

Neutral Citation Number: [2026] EAT 33

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 26 February 2026

**Before:**

**HIS HONOUR JUDGE JAMES TAYLER**

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**Between:**

**TESCO STORES LIMITED** **Case No: EA-2025-001217-AT**  
**Appellant**

-and-

**Ms K ELEMENT & others**  
**(all Claimants represented by Leigh Day and Harcus Parker Employment)** **Respondents**

**Case No: EA-2025-001218-AT**

**Ms K ELEMENT & others (all Claimants represented by Leigh Day)** **Appellants**

-and-

**(1) TESCO STORES LIMITED**  
**(2) All Claimants represented by Harcus Parker Employment** **Respondents**

**Case No: EA-2025-001232-AT**

**Ms K ELEMENT & others (all Claimants represented by Harcus Parker Employment)** **Appellants**

-and-

**(1) TESCO STORES LIMITED**  
**(2) All Claimants represented by Leigh Day** **Respondents**

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**David Reade KC, Mathew Purchase KC and Louise Chudleigh**  
(instructed by Freshfields LLP) for Tesco  
**Sean Jones KC, Andrew Blake and Rachel Barrett**  
(instructed by Leigh Day Solicitors) for the Leigh Day claimants  
**Keith Bryant KC and Stephen Butler**  
(instructed by Harcus Parker Employment) for the Harcus claimants

Hearing date: 3 and 4 February 2026

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**JUDGMENT**

## Summary

### **Equal Pay, Practice and Procedure**

The Employment Tribunal made a small number of errors in its analysis of reconsideration applications. Those matters are remitted with directions for the completion of the mandatory reconsideration process. The stages of determining a reconsideration application considered.

## **HIS HONOUR JUDGE JAMES TAYLER**

### **The Parties**

1. I will refer to the parties as Tesco, the Leigh Day claimants and the Harcus claimants or, when it is not necessary to differentiate between the two groups, the claimants.

### **The decision challenged**

2. The appeals and cross-appeals challenge a decision of Employment Judge Hyams after a second set of reconsideration applications in respect of the Stage 2 Equal Value decisions made in these long-running equal pay claims. The Second Stage 2 EV Reconsideration Decision was sent to the parties on 28 July 2025.

### **The proceedings**

3. To avoid repetition, and for the sake of succinctness, I shall not set out the relevant background in detail. In her Stage 2 EV EAT Judgment, after an appeal heard on 18 and 19 June 2025, Mrs Justice Stacey set out the relevant background at paragraphs 9 to 67. In the Order setting out the outcome of the Stage 2 EV EAT hearing, Stacey J stayed any further consideration of Stage 2 in the Employment Tribunal. Stacey J provided a brief overview in her disposal judgment:

4. By way of brief recap and update on recent procedural developments specific to the equal value question for the tranche 1 sample claimants and comparators in this case, there are now five relevant decisions on stage 2 equal value that have been produced by the Employment Tribunal:

(a) the first ET judgment of 12 July 2023;

(b) the case management order of 26 July 2023;

(c) the second decision of 5 July 2024

(which were the subject of the appeal before me which took place on 18 and 19 June 2025 resulting in the Stage 2 EV EAT Judgment);

(d) the first reconsideration decision of 30 May 2025 after the Tribunal had invited the parties to apply for reconsideration of its decisions second decision (“the First Stage 2 EV Reconsideration Decision”); and

(e) The second ET reconsideration decision of 28 July 2025 after the Tribunal invited further applications from the parties (“the Second Stage 2 EV Reconsideration Decision”)

5. I shall refer to the five documents together as the “ET Stage 2 Equal Value Decisions”.

6. There has since been a third application to the Employment Tribunal by the respondent to reconsider its Second Stage 2 EV Reconsideration Decision. That application has not been considered by the tribunal as I ordered the tribunal and the IEs to pause further work on EV in my order of 31 July 2025.

7. There has been no appeal from the First Stage 2 EV Reconsideration Decision, but on 8 September 2025 all three parties lodged appeals against the Second Stage 2 EV Reconsideration Decision. I granted permission to appeal to all parties on all grounds earlier today at a preliminary hearing listed to consider whether there were arguable grounds sufficient to allow any or all parts of any or all of the three proposed appeals to a full hearing (“the Second Stage 2 EV Reconsideration Decision Appeals”).

8. Permission has been given by the Court of Appeal to appeal the judgment of His Honour Judge Tayler concerning the scope of the grounds of appeal that resulted in the Stage 2 EV EAT Judgment [the Stage 2 EV CA Scope appeal] and permission has also been given by the Court of Appeal to appeal the Stage 2 EV EAT Judgment itself [the Stage 2 EV CA appeal] and both appeals have been expedited and listed to be heard in the Court of Appeal in early March 2026.

9. The parties very much hope that it will be possible for the Second Stage 2 EV Reconsideration Decision Appeal to be expedited so that a judgment can be given and there still be time, if necessary, for any further appeal (if there is to be one) to catch up in time for the Court of Appeal hearing in March 2026.

4. I shall adopt the terminology of Stacey J. This is the judgment in the “Second Stage 2 EV Reconsideration Decision Appeals”, which term I shall use to include the cross-appeals.

