



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Brierley & others

Respondent: Asda Stores Limited

Final Equal Value Hearing

At Manchester Civil Justice Centre, observed remotely using the Cloud Video Platform

On:	Parties
9 and 10 September 2024	Attending
11 to 13 September 2024	Not attending
16 to 20, 23 to 27 and 30 September 2024, and 1 to 4, and 7 to 11 October 2024	Attending
14 October 2024	Not attending
15 to 18, 21 to 23 October 2024, 4 and 5, 7 and 8, 11 to 14 November 2024	Attending
20 November 2024	Not attending
21 and 22 November 2024	Attending
25 to 29 November 2024 and 2 to 6 December 2024	Not attending
9, 10, 20 and 22 January 2025	Not attending

Before: Employment Judge Horne

Sitting with members: Ms J K Williamson and Mr I Taylor

Representatives

For the claimant: Mr A Short, King's Counsel
Mr P Livingston, counsel
Ms V Brown, counsel

For the respondent: Mr B Cooper, King's Counsel
Ms N Motraghi, King's Counsel

Independent experts in attendance

Ms Spence
Mr Walls
Mr Holt

RESERVED JUDGMENT

1. In this judgment, where the name of a lead claimant role, or the name of a comparator, is followed by a letter, that letter indicates the corresponding iteration of that role identified by the Asda experts. (For example, "Haigh (a)" means Iteration (a) of Mr Haigh's role.)
2. The work of Miss Gibbins (Section Leader) was of equal value to the work of all the comparators.
3. The work of Ms Hutcheson (Warehouse):
 - 3.1. Was not of equal value to the work of Haigh (a) or (b), Morris (a) or (b), Beaumont (b) or Ballard (b); but
 - 3.2. Was of equal value to the work of:
 - Ballard (a)
 - Haigh (c) and (d)
 - Makin (a) and (b)
 - Sayeed (a) and (b)
 - Beaumont (a) and (c)
 - Dennis (a), (b), (c) and (d)
 - Mr McDonough
 - Uchanski (a) and (b)
 - Dolan (a) and (b)
 - Mr Matthews
 - Mr Prescott
 - Han (a) and (b)
 - Mr Hore
 - Mr Devenney
 - Mr Welch
 - Mr Opelt

4. The work of Mrs Fearn (Customer Service Desk) and Ms Billings (Service Host (b)):

4.1. Was not of equal value to the work of Haigh (a), (b) or (c), Morris (a) or (b), Ballard (a) or (b), Beaumont (b) or (c), Dennis (d), Dolan (b), or Sayeed (b); but

4.2. Was of equal value to the work of:

Makin (a) and (b),

Dennis (a), (b) and (c)

Beaumont (a)

Sayeed (a)

Uchanski (a) and (b)

Mr McDonough

Dolan (a)

Haigh (d)

Mr Matthews

Mr Prescott

Han (a) and (b)

Mr Hore

Mr Devenney

Mr Welch and

Mr Opelt.

5. The work of Ms Billings (Service Host (a)):

5.1. Was not of equal value to the work of any of the comparators listed in paragraph 4.1,

5.2. Was not of equal value to the work of Mr Matthews, Mr Prescott, Haigh (d) Dolan (a), or Uchanski (b), but

5.3. Was otherwise of equal value to the work of the comparators listed in paragraph 4.2.

6. The work of Mrs Webster (Counters):

6.1. Was not of equal value to the work of Haigh (a), (b) or (c), Morris (a) or (b), Ballard (a) or (b), Beaumont (a), (b) or (c), Dennis (d), Dolan (b), Makin (a), Mr McDonough, or Sayeed (a) or (b), but

6.2. Was of equal value to the work of:

Uchanski (a) and (b)

Makin (b)

Dennis (a), (b) and (c)

Dolan (a)

Haigh (d)

Mr Matthews

Mr Prescott

Han (a) and (b)

Mr Hore

Mr Devenney

Mr Welch and

Mr Opelt.

