintaining sufficient staff in warehouses. This was due to the falling demand for retail staff in the market and at NEXT and a large increase in the demand for warehouse operatives within a geographically limited field, compounded by the level of competition in the same marketplace. The use of agency staff and foreign workers in warehouses but not in stores was a reflection of this as was the number of initiatives in the warehouses we have summarised which were instituted from 2017.

***Maintaining 24/7 work in the warehouse, including night shifts, overtime, Sundays and public holidays – Factor 3.***

136. In respect of premium pay, namely night shifts, Sundays, overtime and public holidays the respondents rely upon maintaining work in the warehouse as a factor, or explanation, for the difference in terms.

137. The second respondent operates its warehouses 24 hours per day and 7 days per week throughout the year save for 16 hours on Christmas day. It provides a next day delivery service. During the relevant period the cut-off point for orders to be delivered the following day was 11pm. The busiest period for the warehouse was between 8pm and 3am.

138. Warehouse operatives are offered a variety of shift patterns. There was no obligation on all workers to work a particular shift, such as nights. The particular shift each operative worked was agreed at interview or varied by agreement thereafter. Mrs MacIntyre provided information about the various hours worked by the comparators over the relevant period.

139. A night shift premium for the hours of 10pm to 6am attracts 20%, save for those who were employed prior to 2006, for whom the rate is 33%. Over the relevant period an average of 24.76% of warehouse operatives worked at least 3 hours in the night shift window, an average of 34.87% of warehouse operatives worked at least 1 hour in the night shift window; and there was a trend of increasing night shift work over the relevant period, reaching a maximum of 28.74% (3 hours) and 38.09% (1 hour) in 2023.

140. Sunday pay premium is paid at 25% for those who were employed before October 2006 and 15% for those who commenced employment between October 2006 and 2017. No Sunday premium is paid for those who started after 2017.

141. Overtime is payable for hours worked above 40 or (40.25 hours from September 2020) at 1.5%.

142. Public holiday premium for those who started before 1 February 2017 was basic pay plus double the basic pay rate. There was no premium for those who started after 1 February 2017.

143. Sales consultants would not work night shifts but, before main sales events in the year, some would be required to do some night working, five or six times per year.

144. In addition, in some City stores night shift hours were included in the contracts when deliveries had to be made at night. None of the lead claimants were engaged on these contracts.

145. The night-time rates were a 33% premium, between 9pm and 7am for those contracted to work such hours before 2002, and otherwise between the hours of 10pm and 6am until November 2012. From then a 25% premium on hours worked from midnight to 5am was paid.

146. In respect of Sundays, no Sunday premium was paid after June 2015. Up until then the rates were 50% for those who had started prior to November 2001, 25% for those who had started before June 2006 and 10% for those who had started before 30 September 2008. A compensation payment was made to those who received the premium when it was abolished in 2015. Ms Cox and Ms Milton received the premium at 50% and Ms Cherry 25% before 2015.

147. In respect of overtime, sales consultants received 50% premium for hours worked over 39 until 12 October 2013 but not thereafter.

148. During the relevant period the only premium paid to sales consultants for Bank holiday work was Boxing Day, which was paid at time and a half.

***Incentivising high productivity in the warehouse, generally and during peak periods of demand – Factor 4.***

149. In respect of productivity bonuses in the warehouse, the respondents rely upon increasing productivity as a factor, or explanation, for the difference in terms.

150. The aim of the productivity bonus in the warehouse is to ensure that employees work faster on any given task. This has the effect of clearing the volume of work more rapidly thereby meeting business deadlines and reducing the cost of the average product processed to the second respondent.

151. The minimum standard required to meet a bonus is 90. That was increased in 2018 from 85. The rates are set by using SMV's for each warehouse operative role. There are 6,000 SMVs covering 650 processes. An SMV is the time it should take an operative to perform a specific task if operating at 100 performance. British Standard 100 performance is the rate of output a qualified worker can achieve without over-exertion as an average over the working day or shift. The second respondent has a Productivity Support Department which sets the relevant SMVs for the tasks. There are 23 qualified staff in the department managed by Mr Churchill.

152. A cost per unit measurement reflects the effect of the productivity scheme. For example, carton opening at performance rate 80 means 165 cartons are opened and the cost per unit is 6.7p; at 90, 185 boxes are opened at 6.3p per unit; at 100, 206 cartons are opened at 5.9p per unit; at 110, 227 cartons are opened at 5.6p per unit; at 120, 247 cartons are opened at 5.4p per unit; and at 125, 258 cartons are opened at 5.2p per unit. The pay rates are respectively £11, £11.75, £12.25, £12.75, £13.25 and £13.50. The total cost saving between the highest and lowest rates of production (6.7p – 5.2 =1.5p x 258 units = £3.87) is greater than the

bonus received by the worker of £2.50 (£13.50 - £11). The bonus scheme is therefore cost effective.

153. At Elmsall in 2020, 19% of operatives were performing at below 80 [no bonus], 18% at between 80 and 89 [no bonus], 24% between 90 and 99 [£0.75 to £1.20 bonus], 22% at between 100 and 109 [£1.25 - £1.70 bonus], 13% at between 110 and 119 [£1.75 and £2.20 bonus] and 4% at between 120 and 125 [£2.25 and £2.50 bonus].

***Incentivising consistent and high attendance in the warehouse, in particular during peak periods of demand – Factor 5.***

154. In respect of attendance bonuses, the respondents rely on incentivising consistent and high attendance as a factor, or explanation, for the difference in terms. It is submitted that the scheme at paragraph 130 above was to promote full attendance of existing staff in the warehouse.

155. Although the name of this bonus suggests it was about attendance, and attendance levels were a condition of receiving it, we do not find that this was the reason it was paid to the warehouse staff and not the retail staff. 2021 was a challenging year because of the aggressive competition for warehouse workers from Amazon, but it was not suggested attendance itself had been a problem at this time.

156. The *material* factor, or explanation, for the payment is retention in the circumstances we have addressed above. It was part and parcel of a package to deter existing staff from being attracted to leave to work for the competitors, specifically Amazon who offered a sign-on bonus of £1,500. The second respondent took the opportunity to incentivise good attendance by making it a qualification to obtain the bonus but that was not the *material* factor, or explanation for the decision to pay it to one group of workers rather than another.

***Business viability, resilience and performance of the NEXT Group and subsidiaries – Factor 6***

157. In respect of all terms for comparison, the respondents rely upon business viability, resilience and performance of the NEXT Group and subsidiaries as a factor, or explanation, for the difference in terms.

158. This category was not expressly addressed or developed in the evidence, rather than it being a theme which ran through the entire decision making process with respect to all terms and conditions. That is not to say it had no relevance, as these criteria are fundamental to sound decision making for the survival and prospering of any business. The decisions which were made were not capricious, but ultimately were for the benefit of the respondents and their survival and success. Our focus must be on whether the factor explained the difference which was neither directly nor indirectly discriminatory on grounds of sex. We address that with regard to the individual terms as categorised, below.

**<u>The legitimate aims, as pleaded by the respondents</u>**

<u>Aim 1: Overarching Legitimate Aim: Viability, Resilience and Successful Business Performance</u>

159. "*The NEXT Group had an overarching legitimate aim to ensure the continued viability and resilience of the Group and its subsidiaries (including the first and second respondents) and their successful business performance, in accordance with the duties of their directors to act in the way they considered in good faith would be most likely to promote the success of the company for the benefit of their members as a whole. Further and as part of that overarching aim:*

   *159.1. The NEXT Group and the second respondent had a legitimate aim in attracting, recruiting and retaining sufficient staff to resource the operational needs of their business, and to secure their strong and resilient performance.*

   *159.2. The NEXT Group and the first respondent had a legitimate aim in seeking to control staff costs including with regard to the multiplier effect and where the rationale for paying higher wages to warehouse operatives did not apply to sales consultants.*

160. *It was proportionate to pay different pay to warehouse operatives and sales consultants where the market rate and competitive pressures applying to those roles were different, and accordingly where different pay packages were required in order to recruit and retain sufficient labour in each role so as to ensure the operational needs of the NEXT Group, the first and second respondents were met*".

<u>Aim 2: Maintaining 24/7 Warehouse Work</u>

161. "*The second respondent had a legitimate aim to maintain 24/7-hour work within its warehouses (excluding Christmas Day).*

162. *It was a proportionate means of meeting that legitimate aim, together with the legitimate aim identified at aim 1, to pay warehouse operatives premium pay for night shifts, Sundays and public holidays, in circumstances where those shifts were less attractive to warehouse operatives, and/or where the ability to earn premium pay was considered by warehouse operatives (and USDAW negotiating on their behalf) to be an important part of their overall pay package. The matters set out under aim 1 in respect of overall pay package are repeated in all respects as applicable to premium pay, including as to competition in the market in respect of the overall pay package*".

<u>Aim 3: Incentivising Warehouse Productivity</u>

163. "*The second respondent had a legitimate aim to incentivise productivity within its warehouses, both in general terms and during peak periods of demand.*

164. *It was a proportionate means of meeting that legitimate aim, together with the legitimate aim identified at aim 1, to pay warehouse operatives productivity bonuses, so as to incentivise staff members to work faster on any given task, to*

*the benefit of both the employee (by increasing take home pay) and the second respondent (by reducing the wage to unit cost ratio) and/or where the ability to earn productivity bonuses was considered by warehouse operatives (and USDAW negotiating on their behalf) to be an important part of their overall pay package. The matters set out in aim 1 in respect of overall pay package are repeated in all respects as applicable to premium pay, including as to competition in the market in respect of the overall pay package"*.

Aim 4: Incentivising Consistent and High Warehouse Attendance

165. "*The second respondent had a legitimate aim to incentivise consistent and high attendance within its Warehouses, both in general terms and during peak periods of demand.*

166. *It was a proportionate means of meeting that legitimate aim, together with the legitimate aim identified at aim 1, to pay warehouse operatives an attendance bonus in the period October to December 2021, which was a period of peak demand, and a response to a period of intense competition"*.

**Material Factor Defence: Approach to Direct and Indirect Discrimination**

167. In ***Glasgow City Council v Marshall [2000] ICR 196*** Lord Nicholls of Birkenhead considered the approach required by the previous legislative provisions concerning the material factor defence in section 1(3) of the Equal Pay Act 1970[3]:

> *The scheme of the Act is that a rebuttable presumption of sex discrimination arises once the gender-based comparison shows that a woman, doing like work or work rated as equivalent or work of equal value to that of a man, is being paid or treated less favourably than the man. The variation between her contract and the man's contract is presumed to be due to the difference of sex. The burden passes to the employer to show that the explanation for the variation is not tainted with sex. In order to discharge this burden the employer must satisfy the tribunal on several matters. First, that the proffered explanation, or reason, is genuine, and not a sham or pretence. Second, that the less favourable treatment is due to this reason. The factor relied upon must be the cause of the disparity. In this regard, and in this sense, the factor must be a "material" factor, that is, a significant and relevant factor. Third, that the reason is not "the difference of sex." This phrase is apt to embrace any form of sex discrimination, whether direct or indirect. Fourth, that the factor relied upon is or, in a case within section 1(2)(c), may be a "material" difference, that is, a significant and relevant difference, between the woman's case and the man's case. When section 1 is thus analysed, it is apparent that an employer who satisfies the third of these requirements is under no obligation to prove a "good" reason for the pay disparity. In order to fulfil the third*

[3] An equality clause shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is not the difference of sex and that factor—(a) in the case of an equality clause falling within subsection (2)(a) . . . above, must be a material difference between the woman's case and the man's.

> *requirement he must prove the absence of sex discrimination, direct or indirect. If there is any evidence of sex discrimination, such as evidence that the difference in pay has a disparately adverse impact on women, the employer will be called upon to satisfy the tribunal that the difference in pay is objectively justifiable. But if the employer proves the absence of sex discrimination he is not obliged to justify the pay disparity.*

168. Section 69 of the EqA reflects this. There would be no need for the employer to have to show that the factor, or proffered explanation, for the difference in pay was not because of sex if a presumption had not arisen that it was. The distinct and different approach to direct and indirect discrimination cases is helpfully identified in section 69(1)(a) on the one hand and section 69(1)(b) and (2) on the other.

169. Some time was spent considering the effect of section 136 of the EqA and its interplay with section 69. Section 136 is specifically applicable to a breach of an equality clause by section 136(4), but it does not fit comfortably with the wording of section 69.

170. Section 69 lays the burden squarely at the feet of the respondent firstly to prove the factor which was relied upon for the advantageous term and also that it is not because of the sex of the claimant (section 69(1)(a)). The language of section 69(1)(a) is that of direct discrimination otherwise found in section 13. It raises the question of the reason for the treatment, what has been described as the reason why[4]. As the burden falls on the employer in this context it might better be described as the reason why not sex. The reason why not is given the description *the material factor*.

171. If, at the material factor stage, the employer said he simply could not remember why there was the difference in pay, the sex equality clause would be effective. Although these provisions do not use the language of a rebuttable presumption of sex discrimination, as explained in ***Glasgow City Council v Marshall***, that is their effect. Mr Short is correct to say that these provisions place the legal burden on the respondent.

172. With respect to indirect discrimination, a burden is placed upon the claimants to establish that the factor adversely affected women disproportionately to men (or vice versa) in section 69(2). If that is proven, the burden then reverts to the respondents, in section 69(1)(b). They must show that the factor was a proportionate means of achieving a legitimate aim.

173. This carefully prescribes the respective burdens of proof without inviting further qualification and complication from the provisions of section 136. Section 136(4) is intended to be directed at other provisions of Chapter 3 of Part 5 of the EqA, which have not expressly placed the burden of proof on one party or another such as establishing that there was equal work within section 65 or, as in ***Element and others v Tesco Stores Ltd [2023] ICR 208***, whether a job evaluation study which fell within section 65(4) and 80(5) of the EqA. Section 136 will not arise

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[4] ***Shamoon v Chief Constable of the RUC [2003] ICR 337***.

when the statute has plainly provided for the burden to fall on the respondent to prove the defence it raises, as in section 69 or, by analogy, under section 19(2)(c) with respect to indirect discrimination. This appears to be the approach of the EAT in ***BMC Software Ltd v Shaikh UK [2017] IRLR 1074***, ***para 88***.

174. All of this is about legal burdens of proof. In ***Efobi v Royal Mail Group Limited [2021] ICR 1263, para 29,*** Lord Leggatt explained the reason the courts have developed burdens and standards of proof:

> *"Any court or tribunal which is required to make findings of fact may face a situation in which it is unclear from the evidence whether something is a fact or not. To enable a court or tribunal to know how to proceed in such a situation, the law has developed rules about the burden and standard of proof. In civil cases (including employment disputes) the general rule is that a court or tribunal must find that something asserted by a party is a fact if, and only if, its truth is shown by sufficient evidence to be more probable than not".*

175. In some circumstances the courts have used a different concept known as an evidential burden. That simply means that when the legal burden falls upon one party, if the other party relies upon a particular matter which is material, he will have to mention it for it to be addressed. A party cannot expect to address facts which are relevant to discharging the legal burden if it is unaware of them.