5. The stay of further consideration of Stage 2 remains in place in the Employment Tribunal, pending the determination of the Stage 2 EV CA Scope and the Stage 2 EV CA appeals.

6. The Second Stage 2 EV Reconsideration Decision was produced just before the Stage 2 EV EAT Judgment.

7. In the Stage 2 EV EAT Judgment Stacey J concluded, at paragraphs 208 to 216, with important comments on the state of this litigation and the need for a return to procedural rigour.

8. Stacey J dismissed the overarching grounds of appeal but allowed grounds challenging specific findings of fact. After a disposal hearing on 14 -15 October 2025, Stacey J provided a disposal judgment and an order to deal with the factual matters that are to be remitted to the Employment Tribunal and, more generally, to require that the final findings of fact be in a tabular form that will be useable for the Independent Experts. In broad terms Stacey J directed a return to the use of Equal

Value Job Descriptions (“EVJDs”) and Records of Dispute (“RoDs”), the approach originally adopted by the parties, before it was rejected by the Employment Tribunal.

9. If the Employment Tribunal applies the procedural rigour required by Stacey J, and the parties comply with their obligation to assist the Employment Tribunal in applying the overriding objective, there is a way forward.

10. Merely saying that this is an appeal against a second set of reconsideration applications, is dispiriting. However, the situation is not quite as bad as that description suggests. In the Second Stage 2 EV Reconsideration Decision, Employment Judge Hyams made 31 determinations. With some recent narrowing of the issues, only 4 of those decisions remained in dispute in this appeal. The matters that I have permitted to proceed for reconsideration should be capable of being dealt with as part of the process of finalisation of the Stage 2 fact finding envisaged by Stacey J.

### **Equal value Stage 2**

11. These equal value proceedings were governed by the **Employment Tribunals (Equal Value) Rules of Procedure 2013 (“EV Rules”)** that require the Employment Tribunal to determine “the question” which is defined by Rule 1 **EV Rules** as being “whether the claimant's work is of equal value to that of the comparator”. The purpose of a stage 2 equal value hearing is set by Rule 6 **EV Rules**:

6.—(1) At a stage 2 equal value hearing the Tribunal shall—

(a) **make a determination of facts *on which the parties cannot agree* which relate to the question and shall require the independent expert to prepare the report *on the basis of facts which have (at any stage of the proceedings) either been agreed between the parties or determined by the Tribunal* (referred to as “**the facts relating to the question**”); and**

(b) fix a date for the final hearing.

(2) Subject to paragraph (3), the facts relating to the question shall, in relation to the question, be the only facts on which the Tribunal shall rely at the final hearing.

(3) At any stage of the proceedings the independent expert may make an application to the Tribunal for some or all of the facts relating to the question to be amended, supplemented or omitted. [emphasis added]

12. The purpose of the Stage 2 process is finally to determine “the facts relating to the question”

which are to be the “only facts on which the Tribunal shall rely at the final hearing”.

13. In the Stage 2 EV EAT judgment Stacey J stated at paragraph 81 [the footnotes are from the joint note on the law she quotes]:

Section 64(1) EqA 2010 provides that the equal pay provisions apply when: “a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does” and the definition of work of equal value in s.65(6) EqA 2010 is set out in paragraph 1 above. **At this stage of the case we are not concerned with the value of the work of either a claimant or comparator, but the role of the tribunal is just to decide the facts of the work. The evaluation of the work comes later.** “Work” is not defined in that section and the parties now agree that the claimants’ joint note provided to the tribunal in October 2023 is accurate:

“CLAIMANTS’ JOINT NOTE ON THE LAW

1. Principles which emerge from the legislation, rules and case law on the task of the Employment Tribunal at a stage 2 equal value hearing are:

a. At stage 2, the Tribunal will determine disputes (of fact and relevance) to establish the “facts relating to the question” of whether the claimants’ “work” is of equal value to that of the comparators.<sup>1</sup>

b. The facts that need to be determined in order to go on, at stage 3, to answer “the question”, are those that relate to what “work” the individual claimants and comparators did.<sup>2</sup>

c. The starting point is “what is done in practice” by the claimants and comparators (the jobholders) – i.e. the jobholders’ “observed activities not their notional paper obligations”.<sup>3</sup>

d. The Tribunal must “look at what the employee actually did, not simply at the documents (such as [...] work manuals)”.<sup>4</sup>

All three of the following different categories of things constitute (part of) the “work” of a jobholder:<sup>5</sup>

i. things that the jobholder is instructed, requested or encouraged to do (even if those things are only done very infrequently or did not actually occur during the Evaluation Period);

ii. things that the jobholder does as a matter of practice which are simply a

<sup>1</sup> Section 65(1)(c) and 65(6) Equality Act 2010 and Rules 1(2) and 6(1)(a) Employment Tribunals (Equal Value) Rules of Procedure.

<sup>2</sup> Section 65(1)(c) and 65(6) Equality Act 2010 and Rules 6(2), 6(3) and 7(1)(b) Employment Tribunals (Equal Value) Rules of Procedure.

<sup>3</sup> *Shields v E Coomes (Holdings) Ltd* [1978] ICR 1159 per Lord Bridge at 1180 C-D.