7. The work of Mrs O'Donovan (George):

7.1. Was not of equal value to the work of Haigh (a), (b), (c) or (d), Morris (a) or (b), Ballard (a) or (b), Beaumont (a), (b) or (c), Dennis (c) or (d), Dolan (a) or (b), Makin (a) or (b), Mr McDonough, Sayeed (a) or (b), Uchanski (a) or (b), Mr Hore, Han (a) or (b), Mr Matthews, Mr Prescott, or Mr Welch, but

7.2. Was of equal value to the work of:

Mr Devenney

Dennis (a) and (b) and

Mr Opelt.

8. The work of Ms Darville (Home & Leisure (b)):

8.1. Was not of equal value to the work of Haigh (a), (b), (c) or (d), Morris (a) or (b), Ballard (a) or (b), Beaumont (a), (b) or (c), Dennis (c) or (d), Dolan (a) or (b), Makin (a) or (b), Mr McDonough, Sayeed (a) or (b), Uchanski (a) or (b), Mr Hore, Han (a) or (b), Mr Matthews, Mr Prescott, or Mr Welch, but

8.2. Was of equal value to the work of:

Mr Devenney

Dennis (a) and (b) and

Mr Opelt.

9. The work of Ms Darville (Home & Leisure (a)):

9.1. Was not of equal value to the work of any of the comparators listed in paragraph 8.1,

9.2. Was not of equal value to the work of Dennis (b) or Mr Devenney, but

9.3. Was of equal value to the work of Dennis (a) and Mr Opelt.

10. The work of Mrs Trickett (Process):

10.1. Was not of equal value to the work of Haigh (a), (b), (c) or (d), Morris (a) or (b), Ballard (a) or (b), Beaumont (a), (b) or (c), Dennis (c) or (d), Dolan (a) or (b), Makin (a) or (b), Mr McDonough, Sayeed (a) or (b), Uchanski (a) or (b), Mr Hore, Han (a) or (b), Mr Matthews, Mr Prescott, or Mr Welch, but

10.2. Was of equal value to the work of:

Dennis (a) and (b)

Mr Devenney and

Mr Opelt.

11. The work of Mrs Gardner (Bakery) and Mrs Wilby (Produce):

11.1. Was not of equal value to the work of Haigh (a), (b), (c) or (d), Morris (a) or (b), Ballard (a) or (b), Beaumont (a), (b) or (c), Dennis (c) or (d), Dolan (a) or (b), Makin (a) or (b), Mr McDonough, Sayeed (a) or (b), Uchanski (a) or (b), Mr Hore, Han (a) or (b), Mr Matthews, Mr Prescott, Mr Welch, or Mr Devenney, but

11.2. Was of equal value to the work of:

Dennis (a) and (b) and

Mr Opelt.

12. The work of Ms Ohlsson (Chilled):

12.1. Was not of equal value to the work of Haigh (a), (b), (c) or (d), Morris (a) or (b), Ballard (a) or (b), Beaumont (a), (b) or (c), Dennis (b), (c) or (d), Dolan (a) or (b), Makin (a) or (b), Mr McDonough, Sayeed (a) or (b), Uchanski (a) or (b), Mr Hore, Han (a) or (b), Mr Matthews, Mr Prescott, Mr Welch, or Mr Devenney, but

12.2. Was of equal value to the work of:

Dennis (a) and

Mr Opelt.

13. The work of Ms Ashton (Checkout):

13.1. Was not of equal value to the work of any of the comparators except Mr Opelt, but

13.2. Was of equal value to the work of Mr Opelt.

14. The work of Ms Hills (Personal Shopper) and Ms Forrester (Edible Grocery) was not of equal value to the work of any of the comparators. Their claims are dismissed.