176. Assessment of the material factor defence with respect to direct discrimination on the one hand and indirect on the other necessitates an understanding of their fundamental difference. This was explained by Lady Hale of Richmond in ***Essop and others v Home Office [2017] ICR 640, para 1***:

> *"The law prohibits two main kinds of discrimination - direct and indirect. Direct discrimination is comparatively simple: it is treating one person less favourably than you would treat another person, because of a particular protected characteristic that the former has. Indirect discrimination, however, is not so simple. It is meant to avoid rules and practices which are not directed at or against people with a particular protected characteristic but have the effect of putting them at a disadvantage. It is one form of trying to level the playing field.*

177. As to direct discrimination, Lady Hale said, at para 17,

> *"Under section 13(1) of the Equality Act 2010, this has become treating someone less favourably because of a protected characteristic. The characteristic has to be the reason for the treatment. Sometimes this will be obvious, as when the characteristic is the criterion employed for the less favourable treatment: an example is Preddy v Bull (Liberty intervening) [2013] I WLR 3741, where reserving double-bedded rooms to heterosexual married couples only was directly discriminatory on grounds of sexual orientation. At other times, it will not be obvious, and the reasons for the less favourable treatment will have to be explored: an example is Nagarajan v London Regional Transport [2000] 1 AC 501, where the tribunal's factual finding of conscious or subconscious bias was upheld in the House of Lords, confirming the principle, established in R v Birmingham City Council, Ex p Equal Opportunities Commission*

*[1989] AC 1155 and James v Eastleigh Borough Council [1990] 2 AC 751, that no hostile or malicious motive is required. James v Eastleigh Borough Council also shows that, even if the protected characteristic is not the overt criterion, there will still be direct discrimination if the criterion used (in that case retirement age) exactly corresponds with a protected characteristic (in that case sex) and is thus a proxy for it".*

178. The clarity which section 69 brings, in addressing direct and indirect discrimination separately and differently, alleviates one difficulty which had arisen with respect to the interpretation of section 1(3) of the Equal Pay Act 1970. In ***North Yorkshire County Council v Ratcliffe [1995] ICR 833*** Lord Slynn criticised the EAT and Court of Appeal for introducing distinctions within the material factor defence of direct and indirect sex discrimination, considerations arising under the Sex Discrimination Act which contained earlier versions of the definitions contained in sections 13 and 19 of the EqA. Overturning the decisions and restoring the industrial tribunal, the House of Lords held that the material factor defence had not been made out.

179. The facts were unusual. The claimants were catering staff and almost exclusively women. The comparators were men who undertook manual work. The work of both had been evaluated as equivalent under a National Joint Council for Local Authority Services (NJC). By statute the Council had to undertake compulsory competitive tendering for the catering staff. Knowing the rates paid by the commercial company, which had successfully obtained a contract under the process, the Council submitted a tender at a lower hourly rate than the NJC had previously determined, to match the rates of the competitor. The tenders of the Council were successful. The caterers brought equal pay claims which the Council sought to defend by arguing that the material factor for the difference in pay was the need to submit a tender to obtain the contracts which had nothing whatsoever to do with sex. The industrial tribunal upheld the claim, by a majority. The tribunal accepted that the Council had submitted a tender to bring it in line with the competitor's rate and that they had to have regard to market forces and the low pay in the catering industry in general, an area where exclusively women were employed. The majority held that the Council were aware that the female workforce would continue to do the work at the reduced rate having no real alternative. Although the Council were 'over a barrel' and the circumstances amounted to a material factor it was a factor due to a difference of sex "*arising out of a general perception in the United Kingdom, and certainly in North Yorkshire, that a woman should stay at home to look after the children and if she wants to work she must fit in with that domestic duty and a lack of facilities to enable her, easily, to do otherwise".* Lord Slynn held that this was a view the tribunal was entitled to reach and, even if he were wrong about the inapplicability of direct and indirect discrimination principles, this was a finding of direct discrimination because it was a finding the Council had paid women less than the men because they were women. He said this was just the type of situation the Equal Pay Act had been designed to eradicate.

180. ***Armstrong (No 1) v Newcastle upon Tyne NHS Hospital [2006] IRLR 124*** was another competitive tendering case which concerned a material factor defence brought by claimants which included female domestics. The Court of

Appeal considered the case of ***Ratcliffe***. Buxton LJ, with whom Latham LJ agreed, held "*Those two matters [that the facts in **Ratcliffe** were similar and the labour market for domestics was almost exclusively female] would only be dispositive if the House of Lords had held in **Ratcliffe** that to adjust wages or conditions in order to compete in a largely female market was necessarily discriminatory as a matter of fact or as a matter of law. But the House of Lords did not so hold".* The case was remitted because the Court held the Tribunal had not addressed some pertinent matters.

181. These remarks were considered on a further appeal of this case to the EAT following the Tribunal's reconsideration of the remitted issues in ***Newcastle upon Tyne NHS Hospitals Trust v Armstrong and others (No 2) [2010] ICR 674***. Underhill P said, at para 38:

> "*Buxton LJ makes clear at para 121 of his judgment that North Yorkshire County Council v Ratcliffe [1995] ICR 833 is not to be regarded as establishing that to adjust wages or conditions in order to compete in a predominantly female labour market [is] necessarily discriminatory, as a matter either of fact or of law. Something more is required. The question is what that additional element is".* At paragraph 40, he answered the question he had posed. "*As we read it, the key to Buxton LJ's analysis is given by the phrasing of the remitted question, namely whether in taking the decisions in question the district health authority had discriminated on grounds of gender. That is the language of direct discrimination; and what we understand Buxton LJ to be saying is that it was necessary for the tribunal not simply to establish that the rates in question were women's rates but to consider whether the decision-takers on the part of the health authority appreciated that fact and were willing to take advantage of it. Using Lord Nicholls' phrase from Nagarajan v London Regional Transport [1999] ICR 877, it was necessary to examine their mental processes. That appears to be why in para 124 Buxton LJ attached importance to the complex history . . . of the introduction of compulsory competitive tendering by the health authority and the numerous factors which were involved; and why in para 125 he emphasised the need to explore that history, and in particular to consider the significance of the fact that other predominantly female groups in catering and laundry retained their bonus. The relevance of those points can only be that they might negate any inference of gender prejudice operating on the minds of the decision-takers in their treatment of the domestics".*

182. Underhill P observed, at para 41, that "'***Ratcliffe*** discrimination' does not fit neatly into the established categories". In ***Armstrong*** the claimants had not suggested that the decision makers during the relevant period had acted on the ground of sex, but the case was one of indirect discrimination. It was the mental processes of previous decision makers which was to be examined. This led Underhill P to conclude that "*even if it is direct [discrimination], the point is that it is not the immediate ground of the employer's action, and we can see no reason why in such a case it would be appropriate to permit a case of objective justification".*

183. These complexities are largely overcome by the provisions of section 69, which expressly identify two separate forms of discrimination which the material

factor must eliminate. The concept of being permitted objectively to justify direct discrimination is no longer relevant. That applies, under section 69(1)(b), only to indirect discrimination as defined in section 69(2). Mr Short suggests this may dilute the rights employees had under the Equal Pay Act 1970 and that the Court of Appeal has expressed the view that it was very unlikely that Parliament intended to make any substantive change for the worse to the rights of equal pay claimants in enacting the EqA, see ***Asda Stores Ltd v Brierley [2019] ICR 1142*** see para 77 per Underhill LJ. That observation was made in rejection of a submission of counsel in respect of comparators. We do not make any comment on the extent to which the rights under the current legislation may have changed with respect to the material factor defence, but we consider there is no room for doubt as to the approach now to be taken under section 69 of the EqA.

184. With respect to indirect discrimination, there is a difference between section 19 and section 69. It is a significant difference. In section 19 there is a requirement for a provision, criterion or practice to be identified and it is those against which disproportionate and then individual adverse effect is measured. In section 69(2) it is the factor which the employer advances as the reason for the difference in pay which is the yardstick against which disproportionate effect is to be measured. Initially the claimants had advanced a number of PCP's which they alleged disadvantaged women as a group, but this was not ultimately pursued. Mr Green invited a ruling on those regardless and we touch upon this in our assessment of the respective terms below. However, we consider that section 19 and 69 are differently framed and it would not be appropriate to use the PCP analysis in a material factor defence case. We must focus upon the factor with respect to each term.

185. The use of statistics is a common way of establishing disproportionate effect. This emerges from an authority of the ECJ, ***Enderby v Frenchay Health Authority [1994] ICR 112, paras 16 and 17:***

> *"If the pay of speech therapists is significantly lower than that of pharmacists and if the former are almost exclusively women while the latter are predominantly men, there is a prima facie case of sex discrimination, at least where the two jobs in question are of equal value and the statistics describing that situation are valid. It is for the national court to assess whether it may take into account those statistics, that is to say, whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant.*

186. There was some dispute between the parties as to the extent to which the decision in ***Armstrong No1*** had been overturned with respect to a proposition that there must be shown to be other factors of sex taint than the raw statistics alone to establish a disproportionate impact because of sex. This has become known as the ***Armstrong*** defence. In ***Essop v Home Office [2017]*** the Supreme Court held that the statistics themselves would suffice and there was no need to show the reason any additional reason as to why the provision disproportionately disadvantaged one group. That is a fundamental distinction between direct and indirect discrimination; in the former the reason why the putative discriminator acted must be answered. Statistical evidence was one means of showing the disadvantage. In the light of this, in ***McNeil v HMRC [2018] ICR 1529*** Simler P

said that ***Armstrong No1*** was not good law to the extent that it had been understood to hold a respondent can defend a finding of particular disadvantage by showing that the underlying reason for it was not related to the protected characteristic.

187. But Simler P then said a Tribunal must evaluate the statistics in order to decide whether they are sufficient to show the disparate impact contended for. "*In my judgment however, as the parties agree, it remains open to a respondent to dispute a case of disparate disadvantage based on statistics by advancing an explanation or evidence to demonstrate that **the statistics are not significant** or **that the result indicated by them is not significant**. What a respondent cannot do once the statistics are shown to be sufficiently significant to prove particular disadvantage, is to seek to undermine that by requiring a claimant to prove the reason why that is so [emphasis added]*', para 72.

188. In ***Essop*** Lady Hale observed that statistics established correlations and in ***McNeil*** Simler P observed, in this context, that a causal link was required between the PCP and disadvantage. In both authorities it was clear that statistics may be sufficient to establish the causal link, but examination of the adequacy of the statistical imbalance and their effect is necessary. This was clear from the ECJ decision of ***Enderby***.

189. Counsel for the respondents submitted that the above comments of Simler P that ***Armstrong No 1*** could no longer be regarded as good law were obiter. They were not addressed in the judgments of the case in the Court of Appeal, because they were not necessary for the determination of the case. They also submit that Simler P's analysis had been based upon a concession, namely that the principles in ***Essop*** applied equally to equal pay, but that was a case concerning a provision, criterion or practice whereas section 69 requires the factor, not a PCP to be the reason for the disadvantage.

190. We do not accept that submission. Simler P was careful to qualify her remarks about ***Armstrong No 1*** with the passage we have quoted. What emerges from the observations is that it remains open for the parties to address the question as to whether the statistics themselves are sufficient to establish a gender disadvantage. They may draw upon other material which might show that the particular disadvantage is not attributable to the protected characteristic notwithstanding that, without more, the statistics may appear to suggest it is. It is probably unhelpful to refer to this exercise as the ***Armstrong*** defence, although it may reach the same point.

191. In summary therefore, in an indirect discrimination case under section 69(2) of the EqA, the law requires the claimant to establish that the factor relied upon by the employer to explain the difference in the terms between her and her comparator put her and those who share her sex at a particular disadvantage. That may be done by the use of statistics, but it is for the Tribunal to evaluate whether the statistics alone are sufficient for that purpose and either party may draw attention to evidence which supports or undermines the drawing of the causal inference. The respondent cannot impose an additional burden on the claimant to discharge her burden of proof to show why that is so at the section 69(2) stage if the statistics suffice to prove causation of themselves. That does not mean indirect discrimination will have been established, because the respondent may establish

justification under section 69(2), which Lady Hale observed in ***Essop*** "*should not be seen as placing an unreasonable burden upon respondents*" para 29. The 'reason why' the statistics have the disproportionate effect may be material to the justification defence in any event, see ***McNeil v HMRC [2020] ICR 515*** per Underhill LJ at para 53.

192. In addition to the use of statistics there are other ways a claimant can establish that the factor is tainted by sex. Judicial notice has been taken of the fact that women bear the greater burden of childcare duties than men and that could limit their ability to work certain hours, see ***Dobson v North Cumbria Integrated Care NHS Foundation Trust (Working Families Intervening) [2021] ICR 1699***. There may be cases in which women are paid less than men because of perceptions of a traditional societal role of women and associated responsibilities or because of job segregation by gender or, as above, because the work revolved around part-time hours which favoured women who primarily have taken the role of looking after small children, see ***Armstrong v Ministry of Defence [2004] IRLR 672,*** per Cox J, at para 64.

193. Care must be taken with the use of the term sex taint, a description which is not infrequently used in the pre EqA cases. Section 1(3) of the Equal Pay Act did not articulate a difference between direct and indirect sex discrimination. From some of the cases, such as ***Ratcliffe*** and ***Armstrong,*** it is not always obvious whether the references to sex taint are about direct or indirect discrimination.

194. Under section 69 of the EqA the dangers of a conflation of direct and indirect discrimination have gone. Sex taint could give rise to direct discrimination, if the employer had a conscious or subconscious attitude that women did not need to earn as much as men because of the traditional social role of women in particular types of work. Alternatively, it could be indirect discrimination, for example if that attitude or state of mind had not been the motivation for setting the current or recent pay rates but because they were a legacy, a perpetuation of historic rates of pay, which continued to be reflected in a disproportionate disadvantage by gender.

195. Justification will be established if the factor is a proportionate means to achieve a legitimate aim. The leading case is ***Bilka-Kaufhaus v Weber-von Hartz [1987] ICR 110***. The ECJ held, "*If the national court finds that the measures chosen by [the employer] correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end, the fact that the measures affect a far greater number of women than men is not sufficient to show that they constitute an infringement of article 119".*

196. In ***Homer v Chief Constable of West Yorkshire [2012] ICR 704*** Lady Hale said, "*To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so*", para 22. "*Part of the assessment of whether the criterion can be justified entails a comparison of the impact of that criterion upon the affected group as against the importance of the aim to the employer",* para 24.

197. In ***Pitcher v Chancellor, Masters and Scholars of the University of Oxford and another [2002] ICR 338***, Eady P said, "*The principle of proportionality requires an objective balance to be struck between the discriminatory impact of the*

*measure in issue and the needs of the employer; the more serious the disparate adverse impact, the more cogent must be the justification (see the observations of the Court of Justice in CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita otdiskriminatsia (Case C-83/14) [2015] All ER (EC) 1083, at para 123). In assessing the discriminatory effect of a measure, the tribunal will need to consider that question both qualitatively (the amount of damage done and/or how long lasting or final that damage is) and quantitatively (the number of people who will or are likely to suffer the discriminatory effect*): *University of Manchester v Jones [1993] ICR 474, per Ralph Gibson LJ".*

## Analysis of each term

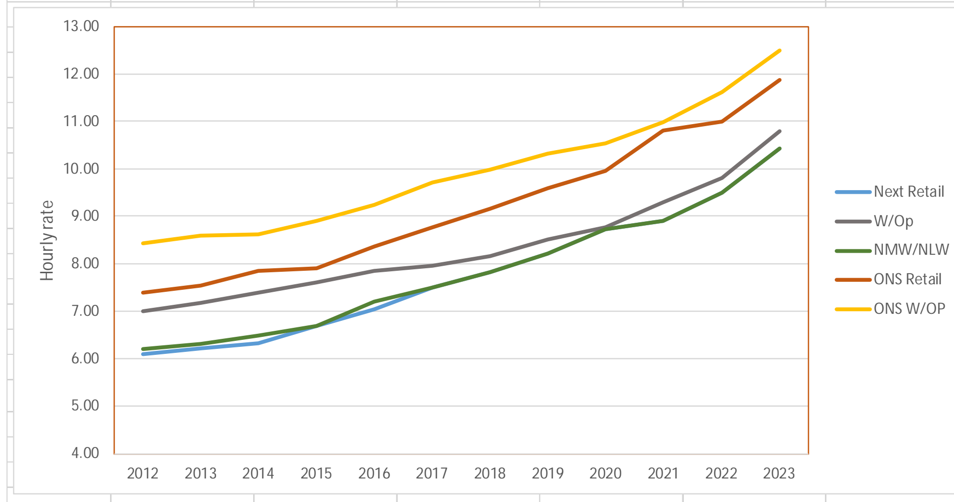
### Basic pay – term 1

198. The lead claimants and the comparators received basic pay during the relevant period in amounts which varied over time and are identified in the table below. The basic pay of the comparators was at all times higher than the basic pay of the lead claimants.