<sup>4</sup> *Beal v Avery Homes (Nelson) Ltd* [2019] EWHC 1415 (QB) per Lavender J at ¶30.

<sup>5</sup> *Beal v Avery Homes (Nelson) Ltd* per Lavender J at ¶32.

way of doing something which is part of their work (regardless of whether their managers know what they are doing); and

iii. things which are done with the knowledge and explicit or implicit acquiescence of their managers.

e. Whether or not something is a “requirement or expectation” of a particular role is a relevant consideration but is not a necessary condition in order for that thing to form part of the jobholder’s “work”.<sup>6</sup>

f. Documents such as “work manuals” are “relevant, but not necessarily determinative” of what constitutes the “work” of a jobholder.<sup>7</sup>

g. Training requirements and working conditions are also potentially relevant matters regarding which the Tribunal may make factual findings.<sup>8</sup>

h. In relation to the matters at (a) to (g) above, the Tribunal is entitled to determine the level of detail which is relevant to “the question” and to establish only such facts as it considers to be relevant to “the question”.<sup>9</sup>

2. These principles are not intended to be exhaustive.”

I agree with the parties that the claimants’ note is an accurate summary. **Mr Jones boiled down the definition of “work” still further into the single proposition of it being “what the employer requires in practice”.** It is thus **not a binary question of only what happens in practice, or what the employer requires, but a combination of the two.** Mr Bryant accepted Mr Jones’ proposition, which I agree was an uncontroversial and accurate distillation of the case law. [emphasis added]

14. It is vital that the “facts of the work” be finally determined in a clear and comprehensible format as soon as possible so that Stage 2 can come to an end, at last.

15. As I have said previously, the question of whether the work of someone working in a shop is of equal value to that of someone working in a warehouse is not conceptually highly complicated and should have been capable of resolution within a reasonable period.

### **Reconsideration in the Employment Tribunal**

16. A mandatory scheme for considering applications for reconsideration of Employment Tribunal judgments is set out in Part 12 of the **Employment Tribunal Rules 2024** (“ETR”):

#### **Principles**

<sup>6</sup> *Beal v Avery Homes (Nelson) Ltd* per Lavender J at ¶¶31-32.

<sup>7</sup> *Beal v Avery Homes (Nelson) Ltd* per Lavender J at ¶30.

<sup>8</sup> *Brunnhöfer v Bank der Österreichischen Postsparkasse AG* [2001] 3 CMLR 9 at ¶48.

<sup>9</sup> Rules 4(1)(d)(ii) and 6(1)(a) Employment Tribunals (Equal Value) Rules of Procedure.

68.—(1) **The Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so.**

(2) A judgment under reconsideration may be confirmed, varied or revoked.

(3) If the judgment under reconsideration is revoked the Tribunal may take the decision again. In doing so, the Tribunal is not required to come to the same conclusion.

### **Application for reconsideration**

69. Except where it is made in the course of a hearing, an application for reconsideration **must** be made in writing setting out why reconsideration is necessary and **must** be sent to the Tribunal within 14 days of the later of—

(a) the date on which the written record of the judgment sought to be reconsidered was sent to the parties, or

(b) the date that the written reasons were sent, if these were sent separately.

### **Process for reconsideration**

70.—(1) **The Tribunal must consider any application made under rule 69** (application for reconsideration).

(2) **If the Tribunal considers that there is no reasonable prospect of the judgment being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application must be refused and the Tribunal must inform the parties of the refusal.**

(3) **If the application has not been refused under paragraph (2), the Tribunal must send a notice to the parties specifying the period by which any written representations in respect of the application must be received by the Tribunal, and seeking the views of the parties on whether the application can be determined without a hearing. The notice may also set out the Tribunal's provisional views on the application.**

(4) **If the application has not been refused under paragraph (2), the judgment must be reconsidered at a hearing unless the Tribunal considers, having regard to any written representations provided under paragraph (3), that a hearing is not necessary in the interests of justice.**

(5) If the Tribunal determines the application without a hearing the parties must be given a reasonable opportunity to make further written representations in respect of the application.

### **Reconsideration by the Tribunal on its own initiative**

71. Where the Tribunal proposes to reconsider a judgment on its own initiative, it must inform the parties of the reasons why the decision is being reconsidered and the judgment must be reconsidered (as if an application had been made and not refused) in accordance with rule 70(3) to (5) (process for reconsideration). [emphasis added]

17. The **Practice Direction of the Senior President of Tribunals on the Panel composition in the Employment Tribunals and Employment Appeal Tribunal (“PDPC”)** dated 29 October 2024 provides:

6. In respect of any other matter **an Employment Tribunal is to consist of a judge. This includes consideration of whether a party’s application for reconsideration discloses a reasonable prospect of a judgment being varied or revoked.** [emphasis added]

18. Paragraph 14 of the **Presidential Guidance on Panel Composition (“PC Guidance”)** provides:

14. **Some cases require more than one final hearing**, in order to deal (for example) with subsequent decisions in respect of remedy, **reconsideration** and costs/expenses. **A judge should have regard to the guidance at paragraphs 7 to 12 above when deciding, for each such hearing, the composition which furthers the interests of justice and accords with the overriding objective.** [emphasis added]

19. The procedure for reconsideration is highly prescriptive. That is demonstrated by the repeated use of the word “must” (that replaced the word “shall” in the **Employment Tribunal Rules 2013** which were of similar prescriptive effect).