15. The claims of all the lead claimants (except for Ms Hills and Ms Forrester) will proceed to a final hearing.

REASONS

Introduction

1. One day between 2008 and 2014, Adrienne Hutcheson arrived at the Hamilton Asda store and put on her high-visibility jacket. She climbed onto a forklift truck in the warehouse. When the next delivery arrived, she started unloading pallets and roll cages of stock.
2. Three hundred and sixty miles away, possibly on the same day, Peter Ballard arrived at the Didcot Ambient Distribution Centre and put on his high-visibility jacket. He climbed onto a type of forklift truck known as a Counter-Balance Truck. When the next delivery arrived, he started unloading pallets and roll cages of stock.
3. Asda say that, overall, Mr Ballard's work was of greater value than Ms Hutcheson's work. The claimants seek to prove that the value of the work was equal.
4. Ms Hutcheson and Mr Ballard had other tasks to do, of course. Ms Hutcheson's other tasks were different from Mr Ballard's other tasks. They worked in different environments. We must compare their demands overall. And this is just one of a huge number of comparisons we have to make. Only once we have made those comparisons can a tribunal decide whether Ms Hutcheson was entitled to be paid

the same as Mr Ballard, and whether the thousands of store workers are entitled to be paid the same as the depot workers.

Acknowledgements

5. Before continuing, we pay tribute to those who have helped us reach our decision. Our hearing involved a lot of moving parts: court and tribunal staff, counsel, solicitors, expert witnesses, transcribers and document-hosts. Almost overwhelmingly they worked smoothly together, removing the need for micro-management of the hearing, and helping us to focus on the business of determining the issues before us. The quality of the written and oral advocacy was outstanding. We have previously acknowledged this work, but it is worth re-stating. Litigation on this scale would simply not be possible without the care and cooperation that the parties have brought to this case.

These reasons

6. These reasons are very long. In a typical case, they would be far too long. When deciding how much detail to provide, we had in mind that these reasons serve purposes that go beyond explaining to the parties why they have won and lost. The reasoning should enable the parties to apply our findings in the lead cases across the whole claimant and comparator population. We are also aware that other large retailers and their workers are watching us. Our hope is that they, too, might be guided by these reasons, avoiding the need for their equal value hearings to be quite so long as ours.
7. To make chapters easier to find, we have added a Contents Page, which appears at the foot of these reasons.

The purpose of the hearing

8. This judgment follows a Final Equal Value hearing. We have to decide whether the work of a sample of women who worked in Asda stores was of equal value to a sample of men who worked in Asda distribution centres.

The Relevant Period

9. We are concerned with the period of six years prior to the presentation of the claims by the lead claimants. The parties agree that the period ("the Relevant Period") ran from August 2008 to June 2014.

Lead claimants and comparators

10. By a case management order sent to the parties on 2 June 2017, the parties were ordered to seek to reach agreement on the identity of lead claimants and comparators. These were not "lead cases" for the purpose of Rule 36 of the Employment Tribunal Rules of Procedure 2013. Rather, the purpose of identifying them was stated to be:

"to provide an equal value assessment in relation to the claims of other claimants performing the same claimant job role" (paragraph (4)(b)); and

"to enable both parties to identify a sufficient range of comparators for the assessment of equal value in order to test the issues in this case".

11. Between them, the parties ultimately identified 14 lead claimants and 17 comparators.

Benchmarking

12. The claimants' opening submissions invited the tribunal to find that certain roles were of equal value to comparator roles by a process of "benchmarking". This process would not involve directly comparing the demands of the roles by reference to each factor. Instead, it would enable the tribunal to say that a proposed role was of equal value if (a) the tribunal determined that another role ("the benchmark role") of equal value to a comparator role and (b) one or more groups of experts had scored the proposed role more highly overall than the benchmark role.
13. This suggestion was opposed by Asda on various grounds. We do not need to set them out. In his oral closing submissions, Mr Short made clear that he was not pressing the suggestion of benchmarking to a contested decision.