Comparison of basic rates of pay

| Year | Next Retail (1) | W/OP (3) | Variance | NMW/NLW (4) | ONS Retail (2) | ONS W/Op (2) |
|---|---|---|---|---|---|---|
| 2012 | 6.08 | 7.00 | 0.92 | 6.19 | 7.38 | 8.43 |
| 2013 | 6.21 | 7.17 | 0.96 | 6.31 | 7.53 | 8.60 |
| 2014 | 6.33 | 7.39 | 1.06 | 6.50 | 7.85 | 8.61 |
| 2015 | 6.70 | 7.61 | 0.91 | 6.70 | 7.90 | 8.91 |
| 2016 | 7.04 | 7.84 | 0.80 | 7.20 | 8.35 | 9.24 |
| 2017 | 7.50 | 7.96 | 0.46 | 7.50 | 8.77 | 9.71 |
| 2018 | 7.83 | 8.16 | 0.33 | 7.83 | 9.16 | 9.98 |
| 2019 | 8.21 | 8.51 | 0.30 | 8.21 | 9.58 | 10.32 |
| 2020 | 8.72 | 8.77 | 0.05 | 8.72 | 9.95 | 10.53 |
| 2021 | 8.91 | 9.30 | 0.39 | 8.91 | 10.81 | 10.97 |
| 2022 | 9.50 | 9.80 | 0.30 | 9.50 | 10.99 | 11.61 |
| 2023 | 10.42 | 10.80 | 0.38 | 10.42 | 11.88 | 12.50 |

Sources
(1) Witness Statement Lionel Mason Exhibit 1 May bundle p353
(2) Report of Dominic Mikles Supplementary bundle p420
(3) Witness Statement Simon Navarro Exhibit 3 May bundle p521
(4) National Minimum Wage/National Living Wage from 2016



199. The respondents have established that factors for the differences were *market forces* [factor 1], *recruiting and retaining sufficient warehouse labour* [factor 2] and *business viability, resilience and performance of the Next Group and Subsidiaries* [factor 6].

200. In respect of *market forces* [factor 1], Mr Short accepts that the respondents may have little difficulty establishing that the lead claimants were paid less than their comparators because of the market price. It is clear from the evidence which we have analysed above, that the pay generally was set by reference to the prevailing rates in the respective markets for sales consultants on the one hand and warehouse operatives on the other. These are very different marketplaces which have attracted different rates of pay for a number of reasons which we consider below.

201. In respect of *recruiting and retaining warehouse staff* [factor 2], Mr Short submits that this factor explains the rates of pay only of the comparators; not why the lead claimants were paid less. In so far as it touches upon that difference, he submits that is merely a restatement of factor 1, namely the market price of labour. In our analysis of this factor above, it is clear that there were specific pressures in the market for warehouse operatives, particularly in the area of recruitment, which did not arise in the marketplace for sales consultants. It is fair to say that it was the overall package of remuneration which was set, which was designed to assist the recruitment problems and alleviate the attrition rates, rather than the basic pay alone. Nevertheless, as part of that package the rate of basic pay was a contributory factor to assist recruitment and retention. There was not any comparable difficulty with respect to recruitment and retention of sales consultants and so factor 2 was an explanation for the difference in rates.

202. In respect of *business viability, resilience and performance* [factor 6], there is undoubtedly overlap with the first two factors and this is a generic category. As such it needs to be treated with care and not liberally applied without scrutiny. Nevertheless, the setting of basic pay during the relevant period was intended by the respondents to maintain both sectors of the business. This included managing a reduction in high street sales because of changes in shopping habits in the retail marketplace with a corresponding increase in warehouse provision.

<u>Direct discrimination</u>

203. The question to be answered under section 69(1)(a) is whether paying a differential rate by reason of *market forces* factors, *recruitment and retention* factors in the different sectors and *business viability, resilience and productivity* factors is not to treat the lead claimants less favourably because of their sex. The respondents submit that both retail and warehouse sectors are comprised of men and women, albeit in very different proportions which we address below in our assessment of indirect discrimination. There is no disparity of pay by gender within each sector. All sales consultants receive the same basic pay regardless of their sex, and similarly warehouse operatives.

204. Counsel for the respondents submit this cannot be a case of direct discrimination by proxy, that is one in which the less favourable treatment applies to all who have the protected characteristic. That is the category of case in which the reason for the treatment is clear because there is an exact coincidence or

exact correspondence between the treatment and those who have the protected characteristic. An example of this was ***James v Eastleigh Borough Council [1990] 2 AC 751.*** A policy which permitted free admission to a leisure centre for those who had reached state pension age was held to be directly discriminatory on grounds of sex, because then the retirement age for women was 60 and for men 65. The policy itself was not intended to differentiate by sex, but the consequence was that all men had to pay an entrance fee if aged between 60 and 65 but women of that age did not. There was an exact correspondence between the policy and gender, notwithstanding that was not the motivation or intention behind the difference in treatment. Mr Short did not suggest this was such a case.

205. The alternative type of direct discrimination involves an examination of the mental processes of the decision-maker to ascertain whether the reason for their actions were consciously or subconsciously motivated and influenced by considerations of sex. It is to ascertain why the alleged discriminator acted as he did. The respondents submitted that there is no evidence of any mental processes suggesting that the first and second respondents had been influenced by the gender of the respective workforces in setting basic pay as they had.

206. The claimants submit that that this approach is flawed. A reliance on market forces was established by detailed evidence about benchmarking exercises which were undertaken in respect of what pay was paid by the respondents' competitors. If that is to set a rate of pay which is suppressed because it is historically discriminatory on grounds of gender for whatever reason and the decision makers know this, they would be taking advantage of and exploiting that group of workers by perpetuating that differential. Mr Short submits it is for the respondents to satisfy the tribunal that such factors play no part whatsoever, consciously or subconsciously, in the setting of basic pay.

207. The claimants say the following features support such an inference:

207.1. There is an unexplained difference between the pay of sales consultants who are predominantly women compared with warehouse operatives who are marginally more likely to be men in the employment in the second respondents' warehouses but within the sector of warehousing generally are predominantly men. That is relevant because benchmarking has taken place against the warehousing sector as a whole, not just online fulfilment centres where the gender distribution is more equally balanced.

207.2. In so far as there is no explanation for this disparity in pay for work which is of equal value, the evidence of Dr Pettinger and Professor Bryson established that there is sex tainting in the retail sales consultant market with historically low rates of pay.

207.3. In support of that, Mr Mason accepted in cross examination that retail shop work was attractive to females.

207.4. Comments made in the documentation of the respondents: [i] in a report headed *Current Key Regulatory and Governance Topics as of March 2022*, "*we recognise that for some people, living on retail wages is very difficult, particularly those supporting a family and working part time*" and, "*not all people's circumstances are the same and retail employment provides many families and students with a valuable source of flexible part time work and additional income*"; [ii] an action point which was identified at a cost focus meeting in July 2015, "*to arrange for HR to do a survey 'know*

*our staff – age, students, married, children, primary earner*", and by implication recognising their workforce will be made of secondary earners.

207.5. Comments in a briefing paper in respect of the Corporate Industrial Relations Function for Asda, dated May 2011, "*The retail colleague demographic is made up of predominantly part time females who are working at Asda for a secondary income to support the main household bread winner. In addition to this, we have groups of older colleagues who work part time for enjoyment and students who work part time whilst at college or university. The full-time breadwinners are a minority group of colleagues"* and "*Distribution is a manufacturing type of environment. It is different to retail, where the mix of colleagues, environment and type of work differ. Our mix of colleagues is predominantly male, full time and primary income earners. The nature of work is physical. This type of workforce has different motivators*".

207.6. A continuing reliance upon the physical nature of the working warehouses.

207.7. The historic issues of sex discrimination in pay recognised in the case law.

207.8. The Code of Practice, together with the Report of the Women and Work Commission: Shaping a Fair Future (2006) research at footnote 27 of the Code of Practice, in particular paragraphs 22 and 23 of chapter 4 of the Report.

207.9. The respondents have failed to call the relevant decision makers, specifically Lord Wolfson or other members of the Board to discount any influence the gender of the sales consultants played in the setting of pay and, the burden of proof lying on the respondents, direct discrimination has not been disproved.

207.10. A failure to disclose relevant documentation against a history of nondisclosure which led to an application to strike out the response, providing fertile ground for the drawing of adverse inferences.

208. These were well constructed arguments. But we find, on the evidence, the respondents have established that the difference in pay, because of factor 1, factor 2 and factor 6, did not involve less favourable treatment because of the sex of the lead claimants. The evidence of Mr Mason, Mrs MacIntyre and Mr Kelly was compelling. It was all about cost. Gender did not enter into the equation. Historic reasons for imbalances in pay for work which is equally valued fall into indirect discrimination considerations. There was no conscious or subconscious influence of gender which affected the basic rates of pay. The drive and imperative was to reduce cost and enhance profit. That would have happened regardless of the gender split in either market, even had there been more men than women sales consultants or women than men warehouse operatives. The renegotiation of the warehouse contracts in 2017, such that new starters had less beneficial rates than exiting staff, was reflective of that state of mind. In that market, men were in the majority.

209. In response, the claimants would say it does not matter what the respondents might have done, hypothetically, if the gender dimensions of the workforce were different. The fact was that a group of workers who were predominantly women were paid less for work of equal value than a group of other workers who were, albeit marginally, men. If the decision can in any part be

attributed to taking advantage of a market rate which has historical sex taint the respondents have not established their defence. The answer to that is that we do not find that any part of the thought processes of Mr Mason and his colleagues when fixing the basic rate, or any aspect of, pay was that this was a group of workers who were in receipt of lower rates of pay because they were women. The attention was on the national minimum wage and how to achieve the necessary number of staff to discharge the sales service by paying as little as they could.

210. Paragraph 81 of the Code of Practice states, "*For example, if an employer argues that the difference in pay is due to market forces, but gender segregation in the workforce means that women are still concentrated in lower paid jobs, this defence may be discriminatory. An employer cannot pay women less than men for equal work just because a competitor does so*" and cites ***Ratcliffe*** and the report on gender segregation referred to above in support. This observation does not identify how the defence may be discriminatory, directly or indirectly. Direct and indirect discrimination are framed as distinct and separate concepts in the current legislation and should not be conflated. The fallout from the ***Ratcliffe*** decision, by which we mean the subsequent judicial explanations of a less than clear precedent, such that direct discrimination on similar facts might be justifiable, is now swept away by the clarity of section 69 of the EqA. We have provided an example of how both could arise, at paragraph 194. Paragraph 81 of the Code must be seen in this context.

211. Mr Mason was specifically questioned about the make-up of the sales consultants who worked for the first respondent. He knew some of the staff were primary earners and some were secondary earners. He knew many worked part-time and the majority of the staff were women. He said retail work was for various reasons attractive to females, in answer to a challenge as to why he thought so many women worked in the shops. It was put to him that he knew store roles were particularly sought by people with caring responsibilities, to which he asked, rhetorically, how did they know that. It was put to him that part time roles were particularly sought by women, to which he said various other types of people were seeking that work. He disputed that they had actually taken advantage of the need for women to have part-time work; it was not a consideration they would ever make. In respect of the documentation about the retail employment, he said he knew that some of the staff were providing additional family income and that some were students who needed flexible work. He said there was a whole range of reasons as to why people required part-time work. Some had other jobs that would fit in around these hours. He did not think these matters would be a consideration of the Board Members when setting or agreeing retail pay. In respect of the document raising the issue of primary earners, he stated they would want to understand the needs of the workforce and how best to fulfil them. Mr Short asked, "*and decide how much you need to pay them*?", to which Mr Mason replied, "*what we paid people is not based on that. It is based on the competitive nature of the retail market*". He was not aware of the Asda document and had not heard comments made about part-time females working there for a secondary income to support the main household.

212. The line of cross examination was designed, in part, to draw out parallels with the type of attitudes found in ***Ratcliffe*** which led to the rejection of the material factor defence. We recognise that there could be a motive for Mr Mason to refute

any suggestion that the first respondent had taken advantage of a group of workers who were historically underpaid because of their gender. We also recognise that employers may not be aware of their own prejudices and so it is important to scrutinise explanations (or excuses) to be satisfied there are no subconscious discriminatory influences at play. We have given full account to these matters. There was a consistency as to the drive behind fixing pay in both sectors, which we have explained. Mr Mason's approach was clear. He was not only an honest witness, but his evidence was accurate and reliable. The material and testimony of others was supportive of his account.

213. That is not to say the approach of the respondents to the issue of pay disparities was satisfactory. Mr Mason had no training in equal pay and nor had others. The respondents had not chosen to undertake an equal pay audit. The gender pay gap reports which were issued from 2017 were not used as a base from which to examine whether structurally discriminatory pay might have become embedded. The types of issues identified in the Code of Practice, how the gender of a workforce and rates of pay may be for sociological reasons and the observations of the judiciary in some of the leading authorities never crossed the minds of the decision makers. Inferences may be drawn from matters such as these that gender had influenced the decision makers, but that was not appropriate in this case given the weight of the evidence as a whole.

214. Focus on the burden of proof and the absence of Lord Wolfson or a member of the Board was an argument which justified careful consideration. There was little doubt that although a number of senior managers fed into the decision-making process about pay and conditions, of which Mr Mason was a major contributor, the ultimate controlling force was Lord Wolfson. He attended the important People Focus Groups which were instrumental in reviewing and tailoring the proposals. The Board approved the budgets but in practice did not have the same level of input as this Group. The Remuneration Committee similarly approved the budget without any real challenge.

215. The question is whether, on all the evidence, it is more likely than not that sex had no causal influence in factors 1, 2 and 6, which we have found explain the difference in basic pay. It is for the respondents to establish that.

216. In ***Scottish Water v Edgar [2024] EAT 32*** the EAT held it was an error of law for the Tribunal to hold that the need to identify the decision maker led to a failure to prove the material factor defence. Lord Fairley said that the Tribunal had become fixated on identifying the decision maker at a particular moment in time and as a result ignored a substantial body of evidence and findings which bore directly on the relevant issue of causation; "*Nor is it the law that evidence to explain the difference in pay must always be direct evidence. It could be circumstantial or, subject always to considerations of weight, could be taken at second hand from a person who was suitably knowledgeable about the factors that were regarded as important and which, objectively, are later relied upon by the employer to explain the difference",* para 53.

217. Mr Mason was at the centre of the process for yearly setting of pay levels during the relevant period and was involved in all stages save for it being approved and signed off by the Board and any contact the Board might have had with the Finance department. He was well positioned to give evidence about those factors

which did and did not influence the process in the extensive discussion he had with others, including Lord Wolfson, over the years. His explanations aligned with the evidence of Mrs MacIntyre and Mr Kelly, insofar as there were commonalities across the Group to setting pay by way of the use of benchmarking by market rates. The records of action points of the People Focus Group confirmed this approach. There was sufficient detail and context to enable us safely to reach findings on the reasons and motivations for setting pay. The absence of Lord Wolfson as a witness was not fatal to the respondents' defence.

218. In ***Efobi v Royal Mail Group Limited [2021] ICR 1263*** the Supreme Court upheld the decision of a Tribunal which had declined to draw an adverse inference because of the failure of the respondent to call decision-makers who had not selected the claimant for promotion in a race discrimination claim. Lord Leggatt said, *"I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules*".