20. It is important to bear in mind that the reconsideration process only applies to judgments of the Employment Tribunal, a term that is defined in Rule 2(1) **ETR**.

21. I considered the mandatory stages in the predecessor provisions in **T W White and Sons Ltd v Ms K White** UKEAT-0022-21-VP.

22. There have been some changes in the wording in the **ETR** from that in the **ETR 2013** and in relation to the composition of the Employment Tribunal that can conduct each step. Taking those changes into account, the parties agreed that the mandatory stages now are:

1. Has an application for reconsideration been made? [**Rule 69**]
2. If so, the application for reconsideration must be considered by the Employment Judge [**Rule 70(1) and PDPC para 6**]
3. Was the application for reconsideration submitted in time? [**Rule 69**]
4. If not, should time be extended?
5. If not in time, and time is not extended, refuse as out of time (**time dismissal**)
6. If in time, or time extended, is there no reasonable prospect of the judgment being

varied or revoked?

7. If so, dismiss the application for reconsideration because there is no reasonable prospect of the judgment being varied or revoked and inform the parties of the refusal. **(prospects dismissal) [Rule 70(2)]**

8. If not, permit the application for reconsideration to proceed **(permission to proceed decision)**

9. If a permission to proceed decision is taken a notice must be sent to the parties specifying the period by which any written representations in respect of the application **(written representations)** must be received by the ET, and seeking the views of the parties on whether the application can be determined without a hearing **(permission to proceed notice)** - the permission to proceed notice may also set out the EJ's provisional views **(provisional views)** on the application **[Rule 70(3)]**

10. On receipt of responses, or expiry of time for response, to the permission to proceed notice the EJ must decide whether the reconsideration should be determined on the basis of written representations or at a hearing - the judgment must be reconsidered at a hearing unless the EJ considers, having regard to any written representations, that a hearing is not necessary in the interests of justice **(method of determination decision) [Rule 70(4)]**

11. If the judgment subject of the reconsideration application was made by a panel the EJ must decide whether the reconsideration should be determined by an EJ or panel **(panel composition decision) [PDPC and PC Guidance para 14]**

12. If the reconsideration application is to be determined on the basis of written representations the parties must be given a reasonable opportunity to make further written representations **(further opportunity for written representations) [Rule 70(5)]**

13. Determine the application for reconsideration **(reconsideration decision)**

23. This analysis may seem a little overengineered, but it is necessary to follow a structured approach to the mandatory stages of determining a reconsideration application. It is also necessary to understand the stage that was being considered by Employment Judge Hyams.

24. There are a number of important points relevant to this appeal. The initial decision is made by the Employment Judge. The initial decision is taken before the rules provide for the other parties to be given an opportunity to make written representations; although in very limited circumstances there can be some minor input from the other parties before the initial decision is taken: **Shaw v Intellectual Property Office** UKEAT-0186-20-VP at paragraph 82.

25. The Employment Judge when making the initial decision has a binary determination to make. Should the application for reconsideration be refused because there is no reasonable prospect of the

judgment being varied or revoked (the prospects dismissal) or should it proceed (the permission to proceed decision)? This was described by His Honour Judge Auerbach in **Shaw** as a “sift or a permission stage”.

26. Only if a permission to proceed decision is taken should a permission to proceed notice be sent to the other parties which requests their written representations. The permission to proceed notice may include the provisional views of the Employment Judge. The other parties then have the opportunity to provide written representations and state whether they consider a hearing is required to determine the reconsideration application. Thereafter the Employment Judge must make the method of determination and panel composition decisions.

27. Where an Employment Judge makes a permission to proceed decision, all that is determined is that it cannot be said that there is no reasonable prospect of the judgment being varied or revoked. The permission to proceed decision is taken before the other parties have had a chance to submit written representations. Strictly speaking, it does not even amount to a decision that there is a reasonable prospect of the judgment being varied or revoked, because it is only the expression of an initial view, having heard only from the party making the application for reconsideration.

28. Accordingly, appeals against a permission to proceed decision are not to be encouraged and will rarely be successful because the appellant has yet to put forward their response in the Employment Tribunal and still will have a full opportunity to argue that the reconsideration application should be dismissed; and could still assert that the reconsideration application had no reasonable prospect of success, if that became relevant for matters such as costs. The first stage exists so that if an application for reconsideration is obviously hopeless the other parties are not put to the trouble and cost of responding.

29. Experience in the Employment Tribunal and EAT suggests that there has been a steady increase in applications for reconsideration, often being no more than an attempt to re-argue the case. Multiple applications are not uncommon. The requirement to apply this structured approach should not alarm Employment Judges who have to consider applications for reconsideration because, if they

are no more than an attempt to re-argue a claim that has already been determined properly, it is likely that it can be said that there is no reasonable prospect of the judgment being varied or revoked. Where repeat applications are made the rule specifically provides that one of the reasons why it may be said that there is no reasonable prospect of the judgment being varied or revoked is where, unless there are special reasons, substantially the same application has already been made and refused. The time limit in which an application for reconsideration should be made is relatively short.