Iterations and attributes

14. Some roles had additional features which affected how demanding it was to do the job. For example, from 2008 to 2010, Mr Ballard was a Colleague Circle Representative on top of his picking and unloading activities. The Colleague Circle part of his role has been called an "attribute". In 2010, he stopped being a Colleague Circle Representative. His role has been assessed with and without the attribute, the better to value the impact of the attribute on the demands of the role. Each version of the role has been called an "iteration".
15. Separate iterations also spring from changes to a jobholder's role over time. A good example is Mr Craig Dennis, who worked in the same depot as Mr Ballard. In September 2009, Mr Dennis began a new activity known as Goods Out. All the experts agree that his job became more demanding as a result. So separate iterations were assessed, one before September 2009 and another afterwards.
16. It was up to each set of experts to decide what iterations to assess. The IEs selected 18 claimant iterations and 41 comparator iterations. Helpfully, they numbered each iteration. This selection was left untouched by the Leigh Day experts. The Asda experts chose a set of 16 claimant and 32 comparator iterations, to which they assigned letters of the alphabet. These overlapped with the IEs' iterations, but did not perfectly correspond to them.
17. By the time the parties had concluded their final submissions, the claimants made a pragmatic decision to adopt the iterations chosen by Asda. Their position was that insistence on the IEs' iterations would not assist the tribunal to resolve the issues in dispute.
18. One iteration (Devenney (2)) had been chosen by the IEs, apparently order to assess the demands of a depot role during the probationary period. There was initially a dispute about whether this iteration should be assessed. Mr Short accepted during his oral closing submissions that there was no need to assess that iteration.

Imperfections in this judgment

19. It is highly likely that the parties will spot imperfections in our judgment. This is partly due to the number of roles and iterations to be compared (we calculate the number of direct comparisons in paragraph 177 below). It is also because it was the parties' preference for us to determine the individual assessments at the same time as determining the issues of principle about how an assessment scheme should be designed. It is also because we have not had as long to prepare our judgment as the experts have had to prepare their reports.
20. If the parties notice an individual determination that appears to them to be out of step with our determinations in similar roles, we would encourage them to seek agreement on ignoring obvious outliers, and translating the consistent findings across the claimant and comparator population. If they identify some equal value assessments which they consider to be erroneous in law, we would encourage the parties to continue to translate those which they consider to be correct, pending the hearing of any appeal.
21. The parties may, of course, apply to have any part of the judgment reconsidered. It is unlikely to be practicable for the reconsideration application to be considered by the same employment judge.

Chapter One - Relevant law

The Equality Act 2010

22. Section 65 of EqA provides, relevantly, as follows:

- (1) For the purposes of this Chapter, A's work is equal to that of B if it is:
- (a) like B's work,
 - (b) rated as equivalent to B's work, or
 - (c) of equal value to B's work.
- (2) A's work is like B's work if-
- (a) A's work and B's work are the same or broadly similar, and
 - (b) such differences as there are between their work are not of practical importance in relation to the terms of their work.
- ...
- (6) A's work is of equal value to B's work if it is-
- (a) neither like B's work nor rated as equivalent to B's work, but
 - (b) nevertheless equal to B's work in terms of the demands made on A by reference to factors such as effort, skill and decision-making.

23. Section 65 of EqA came into force on 1 October 2010. We are determining the equal value question in respect of work done over a 6-year period, which includes work done before 1 October 2010. It is the parties' agreed position that the law prior to 1 October 2010 was in all relevant respects identical to the law after that date.