219. The respondents chose to call a witness who had detailed and extensive knowledge of the annual pay reviews in the form of Mr Mason. They did not know, until receipt of the skeleton argument a week before the hearing, that the claimants were to place reliance upon a record, summarised at paragraph 207.5 above, of the observations of a manager at Asda about its respective store and warehouse make-up. Mr Mason could, and did, adequately address questions about this. It is not surprising that he knew nothing about an internal document of another company. It is highly unlikely anyone else at the respondents did. The respondents were not obliged to call each Board member to say so. It remains for the Tribunal in the Asda multiple case to evaluate that document and its significance to the issues in that case.

220. We did not regard the extracts set out in paragraph 207.4 above to carry the pejorative implication invited. The observations as to retail work do not express the gender make-up of the group nor imply the information is being garnered to fix pay at a particular level. The respondents fixed the pay rates by tracking the national minimum and living wage, as they were required by law to do, not by the gender makeup of the group. There were good and sound reasons to explore and ascertain the demographics of their human resource. Any competent human resources department must keep up to date and review policies which might require revision, for example to eliminate indirectly discriminatory barriers generally.

221. Mr Short relied on the history of disclosure issues and the absence of what he said would have been relevant disclosable documents. He invited an adverse inference.

222. The solicitors for the claimants requested 13 specific areas in which it was alleged the disclosure had been inadequate, by correspondence dated 31 January 2024. One of those concerned the People Focus meetings between 2012 and 2019. The request was for all the PF meeting agendas, action points, minutes and notes covering matters relevant to the issues in dispute. By letter of 29 February 2024, the representatives of the respondents wrote "*For context, the People Focus Meetings did not originally focus on the people and development as they were primarily set up to review staff efficiency. As these meetings evolved, they expanded to consider broader people matters including pay. No formal minutes were taken during these meetings, rather action points were produced and discussed. To that end, we are now disclosing agendas, action points and notes (where any) covering matters relevant to the issues in dispute in to People Focus Meetings for the years as requested in your letter (i.e., 2012-2019). We can confirm that we have provided all available documents for the purposes of this specific request after conducting a reasonable search.* That was compliance with the request. In answer to a question from one of the members of the Tribunal, Mr Mason said he would take data to the People Focus meetings, often as a result of discussions or action points in the previous meetings. He said when considering the year ahead the data would illustrate the rates of pay, the costs of pay rates and any proposals for changes. Mr Short said the failure to disclose this material constituted a breach of the disclosure obligations. We were not satisfied this was the case. They did not obviously fall within the terms of the request. It was not clear whether these records had been retained. No request was made on the second day of the hearing for these to be produced.

223. The other request relied on was for all the Main Board Retail updates and reports for 2012 to 2023. The response was, "*We confirm that there are no specific Retail Board updates or reports. To provide context, all matters relating to people arising from the annual board meetings were documented in the Corporate Governance document on Workforce/Employee Matters. This was a public document which, in accordance with the 2018 Corporate Governance Code, the Respondent was required to create. We have provided these documents but, please note, given the implementation date of the code, there are no documents available prior to 2018*". Mr Short complains of the fact that no reports, board minutes, papers or data were disclosed which show information presented to the Board. We do not draw the inference invited. The evidence was that the proposals placed before the Board were part of the budget which it signed off for the trading year. The recommendations for pay rates were included within that budget. The Board's role did not involve revising the pay proposals when signing off the budgets.

224. Finally, Mr Short invited an adverse inference because of a destruction of paper copies of handwritten worksheets after the respondents had been put on notice of the requirement to retain that type of material by the representatives of the claimants in 2018 when the claim was brought. The circumstances concerning this led to an application to strike out the response, which this Judge considered on 12 January 2021. The reasons for rejecting the application were sent to the parties

on 16 February 2021 and contain the relevant history. The Tribunal observed that adverse inferences could be invited or a costs order made when considering issues of proportionality. The majority of documents had been copies to electronic data sheets and no obvious prejudice was identified. Mrs MacIntyre was questioned about this. She rejected the suggestion that she or anyone had deliberately hidden or not produced anything. She said that the exercise of searching for vast quantities of documents for 6 years was problematic and onerous. There had been a change of computer system. She had pulled data from different sources and looked at many paper records.

225. The handwritten notes which had been destroyed were subject to a policy of retention for only 13 weeks. This should have been overridden because of the notice provided by the solicitors of the claimants. We consider that the likelihood is that this was attributable to human error rather than an attempt to hide information. We do not consider this assists the claimants.

226. In conclusion, we find the respondents have established the defence under section 69(1)(a) EqA, in respect to the differential in basic pay. These findings are equally applicable to each of the relevant terms for comparison.

Indirect discrimination

227. There is a substantial statistical imbalance of retail sales staff in favour of women over the relevant period: 77.5% to 22.5%. In warehouses there is a greater proportion of men than women, 52.78% to 47.22% but it is less significant. This has not always been the case. In 2002 there was a greater number of women than men in the warehouses, 53% to 47%. That was not typical but is an indication of the care which needs to be taken with categorising, or stereotyping, a job as men's work or women's work.

228. The online warehouses do not involve the movement of heavy articles to anything like the extent of other warehousing. This together with a large amount of part time work opportunities and no obligatory night-time shifts may explain to a degree the closer proportion of men to women in the second respondent's warehouses than the norm. It is noteworthy that when the respondents acquired a stake in Joules the warehouse operatives who transferred were in a proportion of 61% women to 39% men. By contrast the second respondent's warehouse in Doncaster, which processes the furniture sector of the NEXT market and therefore involves greater use of forklift trucks and heavy lifting, has a gender split of approximately 80% men to 20% women.

229. Counsel for the respondents argue that these statistics do not demonstrate a sufficient imbalance to warrant a finding of prima facie indirect sex discrimination pursuant to the ***Enderby*** principle. It is submitted that the claimants must adduce some other evidence of adverse impact in reliance upon ***Armstrong No 1*** and the cases which then adopted it.

230. We reject the submission that the claimants are obliged to show something in addition to the statistical imbalance, but it is necessary to consider whether the statistics warrant the finding that there is a disproportionate impact on women.

231. The respondents say the marginal difference in the gender make-up of the warehouse operatives does not suffice. At the time USDAW was first recognised in 2002, when its formal negotiations started, the majority of the warehouse workforce were female. The structures of the remuneration package were then set. Counsel for the respondents argue that most of the terms were at their highest in 2002 and subsequently reduced, such as Sunday pay and night premium. This might suggest, that as the labour force slowly became more dominated by men and the benefits correspondingly reduced, this could not be conscious or subconscious preferential treatment of men's pay.

232. Whilst ***Enderby*** expressed the comparator group as being *predominantly* men and the claimants in that case as *exclusively* female, subsequent caselaw has not supported the need for such high proportions in each group. In ***Home Office v Bailey [2005] ICR* 1057**, "*Section 1(3) cannot demand a high threshold for the establishment of a disparity which prima facie is due to sex. Thus where a difference in pay is established, and statistics seem to indicate a possibility of a disproportionate impact on women when looking at both the advantaged and disadvantaged groups as a whole, those statistics must provide sufficient evidence to get those carrying the burden over the hurdle of placing the onus on the employer to show that there were material factors which were not the difference in sex*", per Waller LJ at para 39.

233. Peter Gibson LJ similarly said, "*I can see no justification for the imposition of a high threshold for satisfying the test of prima facie discrimination. Where, as here, there is one group of employees of an employer which contains a significant number, even though not a clear majority, of female workers whose work is evaluated as equal to that of another group of employees of the employer who are predominantly male and who receive greater pay, it would be very surprising if an ET were to be precluded by the presence in the disadvantaged group of a significant number of men from holding that that disparity in favour of men required justification by the employer. In the present case it may well be that, as the Home Office suggests, there is a genuine material factor which is not the difference of sex and which justifies that disparity. Whether there is such factor is for further determination*". The respondents emphasise the use of the term *precluded* and submit it is not an obligation to find prima facie discrimination.

234. We agree that each case will require consideration of the statistics as to "*whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant",* see para 17*, **Enderby***. For the reasons advanced by the respondents, this is not entirely straightforward in this case. However, the fact the respondents repeatedly set their remuneration levels by benchmarking against the market is significant. That market did not differentiate between those warehouses which were predominantly made up of men, and those in ecommerce fulfilment centres in which the differential was more finely balanced or there was no gender difference at all. Taking the market as a whole, there is a significant imbalance favouring men. The ONS data for 2012 to 2021 shows over 80% of men worked in elementary storage occupations. The setting of pay by that means therefore reflected a predominantly male based labour market.

235. We have regard to the breakdown of hours worked in the stores and warehouses. The respondents drew attention to the substantial number of workers

of the second respondent who undertake part-time hours, including the four comparators. 53.65% of warehouse operatives had part-time roles over the relevant period. From 2016, 36.8% worked less than 30 hours and 26% less than 20. The claimants point out that a greater proportion of those part time workers are women, 47% as opposed to 21%. The number of part-time hours in retail is noteworthy: 96% of staff were contracted to work fewer than 30 hours and 4% over 30 hours. 41% of staff were contracted to work between 6 and 12 weekly hours. Mr Short calculated that the average hours worked were 14 per week for a sales consultant. Ms Cherry started on 12 hours per week because it was compatible with her childcare responsibilities. There is a predominance of women doing part-time work in both occupations and far more in retail.

236. We noted above that, in ***Dobson v North Cumbria Integrated Care NHS Foundation Trust [2021] ICR 1699**,* Choudhry P held judicial notice should have been taken that women are more likely to find it difficult to work certain hours because of childcare responsibilities such as nights and changeable hours. A working document analysing the job and competitors' rates of pay included the observation that variable flex options do not suit parents or students. The author of that document, who worked for the second respondent, showed insight. The respondents argue that none of the lead claimants were limited to part-time hours and so cannot show disadvantage. We reject that. This is a broader consideration about the respective workforces and the history which might explain how, for doing work of equal value, men and women have received different rates of pay; whether there is 'sex taint' in the markets. Notwithstanding the opportunities for part-time work in warehouses, a closer analysis supports the proposition that women have been attracted to the hours which are compatible with childcare. That is not to say many others may not prefer this work, such as students or people with second occupations, but it is indicative. It is reasonable to infer that will explain a significant number of those who have chosen to work as retail sales consultants which has such a large predominance of women.

237. In closing submissions, Mr Green said that we should take into account other factors to explain the different pay rates. He says these are relevant to the factor of market forces, because the rate at which basic pay has been fixed may have included benefits to the employer and employee which fall outside section 65(6); that is the demands made on the employee by reference to factors such as effort, skill and decision-making.

238. The employer's perspective includes the need for people to do a particular job; to recruit and retain employees and the marginal product, which is the additional revenue less cost derived from the employee's work which will inform what the employer is prepared to pay. Employees may have financial and non-financial considerations, even if they overlap with matters already taken into account within section 65(6). These may affect employees differently, for example the physical aspects of a job and the attractions of the working environment, the benefit of the working wardrobe or the ease of swapping shifts electronically.

239. We are satisfied the statistics, the fixing of pay by benchmarking in a warehouse market with a largely male workforce, the gender make-up of those who did part-time work, as above, together with the considerations in ***Dobson*** make good the claimants' case under section 69(2). The influences Mr Green has

drawn attention to, whilst material, are not of comparable weight or significance. But they remain relevant to issues of proportionality to which we return.

240. Factors 1, 2 and 6 which are germane to basic pay, and all other material factors, placed women and the lead claimants at a particular disadvantage when compared with persons of the opposite sex, warehouse workers, for the purpose of section 69(2) of the EQA.

241. The respondents say the lead claimants were not subject to the disadvantage of the PCP originally alleged by the claimants, not being carers or being unable to work the variety of shifts available. They, as well as the group, must be subject to the disadvantage. We find that they were. The reasons that led to the lower basic pay for retail staff impacted upon them and the statistical differential establishes the causal link for them as well as the group.

242. The respondents also argued that the greater proportion of managers in warehouses were women and this was not indicative of a workforce which was predominantly male. The inclusion of more senior staff, however, was not the appropriate pool for comparison in the setting a rate of pay for the comparators and this did not assist.

243. The burden under section 69(2) having been discharged by the claimants, it is for the respondents to establish the factor which explains the difference in pay was a proportionate means of achieving a legitimate aim.

244. The aim relied upon is viability, resilience and successful business performance [aim 1]. Subject to the question as to whether this masks a cost only aim which would not be legitimate, it is, by its own definition, a business need.

245. The *market forces* factor, *recruitment and retention* factors and *business viability, resilience and productivity* factors for which the differential pay rates were set in the retail and warehouse sectors, were an appropriate means of achieving aim 1. We draw that conclusion from our analysis in the section relating to each factor above. Basic pay was not the only means of meeting the aim and the respondents used other methods of remuneration which we consider below, but it was one of them.

246. Was it reasonably necessary? That involves balancing the business need on the one hand with the discriminatory effect on the other.

247. By paying a remuneration package which reflected the market rate, which included the basic pay, the business need for the warehouses was met. The second respondent could not reduce this without a risk of jeopardising the required service from warehouses for online sales and to stores.

248. Mr Short says that does not justify paying the lower rates to the sales consultants. The impact upon the retail staff was that they were not receiving a similar level of remuneration in their basic pay for doing equal work. Although the hourly difference was less than a pound and reducing over the relevant period, the marginal purchasing power of such sums should not be underestimated for pay rates at this level.

249. The respondents make a number of points about proportionality. Firstly, in respect of its business needs, they were working within a budget to maintain efficiency and the fact the national minimum wage impacted on the rates they paid retail sales consultants should not be viewed in isolation. Mr Miles identified a 'concertina effect' of statutory minimum pay levels whereby the budget rises overall because of the need to maintain differentials.

250. Secondly there were a number of advantages to retail workers which were not available to warehouse staff, by way of non-wage amenities. This would be relevant to assessing the extent of the disadvantage.

251. The respondents rely upon the 25% discount on merchandise taken up by the retail staff. That is more than the warehouse staff: 81-93% to 39-49%. That is not helpful. It was available across the board. That it was taken up by one group rather than another has no weight in terms of proportionality.

252. There was a working wardrobe allowance of 75%. It was available to the retail staff only. Staff could choose a broad range of items from the formal to the casual. It was not openly branded as NEXT wear. Staff could opt out of the scheme, but few did. Ms Cherry used the discount. In her witness statement she was quite disparaging about it. She said there were strict rules as to what they could and could not wear. She described it as a uniform. In the early days she said she had to parade up and down, in front of managers. One manager was leery towards younger women. She said they showcased the merchandise. When cross examined she acknowledged that most people preferred to wear these clothes rather than a uniform and that they regarded it as a perk. An example of the range of clothing available reflected a broad range and taste. Staff feedback was that the allowance was a real benefit. It was an amenity to which we have regard on issues of proportionality.

253. The respondents submitted this part of Ms Cherry's evidence had been presented to support the opinion of Dr Pettinger of a "*practice of stores hiring attractive and young employees, particularly in clothes stores as brand ambassadors or models, with generated performances of labour that differ depending on the product being sold*'. An email referring to female staff as ambassadors was said to be indicative of a message which had been stressed in every store in which she had worked. The email was a summary of comments of the views of 6 focus groups of customers in 2017. We accept the submission of the respondents that this has been given a prominence the remark does not warrant. We recognise the dangers of drafting witness statements to complement other features of the case for optimal presentation. The negative portrayal of the benefit by Ms Cherry was not convincing. The above quotation of Dr Pettinger would not be a fair reflection of the policy.

254. Two other benefits which retail staff could use were the Shift and Contract Marketplace. These schemes were available until 2022 when there was a change of computer platform. Attempts are being made to upgrade the functionality to reintroduce them.