30. If an Employment Judge makes a permission to proceed decision all that should be done at that stage is to issue a permission to proceed notice, which may include the provisional views of the Employment Judge. The provisional views are of no binding effect. Before any further determination can be made on the application for reconsideration, the Employment Judge must, having considered any response to the permission to proceed notice, make the method of determination and the panel composition decisions.

31. In a case in which the reconsideration application challenges substantive findings of fact made by a panel and a permission to proceed decision is taken, it often will be appropriate for the reconsideration application to be determined by the full panel. The Employment Judge is required to consider the matter and to take a panel composition decision.

32. I am informed that time was extended for the reconsideration applications. Employment Judge Hyams was making the initial decision. He could, at the stage he was considering the reconsideration applications, only decide to make a prospects refusal; or a permission to proceed decision, in which case he was required to direct that a permission to proceed notice be issued, which could include his provisional views. He could not yet take any of the other steps in the reconsideration process.

### **The decision**

33. Employment Judge Hyams provided a written decision (“the Second Stage 2 EV Reconsideration Decision”) to which written reasons were attached (“the Second Stage 2 EV Reconsideration Reasons”).

34. The Second Stage 2 EV Reconsideration Decision was in the following terms:

1. **The application of the respondent for reconsideration has, except as stated in paragraphs 23, 30-35 and 54-58 below, no reasonable prospect of success and is therefore refused. If the parties agree with my proposals** stated in paragraphs 23-25 and 57-58 below and no cogent objection is made to what I say in paragraph 35 below, **then there will be no need for any further action in those regards to be taken at this stage.**

2. **The application of the Leigh Day claimants for reconsideration has, except as stated in paragraphs 64-69 below, no reasonable prospect of success, and is therefore refused. If the parties agree with my proposal** stated in paragraph 70 below, **then there will be no need for any further action in regard to what I say in paragraphs 64-69 below to be taken at this stage.**

35. The Second Stage 2 EV Reconsideration Decision suggests that the initial decision has been taken in respect of both applications for reconsideration and that most grounds have been the subject of prospects dismissal and some have been given permission to proceed on terms set out in the reasons. However, as we shall see, the Second Stage 2 EV Reconsideration Reasons show that the position is not nearly as simple as that.

36. The parties were given an opportunity to comment on Employment Judge Hyams's proposals. However, the Stage 2 process is now stayed so the comments have not been considered.

37. I shall consider each of the challenged determinations in turn, dealing with the various challenges brought by the parties.

### **The decisions challenged**

#### ***Tesco reconsideration application***

##### ***Physical effort***

38. The Second Stage 2 EV Reconsideration Decision suggests that this matter was the subject of a prospects dismissal on the basis that there is no reasonable prospect of the judgment being varied or revoked. However, the Second Stage 2 EV Reconsideration Reasons suggest otherwise:

Claimed omission submission 1 set out on pages 2-7 of the respondent's application for reconsideration: "Physical effort"

7 The first part of the respondent's application for reconsideration is built on a partial reading of paragraph 52 on pages 213-214 of our reconsideration judgment. In that paragraph **we said that submissions on "the materiality of the overall weight of products moved during a shift by an assembler can be made at the final hearing"**. What we also said in paragraph 52 on pages 213-214 of our reconsideration judgment was what "[a]t this stage, we [thought] were ... the more important questions". Therefore,

we were simply expressing our preliminary view on what were the important questions, and that view was subject to such submissions as might be made at the final hearing. Having spent many months considering the parties' cases and the law relating to what occurs in the course of determining a claim that work is of equal value within the meaning of section 65(6) of the EqA 2010, we concluded that it was necessary to be flexible in our approach in regard to several highly-disputed factual issues, and this was one of them.

**8 Accordingly, the subject-matter of Schedule 1 to the respondent's application for reconsideration on pages 32-42 of the respondent's application for reconsideration ("Schedule 1") can be the subject of submissions at the final hearing** which will occur unless we have by then found that the respondent's defence under section 69 of the EqA 2010 has succeeded. (Where we refer below to "the final hearing", that reference must be read subject to the same caveat.) **The documentary evidence to which reference is made in Schedule 1 can therefore be the subject of submissions at the final hearing.** There is **no reasonable prospect of the tribunal varying its judgment by making further findings of fact at this stage** about the precise figures which the respondent, via Schedule 1 and paragraphs 8-25 on pages 2-7 of the respondent's application for reconsideration, is saying should now, at this stage, be the subject of such findings.[emphasis added]

39. Employment Judge Hyams only stated that there is no reasonable prospect of the judgment being varied or revoked at this stage and that the matter could be considered further on the basis of the material put forward by Tesco, and on hearing further submissions, at the final hearing. That demonstrates that Employment Judge Hyams considered that there is a prospect of the determination being varied or revoked, but he decided that the matter should be put off to the final hearing.

40. The parties all agree that the findings of fact must be finalised as part of the Stage 2 process and that it is wrong in principle to put the matter off to the final hearing. I agree.

41. The parties spent a great deal of time and effort in seeking to establish that the introduction of new material and further submissions should or should not be permitted. However, Employment Judge Hyams could only properly make the initial decision without consideration of the claimants' submissions and either issue a prospects dismissal on the basis that there is no reasonable prospect of the judgment being varied or revoked or take a permission to proceed decision which would result in a permission to proceed notice being issued, in which he could state his provisional views, after which the other parties could make their submissions.