24. “Effort”, “skill” and “decision-making” are stated to be examples of “factors” by reference to which the overall demands of the work can be assessed.
25. A’s work cannot be of equal value to B’s work if A’s work is like B’s work. Mr Cooper submits that it must follow, therefore, that determination of equal value will involve comparing work that is not broadly similar, or which has practically important differences. Effective comparison can only therefore be achieved by reference to factors that are at least capable of applying to dissimilar work. We agree with that submission.
26. Mr Short offered a refinement, with which we also agree. Provided the factor is capable of general application, it should be used, even where one role stands out from the others as having the demand that the factor is being used to measure. For example, “responsibility for health and safety” is an appropriate factor, even where one of the roles is a Health and Safety Officer and the other roles involve little more than taking ordinary care for their own safety in an office.
27. “Equal” does not mean “nearly equal”. It is not enough for a claimant to prove that her work is “substantially equal” in value to that of the comparator. There is no “margin of tolerance” within which equality is automatically established. Specifically, where an assessment scheme has resulted in a woman’s work being awarded only a few points below a man’s work, that fact does not *of itself* mean that the work was of equal value: *Hovell v. Ashford & St Peter’s Hospitals NHS Trust* [2009] ICR 1545, CA, per Elias LJ at paragraph 35.
28. Work is not equal if there is “an overall and measurable and significant difference between the demands of the respective jobs”: *Southampton & District Health Authority v. Worsfold* EAT/598/98. The parties agree that a difference is “significant” if it is more than trivial.
29. Determining the equal value question involves making a relative judgement. The demands of A’s work must be compared to those of B’s work.
30. When making the overall comparison between A’s work and B’s work, all the tribunal has to decide is whether the demands are equal or not. But to get to that point, the demands of the two jobs must be compared by reference to factors.
31. It is common ground that each factor should relate to significant and distinct types of demand that can be defined and assessed. We take up Mrs Hastings’ phrase, as EJ Malone did in *Forward v. East Sussex Hospitals NHS Trust* 1100186/06 at paragraph 24, “all the significant demands of the two jobs being compared must be measured once, but not more than once”.
32. It is not always a valid criticism that two factors appear to measure the same feature of the work, if that feature engages different demands. There may be “two sides of the same coin” as EJ Malone put it in *Forward* at paragraph 206.
33. Gaps in demand under each factor must be not just identified, but also measured. For example, it is not sufficient to determine which role requires the greater physical effort. The tribunal will also need to determine how much more physical effort is needed. Big differences in demand under one factor (such as communication skills) may balance out small differences in multiple other factors (such as knowledge and physical skill).
34. The “demands made on A”, and the demands made on B, must be assessed objectively. The perceptions of A and B are irrelevant. So are their physical

characteristics: *Rummier v. Dato-Druck GmbH* [1987] ICR 774, ECJ. For equal value purposes, a job that requires lifting 15kg objects places the same physical demand on a male jobholder as on a female jobholder, despite the fact that men are generally physically stronger than women. By the same logic, the mental characteristics of the jobholder must be ignored, too. What matters is the objective demand.

35. It is just as important to identify equivalences as to identify differences. Where there are no significant and measurable differences between the work of A and B by reference to a factor, the tribunal must say so.

Burden of proof

36. The burden is on the claimants to show that their work was of equal value to the comparators' work. Section 136 of EqA provides for what lawyers often call "the shifting burden", but that does not help the claimants to establish equal value. This is because equal work, in one of the forms prescribed under section 65, is itself one of the facts that must be established before a tribunal could conclude that there has been a breach of an equality clause: *Element & others v. Tesco Stores Ltd* [2023] ICR 208, para 102.

The Equal Value Rules of Procedure

37. The Equal Value Rules of Procedure ("2013 EV Rules") are set out in Schedule 3 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. These were the rules in force at the time of the hearing. Between the hearing and the date of judgment, the rules have changed. Like provisions can now be found in Schedule 2 of the Employment Tribunal Procedure Rules 2024.
38. Relevantly, the 2013 EV Rules stated:

"1. ... (2) ... in this Schedule ... "the facts relating to the question" has the meaning in rule 6(1)(a) ... [and] "the question" means whether the claimant's work is of equal value to that of the comparator

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"); ...

(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...

10.—... (2) An expert shall have a duty to assist the Tribunal on matters within the expert's expertise. This duty overrides any obligation to the person from whom the expert has received instructions or by whom the expert is paid."

Code of Practice

39. Section 15 of the Equality Act 2006 states that, where a code of practice has been issued under section 14 of that Act, the code shall be admissible in civil proceedings and shall be taken into account by a tribunal in any case where it appears to the tribunal to be relevant.

40. The Equality and Human Rights Commission has issued a relevant code of practice under section 14, with the title, *Equal Pay Statutory Code of Practice*.

41. The Code has this to say, relevantly, about equal value:

“A woman can claim equal pay with a man if she can show that her work is of equal value with his in terms of the demands made on her.