255. Shift Market Place allowed staff to manage their shifts on a weekly basis and to pick up additional hours offered or switch shifts with colleagues. The scheme commenced in 2014. Contract Market Place allowed staff to place their

shifts on the market to change their contractual hours if they were taken on by another member of staff. They could also take shifts of a staff member who left before a vacancy was advertised. This scheme started in 2017.

256. The respondents say that the lead claimants could overcome the shortfall in pay by choosing to work in a warehouse. Specifically, they draw attention to the fact that Ms Cherry, the only lead claimant to give evidence, has no obstacle to taking any of the working shifts available, part time or full time. She made a decision not to take up the redeployment opportunity in the 2021 initiative for sales consultants to transfer to the warehouses. In her evidence Ms Cherry said that was because she did not believe it was genuine but a ruse of the respondents in response to the class action of which she was part. We did not accept that. We accepted the evidence of Mr Navarro that this was intended to alleviate the difficulties of recruitment in South Yorkshire. Ms Cherry was unduly sceptical.

257. The respondents submit that the extraordinary low take up of this opportunity is indicative of the non-wage amenities of retail work and the comparative unattractiveness of warehouse work. It is submitted these are subjective factors so do not trespass on the finding of equal value under section 65(6) of the EqA, which are about demands on the employee by reference to such factors as effort, skill and decision-making and, even if they did they are still available for consideration for material factor defence purposes, see ***Christie v John E Haith [2003] IRLR 670*** and ***Blackpool BC [2007] UKEAT/0428/07/MAA***. They cite the enjoyment derived from customer service and job autonomy in sales, sense of purpose, pride, interest or preference in the product, brand, social status, appealing surroundings, location, ability to socialise with colleagues, self-expression, a sense of belonging and camaraderie. This is to contrast a working life in a big metal box, an environment of piped-music, the drone of machinery, machinery vibration, alarm sirens and the screeching of machinery, wheels and rollers continuously present in all areas, to which the worker was continuously exposed including during rest periods and lunch breaks if spent on the warehouse floor. In support of this, Mr Green relies upon Ms Cherry's acceptance in cross examination that this extract of a job description from the Stage 2 proceedings was not appealing and that a warehouse job did not seem particularly attractive but if it had been a lot more money she would have considered it.

258. If a barrier is absolute the discriminatory effect is substantial. A height restriction to work in a police force could never be surmounted by a woman who was not tall enough. The redeployment scheme demonstrated that the discriminatory impact is not as stark for retail workers as in the example of a height restriction in the police. Nevertheless, it is not an attractive argument to say that the barrier could have been overcome, by leaving a job which is of equal value to do another job of the same value but at the higher rate of pay in these circumstances. We did not regard the fact that Ms Cherry nor any other claimant took up the offer of redeployment in 2021 as of any real significance. To uproot one's life from family, friends and associates to a different part of the country for a job paying not an enormous amount more would be unrealistic, regardless of the non-wage amenities in retail. This would be to apply an unfettered free market model of supply and demand. That is inappropriate for the reasons explained by Professor Bryson and Mr Miles.

259. We accept the impact of the lower basic pay of retail staff is ameliorated to a degree by the non-wage amenity aspects to the retail jobs. The idyllic portrayal of the advantages of the workday of a sales consultant against the grim endurance of the warehouse worker painted in written submissions of the respondents was something of a parody, but retail work had positive aspects which Ms Cherry acknowledged, albeit perhaps a little reluctantly.

260. Paying a higher rate of basic pay to sales consultants which was not necessary from a commercial perspective would come at a cost to the business and impact on the profitability of the first respondent and the NEXT Group. The claimants say cost cannot be advanced as an excusable defence to discrimination and if market forces prevailed in such cases it would defeat the purpose of the legislation.

261. The question of whether market forces and costs may be deployed successfully as a defence is an issue which has been considered in a number of cases over recent years. The respondents draw attention to ***Enderby***. In that case the local authority had argued that the variation in pay between speech therapists and pharmacists was due to market forces, in that the NHS had greater difficulty filling posts for pharmacists than speech therapists. The Tribunal rejected the defence on the basis it only partially justified the difference, but the EAT held that once it had been found that market forces were genuinely material and not *de minimis* the whole difference was justified. The Court of Appeal referred a preliminary issue to the ECJ, considering that the whole of the variation may not be justifiable under ***Bilka***. It was agreed that market forces contributed to the difference to the extent of 10%. The question to the ECJ was whether it was necessary to justify the whole or substantially the whole of the variation or whether it was sufficient to justify only a part. The ECJ held:

> "*26. The state of the employment market, which may lead an employer to increase the pay of a particular job in order to attract candidates, may constitute an objectively justified economic ground within the meaning of the case law cited above. How it is to be applied in the circumstances of each case depends on the facts and so falls within the jurisdiction of the national court.*
> *27. If, as the question referred seems to suggest, the national court has been able to determine precisely what proportion of the increase in pay is attributable to market forces, it must necessarily accept that the pay differential is objectively justified to the extent of that proportion. When national authorities have to apply Community law, they must apply the principle of proportionality.*
> *28. If that is not the case, it is for the national court to assess whether the role of market forces in determining the rate of pay was sufficiently significant to provide objective justification for part or all of the difference.*
> *29. The answer to the third question, therefore, is that it is for the national court to determine, if necessary by applying the principle of proportionality, whether and to what extent the shortage of candidates for a job and the need to attract them by higher pay constitutes an objectively justified economic ground for the difference in pay between the jobs in question*".

262. Ms Donnelly also says the domestic authorities of ***Cumbria County Council v Dow [2008] IRLR 91*** and ***Bury MBC v Hamilton [2011] ICR 655*** support the principle that market forces may constitute a defence of objective justification.

263. Mr Short, in contrast, relies on dicta of Arden LJ in ***Armstrong (No 1) v Newcastle Hospital Trust [2006] IRLR 124***. Having considered submissions about the case of ***Ratcliffe***, she said, "*It is important not to read the decision too narrowly. It was not necessary for the applicants to show that the reason why competitors paid dinner ladies less than the applicants' comparators was because they consciously discriminated against women. As Lord Slynn observed, in the passage I have already cited, to permit employers to rely on market forces as the reason for reducing women's pay below that of their male comparators would be to permit the very kind of discrimination the 1970 Act sought to redress. In equal pay cases, it is necessary at all times to keep in mind the overarching social and economic purposes of the legislation*".

264. From these authorities we draw the conclusion that market forces may be a legitimate aim, but the Tribunal must always then consider issues of proportionality. Market forces are broader than costs. As is apparent from ***Enderby,*** issues of recruitment and retention may be in issue in one market but not another. In ***Armstrong (No 1)***, Arden LJ had not said that market forces were impermissible in principle, notwithstanding the above dicta read in isolation might suggest that. At para 38 she said, "*The House of Lords held that the tribunal was entitled to make that finding. Lord Slynn expressed the view that 'to reduce the women's wages below that of their male comparators was the very kind of discrimination in relation to pay which the Act sought to remove.' In other words, once it was shown that the rates of pay for dinner ladies were determined by rates applicable to what the market perceived to be women's work, competitive forces did not, in the circumstances of that case, constitute a defence and **objective justification had to be shown***" [emphasis added].

265. The issue of costs being the reason for the difference in treatment has been the subject of a number of authorities: In ***Jørgensen v Foreningen af Speciallæger and Sygesikringens Forhandlingsudvalg [2002] 1 CMLR 40*** the ECJ held that budgetary considerations cannot in themselves justify discrimination on grounds of sex, but measures intended to ensure sound management of public expenditure on specialised medical care and to guarantee people's access to such care may be justified if they met a legitimate objective of social policy, were appropriate to attain that objective, and were necessary to that end.

266. A number of domestic authorities have addressed the proper approach to cost in the context of a defence to an indirect discrimination complaint. The latest is ***Heskett v Secretary of State for Justice [2021] ICR 110.*** Underhill LJ approved the principle, derived from the above CJEU authority, that the saving or avoidance of costs alone will not, without more, amount to achieving a legitimate aim. He expressed the view that terms which have been adopted to define, on the one hand, the impermissible extent of this defence, 'costs alone', and, on the other, aims which may be argued to be legitimate because there is something additional, 'costs plus', were best avoided because they risked the adoption of an inappropriately mechanistic approach. He said that the Tribunal should consider how the aim can be most fairly characterised and it would only be if it was solely to

avoid costs increases that it should be treated as illegitimate. A distinction in the case law suggests an employer's need to reduce expenditure to balance its books may constitute a legitimate aim and a real need to reduce or contain staffing costs would suffice. Underhill LJ observed that "*it may sometimes be difficult for a tribunal to draw the line between a case where an employer simply wishes to reduce costs and cases where it is, in effect, compelled to do so. But tribunals often have to make judgements of that kind*".

267. Viability, resilience and successful business performance [aim 1] is advanced as the legitimate aim. In its full definition, at paragraphs 159, it includes components of recruitment and retention and market forces. Market forces was said to be a factor to explain the difference. Basic pay in the warehouses was lower than many competitors. The structure of the remuneration package favoured the productivity bonus increasingly over the relevant period.

268. With respect to aim 1 this was achieved by the factors, insofar as paying the market rate satisfactorily sustained retention and recruitment in both sectors. The second respondent never had to go above and beyond the market rate to address recruitment and retention problems, either with respect to basic pay or the remuneration package overall in the warehouses. ***Rainey v Greater Glasgow Health Board [1987] AC 224*** was an example of a case where the respondents had had to pay beyond the nationally agreed rate (the Whitley Council scale), to attract sufficient staff for a new inhouse prosthetics department. The material factor defence succeeded because the service could not have been established within a reasonable timeframe without paying the higher rate. The present case is dissimilar. The aim was just a financial one; the respondents could have afforded to pay a higher rate of basic pay to retail staff as some competitors did, but paramountcy was given to keeping costs in the labour budgets to their minimum. That enabled the first respondent and the Group to maintain and maximise profitability. This furthered one of the directors' statutory obligations, to the respondents' shareholders.

269. There is no real scope for any *costs plus* ingredient, when the whole drive was about cost saving, a consistent theme of the relevant witnesses. We recognise in the broadest sense that business decisions in this industry were not just about making profits. High street shopping has been on the wane leading to the closure of stores and the loss of retail jobs over a sustained period. The claimants pointed out in closing submissions that there was no evidence the reduction in stores was the reason retail wages were held at or near national living wage rates. But the first respondent has survived where many other retailers have gone to the wall. This was achieved by careful management, particularly in the field of budget planning. Difficult decisions made by businesses are not made with full foreknowledge of the headwinds and so what may appear to be ungenerous wage settlements yesterday may transpire to have avoided business failure today. The fact that the first respondent has made sustainable profits throughout the period, save for the year after lockdown, and could absorb the cost of the same basic pay for work of equal value is a judgment the Tribunal can pass with the merciless wisdom of hindsight. All that said, we are satisfied that with respect to basic pay the legitimate aim of viability, resilience and successful business performance [aim 1], fairly characterised, falls on the wrong side of the demarcation line, of costs only, with no element of costs plus.

270. Even were we wrong, and this were a permissible aim, the payment of different sums of basic pay, for the factors, was not reasonably necessary to meet it. The business need was not sufficiently great as to overcome the discriminatory effect of lower basic pay, having regard to all the considerations we have explained above, including the financial headroom and having given all due allowance for the non-wage amenities in retail. Mr Short is correct to say that for market forces to be a trump card in this way would defeat the objective of the legislation; lower pay in particular sectors due to indirectly discriminatory practices could then be lawfully sustained in perpetuity. There must usually be a more compelling business reason for such arrangements to be justifiable, such as with the incentivised productivity bonuses we consider below.

271. The defence under section 69(1)(b) is not established.

**Covid19 & furlough – term 1**

272. Between 14 April 2020 and 27 June 2020 warehouse operatives who returned to the warehouse early from furlough were paid an additional 10% on basic pay. This followed a two-week shutdown. The agreement with USDAW was to incentivise employees to return to work. Mrs MacIntyre said they had asked for volunteers. There were not enough.

273. Stores reopened at the end of May 2020. Lower numbers of staff were needed because of restrictions. Trade was down by 63% in June 2020. Return by retail sales consultants was voluntary and sufficient numbers came forward. There was a flexible furlough scheme in operation from July 2020.

274. The only factors for which this difference in pay could be explained was the fifth, *incentivising consistent and high attendance* and the sixth, *business viability, resilience and performance*. There was no evidence that there was a market force which influenced this payment, or it concerned business recruitment and retention. The staff were otherwise on furlough.

<u>Direct discrimination</u>

275. The decision to pay this sum to warehouse staff but not to retail staff had nothing to do with sex. Different circumstances prevailed to the return to work of the respective groups. There was no need to incentivise a return of retail staff in contrast to warehouse staff, which was over 2 months earlier in national lockdown. The evidence in this respect was from Mrs MacIntyre, Mr Kelly and Mr Mason. It was not subject to any challenge. The material factor defence under section 69(1)(a) is established.

<u>Indirect discrimination</u>

276. Proportionate disadvantage to women as a group and the lead claimants was established for the same reasons as for basic pay.

277. The legitimate aim is viability, resilience and successful business performance [aim 1]. The 10% temporary enhancement to current staff was for a very specific purpose: encouraging people to work in the early stages of lockdown.

It was a means of achieving aim 1. There had not been sufficient volunteers before it was offered.

278. The issue is proportionality. Was applying this temporary wage enhancement for the fifth and sixth factors a proportionate means of achieving that aim?

279. It was. A problem arose at a particular point in time with the warehouse workers. It did not arise two months later with sales consultants. It is likely the influence of the union resulted in this benefit but that is incidental. The discriminatory effect was not receiving a 10% enhancement for a fixed period, but the business need could not realistically have been met in any other way. It was a reasonably necessary measure of achieving the aim.

280. The material factor defence under section 69(1)(b) is made out.

**Peak Premium Bonus – term 1**

281. Between 3 October 2021 and 1 January 2022 an additional £1 was paid to warehouse workers for every hour worked, including basic, overtime, peak working week and variable flex hours but not for holiday or sick pay.

282. According to Mr Kelly the second respondent was significantly adrift in the market rate for basic pay within warehousing for this period. The competitor Amazon had offered a £1,500 joining bonus to new warehouse operatives and an hourly rate of £11.10. Mrs MacIntyre said, "*Amazon had 3 warehouses in the Doncaster/Knottingley area (just 13.1 miles from Elmsall site) and were offering a pay package that included a basic rate of pay for days of £10.40, +16.4% for nightshift working equating to £12.11 per hour, a £1,500 sign on bonus (pro rata), overtime for the first 40-50 hours at £15.60, and overtime for the next 50-60 hours at £20.80. Our equivalent package at the South Elmsall site was a £9.30 day rate, +20% for nightshifts equating to £11.16 per hour, overtime (at time and a half) at £13.95, £1.00 per hour temporary seasonal uplift, plus bonus schemes ranging from £0.50 - £5.00/£0.75 - £2.50 per hour and a 25% discount*".

<u>Direct discrimination</u>

283. The evidence clearly established that the payment was made at this peak period up to Christmas because of the risk of losing staff and the need to deter them from leaving to work for more money with the competition. No such challenge arose in the stores. This was a payment which had nothing to do with gender and was for *market forces* [factor 1], *recruiting and retaining sufficient warehouse labour* [factor 2] *incentivising consistent and high attendance* [factor 5] and *business viability, resilience and performance* [factor 6].

<u>Indirect discrimination</u>

284. Proportionate disadvantage to women as a group and the lead claimants was established for the same reasons as for basic pay.