42. Because Employment Judge Hyams clearly concluded that this matter merited further consideration he erred in law in issuing a prospects dismissal. He should have made a permission to

proceed decision and issued a permission to proceed notice. I accept that there was material before him that meant that was a permissible option. Once the stay is lifted Employment Judge Hyams should issue a permission to proceed notice and then go through the further mandatory stages of consideration of the reconsideration application. During that process the claimants will be able to make their full submissions.

43. I suggested at the hearing that it might be possible to direct that any elements of the reconsideration application that proceed should go through to a hearing. I raised that suggestion in part because I had assumed that the matters remitted by Stacey J would be determined at a hearing. I was later informed that was not necessarily the case. Although the parties agreed to my suggestion, on reflection, I consider that I should not seek to short-circuit the mandatory stages of consideration of the reconsideration application. There have already been an excessive number of appeals in this matter and I am keen that the EAT should not take decisions properly taken by the Employment Tribunal, otherwise the parties may come to see the EAT as an alternative venue for determination of matters that are for the Employment Tribunal.

44. Accordingly, I will merely substitute a permission to proceed decision in respect of this issue and remit the matter to the same Employment Tribunal so that, when the stay is lifted, Employment Judge Hyams can issue a permission to proceed notice and then go on, in the light of the responses from the parties, to make the panel composition decision and method of determination decision and go through the remaining stages of the process before determining the application for reconsideration as part of the Stage 2 process. It will be open to the claimants to assert that Tesco should not be permitted to introduce new evidence or make new submissions. The facts must be found as part of the Stage 2 process. Fact finding cannot be put off to the final hearing.

***Manual handling of cages in loading bays by ambient assemblers***

45. In the Second Stage 2 EV Reconsideration Decision this matter was the subject of a permission to proceed decision. However, in the Second Stage 2 EV Reconsideration Reasons Employment Judge Hyams stated:

Submission 1 under the heading “Comparators” set out on pages 17-18 of the respondent’s application for reconsideration: “Manual handling of cages in loading bays by ambient assemblers”

30 This submission responds (without saying it specifically) to what we said in paragraphs 105 and 106 on pages 37-38 of our reconsideration judgment. **This submission relies on a new witness statement made by Mr Paul Evans.** That statement is at Schedule 2 to the respondent’s application for reconsideration. **I read it with great care and several times, but could not see in that statement anything that would justify the conclusion that there was a need, for the purposes of section 65(6) of the EqA 2010, for an assembler to move cages by hand when dropping them off at the relevant loading bay.** That is because the cages would have to be dropped off by the LLOP’s forks being lowered, and if they needed to be in a different place from the one where they were initially placed, then either

30.1 the assembler had not done the work of dropping the cages off properly in the first place,

30.2 another assembler had not done his or her work properly in the first place, or

30.3 if (which, I have to say, I rather doubted could be the case if the assembler had done his or her work properly in the first place) the circumstances described in paragraph 10 of Mr Evans’ witness statement at pages 2-3 on pages 45-46 of the respondent’s application for reconsideration occurred, then it was the loader’s work, and not that of the assembler, to move the cages.

31 Similarly, if there was a spillage on the loading bay, as supposed in paragraph 11 of Mr Evans’ witness statement on page 46 of the respondent’s application for reconsideration, then it would be the work of either the assembler or the loader to clean it up before further cages were deposited, so it would be wrong to deposit them with the LLOP and then move them by hand and then clean up the spillage.

32 As for the proposition, stated in the same paragraph, that a “safety strap [might have] become detached and they have to manoeuvre the cage so that they can reattach it”, that was inconsistent with what we set out as a finding of fact in paragraph 43.3 on page 212 of our reconsideration judgment.

33 As for the possibility of an assembler attaching a cage label at the end of the process of assembly rather than the start, that should not require the manual movement of the cage, given

33.1 what was shown by the passage of the video at D9/525 from 7.13 seconds in up to 7.30 seconds in, and

33.2 these words on D9/170/3:

“After completing your assignment you must ensure that you have placed the right label on the right cage. The label should be positioned on the top left hand corner of the cage, on the side where the moveable wheels are.”

34 It seemed to me therefore that this was an issue which could fairly be determined only after cross-examination but that

**34.1 in the absence of such cross-examination the application for reconsideration in relation to it had no reasonable prospect of success, and**

**34.2 it would not be proportionate for there to be a hearing to permit such cross-examination at this stage in the circumstance that the witness statement to which it would relate did not bear scrutiny.**

35 In those circumstances, I concluded that if the respondent wishes to pursue this aspect of its case then it should do so at the start of the final hearing (i.e. and not before then; directions in that regard can be made by me if the parties cannot agree a sensible way of catering for such pursuance) and that at that point **Mr Evans can be recalled to give further oral evidence on this issue only.** [emphasis added]

46. The reasoning is rather hard to follow. Employment Judge Hyams, having made the permission to proceed decision, appears to have thought that the witness statement of Mr Evans did not bear scrutiny but the situation might be improved as a result of (presumably inept) cross-examination and that the respondent, should it wish to, could call Mr Evans at the final hearing.