1. This means that the jobs done by a woman and her comparator are different but can be regarded as being of equal worth, having regard to the nature of the work performed, the training or skills necessary to do the job, the conditions of work and the decision-making that is part of the role.
2. In some cases the jobs being compared may appear fairly equivalent (such as a female head of personnel and a male head of finance). More commonly, entirely different types of job (such as manual and administrative) can turn out to be of equal value when analysed in terms of the demands made on the employee...”

Expert evidence

42. Expert evidence is admissible by way of an exception to the general rule that evidence of a person’s opinion is inadmissible in civil proceedings.

43. A useful working definition of expert evidence can be found in *Barings plc v. Coopers & Lybrand* [2001] EWHC 17 (Ch):

“In my judgment... expert evidence is admissible under section 3 of the Civil Evidence Act 1972 in any case where

[a] the Court accepts that there exists a recognised expertise governed by recognised standards and rules of conduct capable of influencing the Court’s decision on any of the issues which it has to decide and

[b] the witness to be called satisfies the Court that [they have] a sufficient familiarity with and knowledge of the expertise in question to render [their] opinion potentially of value in resolving any of those issues.”

44. The Supreme Court has laid down its own test of admissibility of expert evidence in *Kennedy v. Cordia (Services) LLP* [2016] UKSC 6. That test replicates the *Barings* test, but introduces a further element:

“Is the witness impartial in his or her presentation and assessment of the evidence?”

45. The value of an expert’s opinion is the reasoning behind the expert’s conclusion, and not the conclusion itself: see *Kennedy*, cited above.

46. An IE’s report has no special status: *Dibro v. Hore* [1990] ICR 370. Due weight should be given to the IE’s expertise. But it is open to the tribunal to prefer the opinion of a party-instructed expert. There is no presumption that the tribunal should adopt an IE’s conclusion. It would be wrong for the tribunal to place a legal burden on a party to persuade a tribunal to depart from the IEs’ conclusion: *Tennants Textile Colours Ltd v. Todd* [1983] IRLR 3, NICA. Nor is it sufficient for

the tribunal to engage in a light-touch review of an IEs' conclusion, akin to the "range of reasonable responses" test. On this point, it is hard to improve on the words of EJ Malone in *Forward* (para 95):

"There may, in a particular case, be practical reasons why the Tribunal may find the Independent Expert's report, methodology and evidence to be of the greatest assistance, but that is entirely a matter for the Tribunal on the facts of the particular case. There may well be cases in which the Tribunal is entirely satisfied that the Independent Expert's report has been produced in good faith and with absolutely no question of direct or indirect sex discrimination and that the report is undoubtedly one which a reasonable expert could have produced, but nevertheless the report and evidence and methodology of another expert provide the Tribunal with more suitable equipment to tease out from the facts the answer to the difficult question of equal value."

Overriding objective

47. Rule 2 of the Employment Tribunal Rules of Procedure 2013 provided:

"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable-

- (a) ensuring that the parties are on an equal footing;
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and
- (e) saving expense.

A tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules...

The overriding objective is now to be found in rule 3 of the Employment Tribunal Procedure Rules 2024.

48. The overriding objective does not change the law which the tribunal must apply to the facts in order to determine the issues. It may be a reason for limiting expert evidence, but it is not a reason for preferring one expert over another (see, again, *Forward* at paragraph 95).

49. The tribunal does, however, have to try to avoid delay and to keep the length of reasons proportionate. This means that not every fact or argument has been rehearsed. Some of our conclusions for particular roles are unsupported by a direct rationale for that particular role. They must be deduced from our decisions of general principle.

Chapter Two - Evidence

Documents

50. We considered written material in 8 bundles of documents. They are set out below, together with the number of pages in each.