285. The legitimate aims are said to have been viability, resilience and successful business performance [aim 1] and incentivising consistent and high warehouse

attendance [aim 4]. Those were business needs at that time and the payment of the peak premium bonus was an appropriate means to meet that need.

286. It was proportionate, that is reasonably necessary. We do not consider any lesser measure would have sufficed. Nor would it have been proportionate to pay sales consultants a peak premium bonus when there was not a comparative crisis arising from competition for their labour.

**Unconsolidated awards - term 2**

287. During the relevant period, warehouse operatives were entitled to unconsolidated awards:

287.1. In March 2017, an award of 0.5% of annual basic salary.

287.2. In February 2018, an award of £50 for full time employees, and £25 for part time employees. All comparators were part time at the relevant time and therefore received £25.

287.3. In March 2023, an award of £100 for full time employees and £50 for part time employees. Andrejs Zale was full time at the relevant time so received £100, and Calvin Hazelhurst, Richard Parker and Steven Oliver were all part time, so received £50.

288. Sales consultants did not receive unconsolidated awards during the relevant period.

289. The rationale for these payments was given by Mrs MacIntyre. One-off payments were negotiated with USDAW to conclude deals. She said this enabled the respondents to avoid paying additional basic pay which would provide a lower base from which to start the following year's negotiations. These were described as, "*creative solutions to keep pay rates down, but still to achieve a deal with the union"*.

Direct discrimination

290. The factors are said to be *market forces* [factor 1], *recruiting and retaining sufficient warehouse labour* [factor 2] and *business viability, resilience and performance of the Next Group and Subsidiaries* [factor 6]. Sealing the deal with the union can be construed as being about factor 1 and factor 6 and, indirectly, factor 2. The payment of the sums to the warehouse operatives and not the sales staff was not because of gender. The defence under section 69(1)(a) succeeds.

Indirect discrimination

291. Proportionate disadvantage to women as a group and the lead claimants was established for the same reasons as for basic pay.

292. The aims are said to be viability, resilience and successful business performance [aim 1]. It was obviously advantageous to seal agreements which would be approved by the membership of the union and avoid difficulties in industrial relations. The payment would be a means of meeting that aim

293. The difficulty for the respondents is that this was so clearly connected with determining the rate of basic pay, by keeping it lower than it otherwise would have

been, that it is essentially a cost saving issue. It is true that it arose in a particular context, namely collective bargaining, and that was not therefore an issue which would apply to the retail workforce. The claimants rightly say that it is not sufficient for the respondent to show only a business need in respect of the comparators but they must also demonstrate it was not proportionate to make this payment to the claimants, as their labour was of equal value.

294. The character of the payment is so closely aligned to the underlying basic pay of warehouse workers that we are satisfied it falls on the wrong side of the costs only/costs plus demarcation line. The terminology of the aim as business performance and additional involvement of collective bargaining does not cloak the aim with legitimacy.

295. Had we found the aim to have been legitimate, we would have considered the factors to have been a proportionate means of achieving the aim. No obvious lesser measure was identified.

**Attendance Bonus - term 3**

296. An attendance bonus of £1,000 was paid to warehouse operatives at Elmsall Complex only (not DVB), in January 2022 for 100% attendance in the period October to December 2021. A £500 bonus was also payable for 95% - 99.9% attendance. In each case these sums were pro-rated for part-time employees based on contracted hours. Of the comparators, Calvin Hazelhurst and Richard Parker were at Elmsall and, therefore, received attendance bonuses under this arrangement. The lead claimants were not eligible to and did not receive this attendance bonus.

297. Mr Kelly and Mrs MacIntyre said this was paid to encourage retention, to discourage the lure of Amazon's financial package in particular and to encourage attendance every day.

Direct discrimination

298. The principal factor for this payment was recruitment and retention [factor 2], but that impacted on others, market forces [factor 1] and business viability, resilience and performance of the Next Group and Subsidiaries [factor 6]. Factor 5, incentivising consistent and high attendance in the warehouse, was the means to obtain the bonus, but was not the reason for the payment of this bonus, see paragraph 156 above. The bonus was unique to this period. It would not have been paid but for the aggressive competition from Amazon at that moment in time. Factors 1, 2 and 6 explain the reason for the Attendance Bonus. They were nothing to do with gender. The defence under section 69(1)(a) is made out.

Indirect discrimination

299. Proportionate disadvantage to women as a group and the lead claimants was established for the same reasons as for basic pay.

300. The legitimate aims relied upon are viability, resilience and successful business performance [aim 1] and incentivising consistent and high warehouse attendance [aim 4]. Aim 4 is not relevant to payment of the attendance bonus for

the reasons we have rejected factor 5 as a reason for the difference in treatment between the lead claimants and their comparators. The payment of Attendance Bonus for factors 1, 2 and 6 was an appropriate means of achieving aim 1.

301. The question is whether it was proportionate. It was a reasonably necessary measure of meeting the aims. No obvious alternative was suggested. As with all of these terms, the discriminatory effect was not receiving the payment for undertaking work of equal value. But that was no different from those warehouse workers who worked at DVB, such as Mr Zale and Mr Oliver who were not eligible. This was targeted directly to meet the proximate threat of departures to Amazon at Elmsall and was for a limited period of time. We are satisfied the payment for the factors identified to meet aim 1 was proportionate. No comparable problem arose in the retail sector requiring such a payment. The defence under section 69(1)(b) is established.

**Sunday Pay Premium - term 4**

302. For warehouse operatives starting prior to October 2006, Sunday pay premium was paid at 25%. For those starting after October 2006 but before 2017, Sunday pay premium was paid at 15%. In 2017, it was removed for all new starters, but those entitled to Sunday pay premium under their existing contracts continued to receive it.

303. By reason of their respective start dates during the relevant period, Steven Oliver and Richard Parker were paid Sunday pay premium at a rate of 25%. Calvin Hazelhurst and Andrejs Zale were paid at 15%.

304. For sales consultants starting prior to November 2001, Sunday pay premium was paid at 50%. For those starting after November 2001 but prior to June 2006, Sunday pay premium was paid at 25%. For those starting after June 2006 up to 30 September 2008, Sunday pay premium was paid at 10%. For those starting on or after 1 October 2008, no Sunday pay premium was paid.

305. In June 2015, Sunday pay premium was removed for all sales consultants previously receiving it at any rate. They received a payment calculated at one quarter of any Sunday Pay Premium received in the previous 12 months.

306. By reason of their respective start dates, during the relevant period and until June 2015, Amanda Cox and Alison Milton were both paid Sunday pay premium at 50% and Helen Cherry was paid at 25%. (Helen Cherry, who was the only lead claimant regularly to work Sundays was paid £144.60 by way of compensation for the removal of Sunday pay premium on 26 June 2015.)

307. Mrs MacIntyre explained the reasons for the many changes in the warehouses. The 2002 benchmarking exercise identified that among local competitors, other small employers (50 – 150 staff) did not pay a Sunday premium, but Superdrug (which was on the same industrial estate) paid Sunday pay at 1.5 rate. During 2006 as part of a cost saving measure, the second respondent negotiated a reduction in Sunday pay for new starters, reducing their Sunday premium rate from 25% to 15%. The business case for current employees was not agreed by USDAW but the change was agreed for new starters. This change was effective for all new starters from 1 October 2006 onwards. The Sunday pay rate

was under review in subsequent years. Benchmarking in 2013 identified that for new starters, CEVA, Claire's Accessories and DHL paid Sunday 2x; Morrisons, Royal Mail, Superdrug and Waitrose paid 1.5x; and Tesco paid 1.25x, but many other employers did not pay any increased Sunday pay. Sunday pay was becoming generally less common, for example the June 2016 Pay Climate Bulletin recorded that just 5 out of 23 employers in the retail sector paid a premium for working Sundays.

308. There was also a move by many employers to fund increases to basic pay pushed up by the national living wage by making cuts to Sunday pay. For example the March 2016 Pay Climate Bulletin records that John Lewis (which owns Waitrose) was ending Sunday premiums for staff recruited after February 2016. A review of pay rates in 2016 identified that local competitors were no longer paying Sunday pay rates, and that 70% of companies surveyed by Alan Jones nationally were not paying premiums for Sundays. The second respondent therefore identified that removing Sunday premium for all future employees would be desirable and could be justified. This change took effect from 1 February 2017. It was negotiated with USDAW on the basis that premium was incorporated into the 15p enhancement in basic pay. The second respondent was not in a position to remove the rates for Sunday pay for warehouse operatives recruited before this date, however reducing the rates for future employees represented a cost saving measure which would have increasing effect with the turnover of warehouse operatives each year.

309. In respect of retail, Mr Mason said that the market drove the changes. He said no new starter could get a job in that market and receive a Sunday premium. By the time it was abolished in June 2015, only 1 out of 10 were still receiving it on a legacy basis and that seemed inequitable.

<u>Direct discrimination</u>

310. The factors relied upon for the difference in payments are *market forces* [factor 1], *recruiting and retaining sufficient warehouse labour* [factor 2], *maintaining 24/7 working* [factor 3] and *business viability, resilience and performance of the Next Group and Subsidiaries* [factor 6]. These factors, as described by Mrs MacIntyre and Mr Mason, explained how each sector determined the pay levels and how they came to be reduced. We accept that evidence and these factors explained the difference. They were not because of gender. The material factor defence under section 69(1)(a) is established.

<u>Indirect discrimination</u>

311. Proportionate disadvantage to women as a group and the lead claimants was established for the same reasons as for basic pay.

312. The legitimate aims are said to be viability, resilience and successful business performance [aim 1] and maintaining 24/7 work [aim 2]. By seeking to track the respective markets in their benchmarking exercise, the different payments to warehouse and retail were an appropriate means to meet those business aims.

313. Were the aims legitimate or was this simply about cost? Incentivising people to work on what would conventionally be regarded as unsociable hours was

not merely about cost, but the different expectations in the respective markets. Many years ago, Sundays was not a permissible day to trade and so the changes in societal attitudes and behaviours have been developing over a long period. The same history is not apparent for warehouse work, but the trend whereby working Sundays no longer attracts premium pay followed a similar trajectory. We regard these additional factors to take the aim beyond merely cost savings and so it is legitimate.

314. The warehouse workers retained their pay for longer, although there is a common position since 2017 when no new starter in either sector receives a Sunday premium.

315. We are considering the lead claimants and their comparators. Was it proportionate for different premiums to be paid to those who worked on Sundays and whose work was equal, now reflected in the fact that Ms Cherry receives no Sunday premium but her comparators do, as a consequence of falling into a legacy group of workers? The effect of union representation may explain the better outcomes for warehouse workers in this area, but that is not really to the point. There was a significantly different approach and Ms Cherry did receive a capital payment in compensation for the removal of the premium in 2015. The respondents assert the proportionality arises from different occupational requirements for different labour markets without establishing on the evidence what they were: the reality is both markets require staff to work on Sundays.

316. The factors were not a proportionate means of meeting the legitimate aims and the material factor defence under section 69(1)(b) is not established. We do not consider the difficulties of attracting warehouse staff to work on Sundays was supported by the evidence. It was abandoned after 2017 for new starters and there is no suggestion Sunday attendance was affected thereafter. This contrasts with public holiday premium, which we address below. In that case an attempt to fulfil the requirement with volunteers failed, even with a premium of double pay. Whilst there were market forces and retention and recruitment issues explaining the differential in Sunday premiums, the business need was not sufficient to outweigh the detrimental discriminatory effect overall.

**Night Time Premium – term 5**

317. Night-time premium was paid at 33.33% for hours worked between 10pm and 6am for warehouse operatives who had a start date prior to October 2006. For those with a start date after October 2006, night-time premium was paid at a 20% rate. Night-time work was critical to the warehouse operation which worked 24 hours a day, 7 days a week. Orders peaked at 8pm and despatch cut offs for next day delivery fell between 11pm and 5am and so a significant proportion of operatives were required between 10pm and 6am.

318. The premium was for the anti-social hours worked and was a market standard. The rates were set and varied through benchmarking against competitors.

319. Steven Oliver and Richard Parker qualified for the 33.33% rate, and Calvin Hazelhurst and Andrejs Zale qualified for the 20% rate.

320. For retail staff, prior to November 2012 night-time premium was paid at 33%, for hours worked between 9pm and 7am for those who were contracted to work such hours prior to April 2002 and, in all other cases, for hours worked between 10pm and 6am. From November 2012, night-time premium was paid at 25% in respect of hours worked between midnight and 5am for all sales consultants. A small number of retail staff in some city centre stores where vehicular access was restricted had contracts which included some night shift hours. That was not the case for the three lead claimants and so does not fall for our consideration in this hearing.

321. The stores were not open during the night, but during the sales periods; at the end of the spring/summer season and autumn/winter season the first respondent had sales which attracted heavy trade. The stores opened from 5am. The change in the classification of night-time hours from up to 6am to 5am was designed to make savings because every employee would work two days a year during those sales period. The rationale was not that this was night-time work but starting earlier.

Direct discrimination

322. The factors relied upon to explain the difference between night-time premiums paid to warehouse and retail workers were *market forces* [factor 1], *recruiting and retaining sufficient warehouse labour* [factor 2], *maintaining 24/7 working* [factor 4] and *business viability, resilience and performance of the Next Group and Subsidiaries* [factor 6]. We accept that the evidence of Mr Kelly, Mrs MacIntyre and Mr Mason about the reason the different rates were paid and they touch upon each of these categories. They were not because of the sex of the claimants and their comparators but the different labour markets and need of the two sectors.

Indirect discrimination

323. Proportionate disadvantage to women as a group and the lead claimants was established for the same reasons as for basic pay.

324. The aims relied upon are viability, resilience and successful business performance [aim 1] and maintaining 24/7 work [aim 2]. Payment of these respective sums were appropriate means of achieving those.

325. The most significant difference relates to the hours which attracted the payment. The change from 6am to 5am for retail staff to qualify for the premium was solely about cost saving. It was not an aim which could be legitimate.

326. In any event we do not regard it as proportionate to meet the aims by reason of the factors relied upon. Anti-social hours do not transpose into social hours by describing them as merely an earlier start in the day, on those occasions when the stores opened. There was no justification to define differently the hours which qualify for the premium because the stores and warehouses have different operational requirements.

327. With respect to the amount of the premium, the comparators qualified for different rates, 33% or 20% depending on their start date. That difference is one

which should be applied to the respective start dates of the lead claimants, who had received 25% from 2012 and 33% before then. That could mean they are not necessarily worse off.

328. The material factor defence under section 69(1)(b) is not established.

**Bonus Pay - terms 6, 7 and 8**

329. Throughout the relevant period, warehouse operatives were entitled to receive bonuses pursuant to a scheme recorded in the 2010 Procedures and Rules Regarding the Calculation and Payment of Bonus and, subsequently, the 2013 Bonus Agreement.

329.1. Direct bonuses for work on direct bonus tasks, either as an individual or part of a group. The bonus amount was based on performance and calculated according to a set formula: number of units of production, multiplied by standard minute values ('SMVs') and divided by the time in minutes on the bonus task. A bonus was payable at 85 performance and above until 1 April 2019, when it was changed to 90 performance. The bonus rates payable were in the following ranges:

329.1.1. 3 May 2012 to 28 February 2013: £0.69 to £4.25 (from 85 up to 125 performance);

329.1.2. 1 March 2013 to 31 March 2019: £0.71 to £4.35 (from 85 to 125);

329.1.3. For new contracts from 1 February 2017: £0.50 to £2.50 (from 85 to 125);

329.1.4. 1 April 2019 to 31 March 2020:

- for established contracts (i.e. pre-1 February 2017): £0.99 to £4.28 (from 90 to 125) – with a 12-month Protection of Earnings Agreement for those who had performed at 85 to 89 over the previous 12-month period;
- for new contracts (i.e. post-1 February 2017): £0.75 to £2.50 (from 90 to 125).