47. The parties agree that any further fact finding must be made before Stage 2 is completed and cannot be put off to the final hearing.

48. The claimants contend that there should have been a prospects dismissal on the basis that it should have been concluded that no further evidence could be provided because to allow new evidence to be introduced would go against the principle of finality.

49. Employment Judge Hyams was only taking the initial decision. He made a permission to proceed decision on the basis that the matter merited further consideration, putting that off to the final hearing. The Employment Tribunal had itself suggested the possibility of further evidence on this matter. On balance, I do not consider it was perverse of Employment Judge Hyams to make a permission to proceed decision, but he should have done no more than issue a permission to proceed notice, possibly with his provisional views about the evidence of Mr Evans. That does not preclude the claimants submitting that the application should be determined on the basis of the witness statement submitted (rather than what might come out in cross-examination) and that proper application of the principle of finality precludes the introduction of further evidence or submissions as part of the Stage 2 process. This matter is remitted for Employment Judge Hyams to issue a

permission to proceed notice and to go through the further mandatory reconsideration stages once the stay has been lifted.

***Leigh Day reconsideration application***

***Mrs Worthington***

50. This was the subject of a prospects dismissal in the Second Stage 2 EV Reconsideration Decision. The challenge to this decision is not opposed by Tesco. I substitute a permission to proceed decision and this matter will be remitted to the Employment Tribunal to issue a permission to proceed notice and to go through the further mandatory reconsideration stages once the stay has been lifted.

***Mr Jones: Training videos – evaluative language***

51. This was the subject of a prospects dismissal in the Second Stage 2 EV Reconsideration Decision. In the Second Stage 2 EV Reconsideration Reasons Employment Judge Hyams stated:

“Training videos – evaluative language”

74 In paragraph 12 on page 5 of the claimants’ application for reconsideration, the claimants “invited [us] to reconsider the following descriptive wording incorporated from Wayne Jones’ EVJD [via paragraphs 37 and 38 on pages 210-211 of our reconsideration judgment]: “hazardous environment”, “disagreeable nature of the environment” and “industrial nature of the activities”.

75 On pages 4-5 of the claimants’ application for reconsideration, the claimants asked us to “reconsider the incorporation of the following training videos, or alternatively to include clarificatory wording to the effect that the videos should be relied on to show the way tasks are done but not to the extent of incorporating the entirety of the narration into the job descriptions”:

75.1 D9/512;

75.2 D9/537; and

75.3 D9/543.

76 Those aspects of the claimants’ application for reconsideration were based on what the IEs had said about the use of evaluative language, namely as set out at the end of paragraph 10 on page 4 of the claimants’ application for reconsideration, which was this.

‘The IEs agreed the following passage in the Points of Principle document {H/28/3}:

“Evaluative, subjective, or ambiguous language (e.g. “carefully” is to be reviewed and removed from the EVJDs. The IE indicated that they would prefer to have no evaluative

descriptions in the EVJDs and that what they need to know is what people do.”

77 We ourselves were fully cognisant of what the IEs had said in that regard. We had concluded that there was no good reason to regard ourselves as bound to accept what the IEs had said in that regard, and we had ourselves in a number of places in our reconsideration judgment included references to the need to take care. We considered very carefully the language which was in the parts of the EVJD which we endorsed, with some modifications, in paragraphs 37 and 38 on pages 210-211 of our reconsideration judgment. For example, we agreed that the “warehouse was a hazardous environment”, if only because of the use by operatives of heavy, powered, wheeled vehicles, in many cases with protruding forks.

78 As for the videos, we incorporated D9/512 precisely because it was highly informative, and the language used in it was as far as we were concerned relevant (albeit that the reference to “60 billion things that are going on that can distract you” was intended to grab the attention and was plainly not intended to be taken literally). The fact that the video was created otherwise than for the purposes of these proceedings meant in our view that there was no risk that it might have over-stated the demands of working in a DC for the purposes of these proceedings. The same was true of D9/537. In fact, the claimants objected only to the use in D9/537 of the words “60 billion slip and trip hazards”, but those words were plainly used by the presenter in a wryly humorous way with a view to gaining the attention of the viewer, and the emphasis was the next thing said by the presenter, which was: “But it only becomes a risk if you don’t see it”.

79 The only thing to which the claimants objected (via paragraph 11(c) on page 5 of the claimants’ application for reconsideration) as having been said in D9/543 which we agreed was potentially problematic was the words “this job is hard, you have to be fast, accurate...”, but those words had to be understood in their context, i.e. as part of the complete sequence of things said by the person who spoke them, which was this.

“This job is hard, you have to be fast, accurate, picking into cages takes a bit of getting used to, but once you get the hang of it, you can fly”.

80 The other things referred to in paragraph 11(c) on page 5 of the claimants’ application for reconsideration were in our view at least to some extent helpful statements, although they were rather less important than the factual picture shown by the “real” evidence in the video, ignoring the commentary in the video.