329.1.5. 1 April 2020 to 31 March 2021: for both established and new contracts, £0.75 to £2.50 (from 90 to 125) – with a Protection of Earnings Agreement for those on established contracts who had performed at 107 or more, over the previous period 31 March 2019 to 25 January 2020;

329.1.6. At Elmsall only, 27 September 2020 onwards: a trial performance bonus scheme (which became permanent), £1 to £5 from 7/10 to 10/10;

329.1.7. At DVB:

- 16 August 2020 to 5 June 2021: as before, £0.75 - £2.50/hour (from 90);
- 6 June 2021 to 31 January 2022: DVB trial bonus scheme £1 to £5 from 7/10 to 10/10;
- 1 February 2022 to the end of the Relevant Period: as before, £0.75 - £2.50/hour (from 90) and a Super Bonus Scheme doubling the otherwise applicable rates for performance at 115 to 125 (doubled from £2 up to £2.50, to £4.00 up to £5.00).

329.2 Indirect bonuses for work on indirect bonus tasks, which are tasks which were integral operations but difficult to measure individually, such as moving

stock around the warehouse. The bonus amount was based on site level performance or a specific area within a site rather than as a direct measure of the individual's or group's performance. Direct and indirect bonus work were mutually exclusive. Throughout the relevant period, indirect bonus was paid at a rate of 65% based on direct bonus payments, save for the following:

- At Elmsall only, from 27 September 2020 onwards: a fixed rate of £0.50;
- From 1 April 2019 to 31 March 2020: the addition of a minimum bonus payment for when the average site performance dropped below 90% for those on established contracts at £0.40 and those on new contracts at £0.28;
- From 1 April 2020 to 31 March 2021: a minimum bonus payment of £0.28 for all contracts.

329.3 When undertaking specified work to which direct bonus or indirect bonus could not apply, warehouse operatives were paid an average bonus based on a rolling weighted average of their direct bonus earnings during the previous 4 qualifying weeks.

329.4 In relation to Covid, special arrangements applied:

- 26 March 2020 to 11 April 2020: for those on furlough, 100% average bonus based on individual's own bonus earnings in 2019/20 tax year;
- 12 April 2020 to 30 June 2020: for those on furlough, 80% average bonus was paid based on individual's own bonus earnings in 2019/20 tax year;
- 14 April 2020 to 27 June 2020: for those returning from furlough, 100% average bonus based on individual's own bonus earnings in 2019/20 tax year.

330. A number of retail bonuses have been introduced and withdrawn during the relevant period. These were bonus schemes primarily, but not always, based on store performance. They are explained in our decision which was sent to the parties on 27 April 2024.

330.1. <u>Sales Bonus Scheme (2012 to 2014)</u>:

- Monthly Sales Bonus (3% to 8% based on sales at 95% or above of monthly store targets);
- Seasonal Guarantee Bonus (3% to 8% based on sales at 95% or above of seasonal store targets); and
- Super Sales Bonus (1% to 7% based on sales at 1% to 10% above seasonal store targets).

330.2. <u>Sales Bonus Scheme (2012 to 2014)</u>:

- Monthly Sales Bonus (3% to 8% based on sales at 95% or above of monthly store targets);
- Seasonal Guarantee Bonus (3% to 8% based on sales at 95% or above of seasonal store targets); and
- Super Sales Bonus (1% to 7% based on sales at 1% to 10% above seasonal store targets).

330.3. <u>Customer Experience / Service Bonus (2014 to 2018)</u>:

- initially, an additional £0.25 per hour for one great mystery shopper visit and an additional £0.50 per hour for two great mystery shopper visits in a month;
- from 2018, an additional £1 per hour for two 100% scores during the month.

330.4. Service and Sales Bonus (2018 to 2020). Up to an additional £0.80 per hour depending upon the combination of service ("NEXT Loves to Listen" – based on customer service feedback) and sales (from 95% to 105% of store targets).
330.5. Delivery Bonus (2016 to 2018): Individual performance against delivery targets (below 96% up to 116%) from £0.30 to £1.06.
330.6. Delivery and Sales Bonus (2018 to 2020). A combination of individual performance against delivery targets (below 95% up to 117%) and store sales against targets (Base, Good or Exceptional, based on store sales targets).
330.7. Normal Store Surplus Bonus and Priority Surplus Stock Bonus (2013 - 2019): picking bonuses rewarding staff for the number of items picked (£0.05 to £0.15) with additional seasonal schemes such as (in 2015) Golden Store Surplus, Full Price Xmas Promise, and Platinum Promise and (in 2016) Platinum Store Surplus (increasing rates up to £0.10 to £0.35).
330.8. Directory and Temporary Directory Card Bonuses (2012 to 2018). Signing up customers to NEXT Directory cards.
330.9. Directory Parcel Incentive (2013 to 2018). 15p for every parcel made ready for customer collection within 2 minutes.
330.10. Shoe Incentive (2014): 10p for selling shoes within 30 minutes.
330.11. Replen Bonus (2017 to 2018). Picking items that need replenishment on the shop floor, from £0.20 for 100 items to £1.87 for 170 items.
330.12. Store Collection Bonus (2018 to 2020). Picking and packing a customer order within 40 minutes, initially £0.20 and then £0.10.
330.13. My NEXT Rewards Scheme (from December 2020 as a trial and in all stores from April 2021).

331. The claimants invite findings that the warehouse performance bonus had the dual purpose of increasing productivity and ensuring the overall remuneration package matched the market. That did not seem to be disputed. The second respondent pays a higher rate of productivity bonus than its competitors but a slightly lower level of basic pay. That was taken into account in the benchmarking exercises.

332. The claimants invite a finding that a bonus was sometimes payable irrespective of increased productivity. This was true in respect of average bonus. In respect of indirect bonus, it was measured on site or specific area performance, not individual. However, the evidence of Mr Navarro was that there was only a small amount of bonus was paid for indirect work, because those tasks were considerably fewer. The average bonus was also a proportionately small element of total bonus paid. We did not have a breakdown of the respective bonuses for the comparators but accept it would reflect the proportions suggested by Mr Navarro.

333. The claimants invite a finding that the bonus payable at BS85 was effectively basic pay as almost all employees prior to 2020 at DVB received bonus. Prior to 2019 BS85 was the minimum standard expected of a trained operator and disciplinary action could be taken if it was not achieved. It is said this was not a reward for productivity, but merely working to the required standard.

334. Mr Churchill produced tables of data which demonstrated the proportion of workers who received bonuses at the respective rates. Between 2012 and 2018 at

DVB, between 5% and 15.5% of operatives received no bonus because they operated at below 85. At Elmsall, the rates ranged from 14% to 60% who did not receive bonus. In his evidence, Mr Churchill said that calculations are made for 7,000 workers each week of which 80% received a bonus. Mr Short suggested many of those not receiving bonus were new starters and that the statistics needed to be considered in that context. Mr Churchill could not clarify who fell into the category who did not receive bonuses. There is a new starter running in allowance, for a full-time worker for a week and two weeks for a part-timer.

335. We do not regard the direct bonus at level BS85 as basic pay. Not only do a significant proportion of workers not achieve the minimum trigger for a bonus, it is part of a graduated scheme in which the levels of productivity are individually remunerated by enhanced payments. It has the effect of reducing the cost per unit. We agree with the submission of the respondents that these were well monitored schemes directly linked to output and of a quite different character to schemes in earlier cases in which the productivity link was highly tenuous, eg ***Cumbria County Council v Dow [2008] IRLR 91***.

336. The claimants also invite a finding that the first respondents did not assess whether or to what extent retail bonuses could be financed from productivity improvements or sales bonuses. Mr Short asked Mr Mason about analysing till transactions to evaluate savings which might be made with respect to the speed to scan the item, pay for it and pack it. Mr Mason said that this study addressed the problem of a customer looking for their means of payment in a purse or wallet which delayed the process. By scanning the item first and then packing the goods whilst the customer fiddled for their payment card, time was saved. The model used by the statistician suggested there could be savings of £2.9 million based on average transaction times. The claimants say this illustrates how it was possible to introduce productivity schemes in stores, but also an attitude of mind that it did not really matter because it meant no more than a slightly longer queue.

337. It is fair to say that not all aspects of the work of retail consultants cannot be measured individually, not least because there was a Replen and Delivery Bonus which did just that but which was withdrawn. That and other bonuses which retail workers had received were principally casualties of the rechannelling of funds in the labour budget to meet the yearly increases in the national minimum or living wage. That did not arise in warehouse work, because the margins between the national living wage and the market rate for them was greater.

338. Professor Bryson observed that for a pay performance structure to be viable the employer must have a means of tracking the worker's productivity, identifying the contribution the worker makes to output and how those changes over time. Generally speaking it is not possible to measure the performance of the sales consultant in the same way as that of the warehouse worker. That is because of the nature of the work. Warehouse workers individually process units, the number of which can be counted by reference to speed. To effect sales is the essential function of the retail worker. The sale of any product cannot be attributed to any individual worker but depends upon a number of vagaries over which no individual has any control. Although there are certain duties which could be individually measured, such as in replenishment and picking, these could not reflect the majority of what the sales assistant does in a day. The example of the speed at

which an item is processed at the till is possibly another, but whether this could be introduced as a viable system of incentivisation is speculative.

339. The respondents could doubtless have done more to measure and reward higher levels of productivity, such as maintain the Replen and Delivery Bonuses, although they would always be a marginal part of the work of a sales consultant. In these matters, we must remind ourselves that we are not concerned with fair pay but equal pay and it is only through the principles of direct and indirect discrimination as material factor defences that these issues must be addressed.

340. The factors relied on are *market forces* [factor 1], *recruiting and retaining sufficient warehouse labour* [factor 2], *incentivising high productivity* [factor 4] and *business viability, resilience and performance of the Next Group and Subsidiaries* [factor 6].

Direct discrimination

341. The reasons for the payment of direct bonus to warehouse operatives was principally to enhance performance and efficiency, factor 4, for the reasons Mr Kelly, Mrs MacIntyre and Mr Churchill gave. The other reasons, with respect to indirect and average bonus, were not for efficiency purposes, but to ensure others in the warehouse did not lose out when they were not able to perform the direct bonus tasks, which were the lion's share of the duties. It maintained their pay within the market rate. All these bonuses were part of the remuneration package and related to factors 1, 2 and 6.

342. The removal of the respective bonuses from the sales assistants was principally to release part of the wage budget to fund the increases in the national minimum wage. The absence of bonuses more generally was because of the difficulties in measuring their performance, because of the nature of their duties.

343. The differential in pay with respect to these bonuses was not because of gender. The defence under section 69(1)(a) is established.

Indirect discrimination

344. Proportionate disadvantage to women as a group and the lead claimants was established for the same reasons as for basic pay.

345. The legitimate aims are aim 1, business performance and aim 3 incentivising warehouse productivity. The payments for factors 1 and 3 were plainly appropriate means to achieve the aims, for the reasons we have explored above.

346. We are also satisfied that this was a proportionate means of achieving the aims. With respect to direct bonuses, the sophisticated schemes which drove down costs met a significant business need in a way which could never be achieved within the sales environment. In ***Redcar and Cleveland v Bainbridge and others [2007] IRLR 91*** the EAT overturned a finding of a Tribunal that a material factor defence failed in circumstances in which bonuses paid to refuse collectors were not paid to caterers and care workers. The bonuses to the refuse collectors had productivity elements. The Tribunal held that it would have been

possible for the employer to construct some other scheme for the caterers and care workers to reward them commensurately. That was an error of law.

> "*57. We accept that in assessing the issue of proportionality it may be necessary to focus on the disadvantaged as well as the advantaged group and to ask why the disadvantaged group were not given the same benefits, or opportunities to benefit, as the advantaged group. The council has implicitly accepted as much by conceding that their GMF defence will not succeed if a similar productivity scheme could have been implemented for these claimants. Here, however, there was an obvious and vital difference between the situation of the claimants and their chosen comparators.* ***The refuse collectors were employed in work which enabled a productivity scheme to be adopted and which, as a consequence, brought savings and greater efficiency to the work being carried out for the council. That opportunity did not exist in relation to these particular claimants. The comparators were fortuitously in posts where they could largely pay for their own bonuses by productivity improvements. These particular claimants could not.*** *Mr Allen submitted that a merit based scheme might have resulted in greater efficiencies. However, the Tribunal recognised in terms that they could not be formulated in a way which would save money or be self financing for these particular groups.*
> *58.* ***It cannot in our judgment be the case that in order to seek to bring the pay back into equilibrium that the employer should be under some obligation to adopt some other technique, be it a bonus scheme or some other way, of seeking to pay the claimants more.*** *That is simply adding costs to the employer without any corresponding benefits. That argument would always be available where a GMF had been established; if correct it would fundamentally undermine the scope of the GMF defence.*
> *59. Moreover, in our view any such suggestion is inconsistent with the general approach of the courts to the scope of the GMF defence.* ***For example, the European Court has accepted that there may be cases where, for example, full time workers may justifiably be paid more than part timers if there are objectively justified economic reasons, such as the better use of resources by full time workers****: see e.g Jenkins v Kingsgate Ltd [1981] ICR 592 and Bilka Kaufhaus v Weber von Harz [1987] ICR 810.* ***It has never been suggested that in those circumstances some alternative scheme should be adopted to allow part timers to be brought up to the same level as the full timers. Nor in our view does the GMF lose its force merely because the disparity in pay is significant or has operated for a long period.***
> *64…* ***Once the Tribunal had concluded that the higher bonus paid to the refuse workers was justified because of the arrangement they made they ought not, in our judgment, to have found that the material factor defence was not made out because of the failure to apply a wholly different kind of scheme for the benefit of these comparator groups. As the Tribunal accepted, no such scheme could finance itself or indeed involve any savings to the council***" [emphasis added].

347. There are distinguishing features on the facts of this case. There were a number of bonus schemes in retail over the relevant period. The claimants would say it is not a case of the Tribunal requiring the respondents to create or

adopt a similar scheme. In reality, we are satisfied that is what we are being invited to do.

348. The Replen and Delivery Bonus and the shoe bonus were capable of monitoring individual performance, but they were a small part of the duties of the lead claimants and could not conceivably reflect the extensive direct bonus scheme which applied to the majority of the warehouse operatives' duties. The retail sales bonuses between 2012 and 2020, which became coupled with other bonuses after 2014, were measured against store targets and did not improve the marginal product by reference to the input of the worker. As Professor Bryson observed, the duties of the sales consultants were not capable of this type of cost incentivisation. The warehouse workers, in contrast, could be measured for every minute of work during the day with the effect of reducing the cost of processing the goods.

349. The indirect and average bonuses were in a different category, but these were important means of maintaining retention and improving recruitment in an increasingly difficult marketplace which did not apply in retail. They were not significant in the comparison and could not have been replicated.

350. We reject the submission of the claimants' counsel that the evidence supported the notion that similar schemes had been and could be available to reward productivity similarly.

351. For the reasons advanced above in ***Bainbridge***, the justification for productivity bonuses is established here.

**Holiday Bonus - term 9**

352. For warehouse operatives from the start of the relevant period until August 2014, a holiday bonus was paid for the first 20 days of holiday (or pro rata for part time workers), based on an average of their bonus earned, calculated over the previous 3 months earnings up until April 2020 and the previous 12 months earnings thereafter; and from August 2014 this calculation incorporated overtime pay (including additional hours at normal rate up to Full Time Equivalent ('FTE') and overtime pay above FTE).

353. For sales consultants from the start of the relevant period until August 2014, store-based bonus payments referable to store performance were paid based on the number of qualifying hours worked by each sales consultant during the relevant period, including paid holiday hours; from August 2014, sales consultants received a holiday supplement for the first 20 days of holiday (or pro rata for part time workers) which included average additional hours worked and bonus earnings, calculated over the previous 3 months earnings up until April 2020 and the previous 12 months earnings thereafter.

354. In closing submissions, it was accepted that there was no significant difference between these terms. The difference arose from the entitlement to productivity bonuses, which had a consequential effect on the calculation of holiday bonuses. The material factor defence is established in respect of bonuses for the reasons set out above and so this is not a comparative term which requires any equivalence.

**Bank Holiday Bonus - term 10**

355. For warehouse operatives, payment of average bonus for leave taken on Bank Holidays was phased in over the period 2011 to 2014, with 1 Bank Holiday attracting bonus from February 2011, 2 from February 2012, 3 from February 2013, and any remaining Bank Holidays from 1 February 2014 onwards. The calculation for the average bonus applied to Bank Holiday leave days was the same as the calculation for any other leave day, i.e. as set out for holiday bonus.

356. For sales consultants, if leave was taken on a Bank Holiday the same calculations were made set out as for holiday bonus.

357. In closing submissions, it was accepted that there was no significant difference between these terms. The difference arose from the entitlement to productivity bonuses, which had a consequential effect on the calculation of holiday bonuses. The material factor defence is established in respect of those bonuses for the reasons set out above and so this is not a comparative term which requires any equivalence.

**Public Holiday Premium - term 11**

358. For warehouse operatives during the relevant period with a start date before 1 February 2017 (which includes all comparators) pay for hours worked on a public holiday (or additional time off in lieu of hours worked) was basic pay plus double the basic pay rate (that is triple pay); public holiday premiums were removed for new starters after 1 February 2017.

359. Sales consultants, including the lead claimants, were paid at time and a half their basic hourly rate when working on Boxing Day, but otherwise received their normal hourly rate when working on a public holiday.

360. The respondents say the rationale for paying Public Holiday Pay to Warehouse Operative was explained in Mrs Macintyre's witness statement. "*As a business we require warehouse operatives to work on bank holidays to keep the business operational all year round. However employees often did not want to work bank holidays, and therefore we paid a premium rate or offered time off in lieu for those who worked them. This was to incentivise employees to work those days, which were regarded as unsociable, and to remain competitive in the market. Bank holiday work was an emotive issue with USDAW and a topic that was frequently discussed.*"

361. Before 2002 public holidays had been paid at double pay. The second respondent rejected a request of the union to make bank holiday working voluntary but agreed to ask for volunteers in the first instance. There was an insufficient take up and the second respondent had to supplement numbers by calling on others pursuant to their contractual duties. Following collective consultation in the 2003/04 joint statement it was agreed that pay for hours worked on a public holiday (or additional time off in lieu of hours worked) was basic pay plus double the basic pay rate.

362. In respect of new starters after 1 February 2017 an additional 15p enhancement to basic pay was agreed following collective bargaining in

consideration for the loss of public holiday premium. This arose following benchmarking exercises which revealed some competitors, including Amazon, did not pay public holiday premiums.

363. The sales consultants had received time and a half payment for all public holidays, but these were removed in March 2002 save for Boxing Day, in return for an additional day of leave. That followed a consultation in which the proposal was approved by 89%. The first respondent no longer opens its stores on Boxing Day and so that premium has become academic.

Direct discrimination

364. We accept these were the reasons for the differential and they fell within the material factors relied upon, *market forces* [factor 1], r*ecruiting and retaining sufficient warehouse labour* [factor 2] and *business viability, resilience and performance of the Next Group and Subsidiaries* [factor 6]. The decisions were largely dictated by the market in the respective sectors and the negotiations which followed. To maintain staffing levels at the necessary levels in the respective markets the respondents chose these differential premiums. Gender was no part of the reason, or motivation, for the difference. The defence under section 69(1)(a) is established.

Indirect discrimination

365. Proportionate disadvantage to women as a group and the lead claimants was established for the same reasons as for basic pay.

366. The aims are viability, resilience and successful business performance [aim 1] and maintaining 24/7 work [aim 2]. To the extent that this reflected adopting standards in the respective marketplaces, the differential premiums were an appropriate means of achieving these aims.

367. The aims were not merely about saving cost, because there were different operational requirements whereby the warehouses opened 24 hours a day for seven days a week in contrast to the stores which did not operate around the clock. That led to a different approach to the changes in the entitlement in the respective labour markets. The respondents gave something in return for the premiums which were foregone in each respective marketplace. The aims were legitimate.

368. Since 2017 there is no difference in premiums for those who commenced work after then. That would not be the case in respect of the lead claimants and their comparators. Because of the different circumstances in which this premium evolved, we are satisfied that the approach was a proportionate means of achieving a legitimate aim. The difficulties in finding sufficient warehouse staff to work on public holidays was demonstrated by the attempt to use only volunteers in 2002. There was an insufficient number, notwithstanding they were then receiving double pay. No comparable problems arose for attracting sales assistants on public holidays. The subsequent increases in premiums for warehouse staff reflected this particular issue.

369. Changes in the market led to it being discontinued after 2017, albeit only for those who started work after that date. Two different forms of payment had been implemented for warehouse staff by then in the form of an extra 15p per hour. This was the beginning of the most difficult period in respect of retaining staff who might be attracted by offers from competitors and factor 2 had become particularly pressing. Given the compelling business needs over the relevant period, we are satisfied that it was proportionate, or reasonably necessary, to adopt and maintain this differential.

370. The defence under section 69(1)(b) is established.

**Notional Public Holiday Premium - term 12**

371. It was agreed in collective bargaining in the Joint Statement for 2008/09 warehouse operatives whose public holiday reduced following a forced shift change were entitled to treat the first contractual day following the public holiday as their public holiday for leave purposes, and for payment of public holiday premiums on that date.

372. There was no notional public holiday premium applicable to sales consultants.

373. Mrs MacIntyre said this term was introduced with negotiations about public holiday premiums for warehouse operatives. The same considerations which applied to term 11 are equally relevant to term 12. The material factor defences under section 69 are established.

**Overtime Premium (Hours Worked above FTE) - term 13A**

374. During the relevant period warehouse operatives received no premium for hours worked up to full-time equivalent hours for their relevant site (40 hours at Elmsall and DVB; 40.25 from September 2020); for additional hours above full time equivalent, those employed prior to 1 February 2013 received double time on Sundays, and time and a half for other days of the week; new starters after 1 February 2013 received the time and a half rate for all overtime days.

375. For sales consultants from the beginning of the Relevant Period until 12 October 2013, they were paid a 50% premium for all hours worked over 39 hours; from 13 October 2013 no overtime premium was payable.

376. Mrs MacIntyre said that there were peaks in demand in the warehouse operations which were difficult to predict. Poor weather could lead to an increase in online shopping. Overtime premium rates were offered to provide for flexibility to avoid having to have more staff than were required at quieter times and to avoid the need for agency staff.

377. Although there had been a premium on respect of overtime for sales consultants until 2013, Mr Mason said that no-one was earning that.

<u>Direct discrimination</u>

378. The respondents relied upon *market forces* [factor 1], *recruiting and retaining sufficient warehouse labour* [factor 2] and *business viability, resilience*

*and performance of the Next Group and Subsidiaries* [factor 6] to explain the difference. There were different operational requirements. There was no need to have the same flexibility for staff in the stores for peaks in demand. That is why they did not work overtime, that is in excess of 39 hours a week. The factors relied on are established. The reasons were not gender. The defence under section 69(1)(a) is established.

Indirect discrimination

379. Proportionate disadvantage to women as a group and the lead claimants was established for the same reasons as for basic pay.

380. The legitimate aims are viability, resilience and successful business performance [aim 1] and incentivising warehouse productivity [aim 3]. Payment of the overtime premium was an appropriate means of achieving the aims.

381. In the one instance there was a business need for overtime and in the other there was none. The discriminatory effect was notional given that sales staff were not required to work in excess of 39 hours. Nevertheless, to cover the eventuality that overtime might, exceptionally, be required in retail, there should be equivalence of terms. It was not reasonably necessary to meet the aim to maintain the differential rates. The defence under section 69(1)(b) is not established.

**Additional Hours Premium - term 13 B**

382. A ‘Golden Christmas’ incentive scheme ran for warehouse operatives from 27 September 2020 to 9 January 2021 at Elmsall only. For extra hours worked over the 15 week period, a higher rate of pay (on top of bonus earnings) was paid for full time employees: over 50 hours, £20; over 65 hours £23, and over 80 hours, £30, provided eligibility criteria were met including no unauthorised absence or sickness, and achieving a minimum performance standard of 7/10 or 85. The rates for part time employees were: over 25 hours, £13.62; over 30 hours, £15.93, and over 40 hours, £18.20.

383. Other short-term incentives (Elmsall only):

383.1. 6am 30 November 2021 – 5.59am 4 December 2021: basic hourly pay paid at double time on additional hours worked for Warehouse Operatives working on indirect tasks;

383.2. 6am 15 October 2021 – 5.59am 17 October 2021: 2x Direct Bonus on all additional hours worked;

383.3. 3pm 3rd November 2021 – 5.59am 7th November 2021: applicable to Warehouse Operatives who worked at least 8 hours on packing and RTF only - 2x over time and 2 x Direct Bonus;

383.4. 9am 28 November – 5.59am 2 December: applicable to Warehouse Operatives who worked at least 4 hours per day 3 x Direct Bonus on all additional hours worked.

383.5. 6am 2 December 2021 – 5.59am 4 December 2021: applicable to Warehouse Operatives working at least 4 hours per day in all departments (except on Indirect tasks) 5 x Direct Bonus on all additional hours worked.

384. Sales consultants were not entitled to additional hours premiums.

385. Mr Kelly said that the schemes were introduced following the pandemic which had led to operational disruption. At this time there was a high demand for online orders and it was the busiest time of the year. He said that without the schemes there was no question that they would not have coped operationally. His evidence was not challenged.

Direct discrimination

386. The respondents relied upon *market forces* [factor 1], *recruiting and retaining sufficient warehouse labour* [factor 2] and *business viability, resilience and performance of the Next Group and Subsidiaries* [factor 6] to explain the difference. There was a different operational requirement which arose at only one of the warehouses and was for specific reasons during 2021. The factors relied on are established and the reasons were not gender. The DVB warehouse did not attract the premium either. The defence under section 69(1)(a) is established.

Indirect discrimination

387. Proportionate disadvantage to women as a group and the lead claimants was established for the same reasons as for basic pay.

388. The legitimate aims are viability, resilience and successful business performance [aim 1] and incentivising warehouse productivity [aim 3]. Payment of these isolated premiums were plainly appropriate to meet the aims.

389. We are satisfied they were proportionate. The business need was compelling. It would not be proportionate to have paid the sales consultants these premiums when they were not paid to DVB staff, where there was no business need for them either. The defence under section 69(1)(b) is established.

**Holiday Entitlement - term 14**

390. In closing submissions, it was accepted that there was no difference in respect of the lead claimants and their comparators.

**Holiday Pay - term 15**

391. We were unable to identify any material difference with respect to the lead claimants and their comparators. Warehouse operatives were entitled to holiday pay comprising basic pay, contracted premium rates and holiday bonus which from 2014 included overtime as set out under Term 9 above.

392. Sales consultants were entitled to holiday pay comprising basic pay, contracted premium rates and holiday bonus which from 2014 included overtime as set out under Term 9 above.

393. Insofar as findings in respect of other terms concerning premiums in which the respondent has failed to establish the material factor defence, the amount of holiday pay due will require inclusion of that amount. That does not mean the formula or metrics of this term warrants correction.

**Paid Rest Breaks - term 16**

394. During the relevant period, warehouse operatives were entitled to a 10-minute paid rest break when working 4 hours or more, including an employee working a 4-hour shift; two 10-minute paid rest breaks when working 6 hours or more, including an employee working a 6-hour shift; three 10-minute paid breaks when working 10 hours or more, which was replaced with two 15-minute paid breaks from October 2015.

395. During the relevant period, sales consultants were not entitled to paid rest breaks.

396. The respondents relied upon *market forces* [factor 1], *recruiting and retaining sufficient warehouse labour* [factor 2] and *business viability, resilience and performance of the Next Group and Subsidiaries* [factor 6] to explain the difference. Mr Mason said that before in the early 2000s paid rest breaks which sales consultants had received were removed following the introduction of the national minimum wage and the requirement to attend early or start late was removed as a trade-off. Unpaid rest breaks were, according to him, an industry standard. Mrs MacIntyre said that breaks were negotiated with USDAW and reflected the repetitive and monotonous nature of the tasks of warehouse operatives. That does not explain why the breaks were paid or not.

<u>Direct discrimination</u>

397. We accept the evidence of Mr Mason and Mr MacIntyre as to the reasons these differentials arose, that they fall within the three factors relied and they were not because of gender. The defence under section 69(1)(a) is established.

<u>Indirect discrimination</u>

398. Proportionate disadvantage to women as a group and the lead claimants was established for the same reasons as for basic pay.

399. The legitimate aims are viability, resilience and successful business performance [aim 1] and incentivising warehouse productivity [aim 3].

400. To the extent that this reflected the market standard, payments of rest breaks would be an appropriate means of achieving aim 1. It is not apparent how the factors met aim 3. The break from a monotonous activity would be likely to incentivise performance because the worker would be refreshed, but we do not draw the inference that its payment materially influenced how productive the operatives were.

401. It is clear that the payments to the retail staff were removed because of the practice of diverting of funds to meet the increase in the national minimum wage. The aim was solely about cost. It was not legitimate.

402. Even if it were, we would not have found it proportionate. It was not reasonably necessary to restrict payment only to warehouse operatives to meet the aim. The defence under section 69(1)(b) is not established.

**Long Service Awards - term 17**

403. Throughout the relevant period, warehouse operatives were entitled to the following long service awards, paid by vouchers or gifts:

(a) 5 years’ service: £25
(b) 10 years’ service: £50
(c) 15 years' service: £200
(d) 20 years' service: £250
(e) 25 years' service: £350
(f) 30 years' service: £400
(g) 35 years' service: £450, increased to £500 from 1 February 2014
(h) 40 years' service: £500, increased to £600 from 1 February 2014.

404. From the beginning of the relevant period, sales consultants were entitled to the following long service awards, paid by vouchers:

(a) 15 years: £200
(b) 25 years: £350
(c) 35 years: £500
(d) 40 years: £600

62. From January 2020 additional awards were also introduced, paid by vouchers:

(a) 5 years: £15
(b) 10 years: £50
(c) 20 years: £150
(d) 30 years: £300

405. The respondents relied upon *market forces* [factor 1], *recruiting and retaining sufficient warehouse labour* [factor 2] and *business viability, resilience and performance of the Next Group and Subsidiaries* [factor 6] to explain the difference. The second respondents had negotiated some different awards as part of an overall deal.

Direct Discrimination

406. We accept the evidence of Mrs MacIntyre that the differences arose from negotiation with USDAW with respect to agreeing an overall package of remuneration. No such collective negotiations occurred with retail staff, but this was not because of gender. We accept the factors relied upon. The defence under section 69(1)(a) is established.

Indirect discrimination

407. Proportionate disadvantage to women as a group and the lead claimants was established for the same reasons as for basic pay.

408. The legitimate aim is viability, resilience and successful business performance [aim 1]. We accept that payments of the respective awards were an appropriate means of meeting the business need, which in this context was to ensure that a negotiated agreement with the union would be acceptable to its members. No such requirement arose with the setting of pay for retail staff.

409. Was that a proportionate means of achieving the aim? The sums were small and largely equalised in 2020 but there was no good reason the respondents could not have aligned these payments earlier or completely. The defence under section 69(1)(b) is not established.

**Unanimous decision**

410. Each member of the Tribunal was in agreement in respect of all the findings and conclusions.

Employment Judge D N Jones

Date: 22 August 2024