81 In any event, we incorporated C7/262 in our reconsideration judgment, having referred to it expressly first in paragraph 83.8 on page 54 of our second reserved judgment. We incorporated paragraph 83.8 via paragraph 25 on page 91 of our reconsideration judgment and then for the avoidance of doubt incorporated C7/262 via paragraph 154.5 on page 122 of our reconsideration judgment. In doing so we were fully aware that it said at the top of page 2, i.e. at C7/262/2:

“We all know that filling can be a hard job; we have large volumes of stock both during the day and night. However having the right tools available and knowing how to use them can make replenishment much easier.”

82 So, we saw that the respondent’s training materials referred to some of the work of both the sample claimants and the comparators as “hard”. We did not regard that word as being inapt in either context, and we thought that excising it from the evidence before us

would be unrealistic and was unnecessary.

83 For all of those reasons, there was no reasonable prospect of this aspect of the claimants' application for reconsideration leading to a varying of our reconsideration judgment.

52. This challenge arose from the surprising decision of the Employment Tribunal to use training videos as part of their findings of fact. That problem may be ameliorated when the tables that Stacey J required are produced. However, there is a legitimate concern about the use of evaluative language, when at Stage 2 the Employment Tribunal is concerned with the "facts of the work" rather than the "value of the work". The Employment Tribunal noted the videos included statements that were "intended to grab the attention and was plainly not intended to be taken literally" and referred to "60 billion slip and trip hazards" which words "were plainly used by the presenter in a wryly humorous way with a view to gaining the attention of the viewer". It is arguable that such material should be omitted. I have concluded that it was perverse to issue a prospects dismissal. The matter was sufficiently arguable that the only proper outcome was to make a permission to proceed decision. I substitute a permission to proceed decision and this matter will be remitted to the Employment Tribunal to issue a permission to proceed notice and go through the further mandatory reconsideration stages once the stay has been lifted.

***Mr Hornak***

53. This was the subject of a prospects dismissal in the Second Stage 2 EV Reconsideration Decision. In the Second Stage 2 EV Reconsideration Reasons Employment Judge Hyams stated:

Application in relation to our findings concerning the work of Mr Hornak

84 The final aspect of the claimants' application for reconsideration related to our approach to the "consequences of doing the work wrong[ly]". That was stated in paragraphs 13-18 on pages 5-7 of the claimants' application for reconsideration.

85 The claimants objected to us stating (in paragraph 327 on page 86 of our reconsideration judgment and paragraph 73 on pages 234-235 of that judgment) in very careful terms what we concluded were real risks from making a mistake in loading or in the use of MHE, but at the same time declining to state for example that if Ms Garrod erred then there was a risk of "injury to herself, colleagues or members of the public (including potentially fatal consequences: food poisoning, allergic reactions, falling/crushing injuries, solvent abuse etc)" on the basis that none of those things were, as we said in paragraph 6 on page 177 of our reconsideration judgment, "out of the ordinary".

**We said the latter because in our view it would be obvious to the IEs (as it would be to the reasonably well-informed observer, as it was to us) that those risks arose from the work of a customer assistant doing the work which Ms Garrod did. That was in part because shopping is an everyday activity. In contrast, visiting a DC is not.** It could, however, be said that the risks arising from the use of MHE or errors in loading were also obvious, so **I accepted when considering this aspect of the claimants' application for reconsideration that the tribunal's approach to the spelling out of risks could for that reason be said to have been less than even-handed.** However, we had in our reconsideration judgment stated the work of a customer assistant such as Ms Garrod by reference in part to training materials which showed what the work was, and from which it was possible to see what risks arose from doing that work. Good examples of that were our reference to the documents relating to allergens and to baking. **The risks arising from the use of an oven really are obvious, and do not need to be spelt out for present purposes,** but they were in fact spelt out by us via paragraph 45 on page 181 of our reconsideration judgment. The risks arising from giving wrong information in relation to allergens were in our view also obvious: someone might even die. But we did in fact, in paragraph 50 on page 182 of our reconsideration judgment, refer expressly to the risk of "incorrectly labelled items", and that paragraph had to be read with what we said in paragraphs 129 and 130 on pages 117-118 of that judgment, where we expressly referred to (and therefore incorporated in our findings of fact) C7/430, and the risks arising from an allergen were stated expressly on page 3 of that document.

86 In those circumstances, I concluded that there was no reasonable prospect of the claimants' application to "remove the two paragraphs RJ §327 (p.86) and RJ appendix 8 §73 (p.234)", stating the impact of an error in the process of loading or the use of MHE, leading to a decision by the tribunal to vary its judgment by such removal.

54. Employment Judge Hyams himself recognised that the approach he adopted to fact finding might "be said to have been less than even-handed" where facts were found about the risks resulting from errors being made by the comparator but not the claimant. This was on the basis that the "risks of making a mistake by a customer assistant were obvious" in part "because shopping is an everyday activity" whereas "visiting a DC is not." I consider that reasoning fails to address the fact that, as Mr Jones for the Leigh Day claimants puts it "the Independent Experts can only base their reports on the facts relating to the question, not on their knowledge of shopping." As Stacey J stated in the Stage 2 EV EAT Judgment "an obvious relevant fact still needs to be stated". The point is arguable and it was perverse to issue a prospects dismissal. I substitute a permission to proceed decision and this matter will be remitted to the Employment Tribunal to issue a permission to proceed notice and go through the further mandatory reconsideration stages once the stay has been lifted.