A	Proceedings, orders and judgments	407 pages
B	Job descriptions	4,453 pages
C	Independent expert briefing notes, correspondence and related documents	411 pages
D	Expert reports and related documents	2,820 pages
E	Relevant correspondence between the parties	189 pages
F	Skeleton arguments and submissions (previous hearings)	549 pages
G	Hearing transcripts (previous hearings)	1,021 pages
H	Additional materials	772 pages

51. The bundles were hosted electronically by an external provider. Relevant pages were displayed and highlighted for us in real time on monitors as and when they were mentioned during the hearing.

52. In addition, the parties relied on the following submissions:

Claimants' opening submissions	101 pages
Asda's opening submissions	183 pages
Claimants' closing submissions plus appendices	136 pages
Asda's closing submissions plus appendices	145 pages

53. The grand total was 11,187 pages, not counting authorities. It goes without saying that we did not take in the detail of every one of them. We concentrated on the pages on which the parties focused during the oral evidence and which they had specifically asked us to read at intervals during the hearing.

Expert evidence

54. It was agreed that the IEs' report should be admitted into evidence under rule 8(1) of the Equal Value Rules of Procedure 2013 (now rule 8(1) of the 2024 Rules).
55. Permission was granted for the parties to rely on evidence from experts ("party-instructed experts") whom they had unilaterally instructed. For short, we identify the party-instructed experts by name, or collectively as "the Leigh Day experts" and "the Asda experts". We admitted their report into evidence.
56. Each of the IEs gave oral evidence. The Leigh Day experts to give oral evidence were Mrs Hastings and Ms Branney. Ms Waller was the only Asda expert to give oral evidence.
57. Each of the testifying experts orally confirmed the facts and opinions contained in the report to which they had contributed, then answered questions.
58. We heard from no other witnesses: the facts related to the question had been agreed or found at Stage 2.

Chapter Three - Overview of the schemes

Development of the IE assessment scheme

59. It is worth stating at the very start that the IEs worked as a team of two experts, and more recently, three experts, without any of the administrative, technical or legal resources available to the parties. In fact, they did not have any technical support at all. Our judgment highlights a number of difficulties with the IEs' reports, but that should not diminish our appreciation of the Herculean task they faced.
60. On 23 February 2017, Ms Spence e-mailed the parties' representatives to inform them that she and Mr Kennedy had recently been appointed as IEs. Her e-mail enclosed "Guidance notes on preparing job information for Independent Experts in equal value cases". Page 5 of the Guidance Notes was a table of "Job elements for consideration". The table contained 14 "job elements" with accompanying notes. The job elements were grouped into "Knowledge", "Responsibilities" and "Demands", each with their own heading. The groupings were intended by Ms Spence to form part of a checklist to assist with information gathering. In Ms Spence's mind, the headings (Knowledge, Responsibilities and Demands) had no analytical value. They were not intended to categorise demands in a way that would influence factor selection.
61. Ms Spence and Mr Kennedy subsequently circulated Briefing Note 1. In Briefing Note 1, they provided an example of a (deliberately irrelevant) factor, providing 7 level definitions. The document concluded with a "Table of commonly used work elements in Factor analysis Schemes". Each "work element" was accompanied by a "summary definition".
62. In September 2017, Mr Kennedy and Ms Spence circulated Briefing Note Two – Provisional Factor Plan. The plan proposed 13 factors.
63. The provisional factor plan was based on the experience of Ms Spence and Mr Kennedy in the field of job evaluation, in Ms Spence's case, going back to the 1970s. They read job evaluation schemes prepared by outsourced providers

such as Hay. They also drew upon previous equal pay cases, which were mostly in the public sector.

64. Draft job descriptions for 6 lead claimant roles were sent to the IEs on 29 March 2018.
65. Following representations from Leigh Day, a Revised Factor Plan was attached to Mr Kennedy's e-mail of 18 April 2018.
66. The IEs provided a progress report on 17 May 2018. Amongst other things, they reported:
67. "The Independent Experts have also undertaken an exercise to test the draft assessment scheme. This involved each expert separately carrying out [trial] evaluations of the work of some claimants and some comparators. We then met in London ACAS HQ to review our findings and to note any problems arising and amendments that might be required."
68. On 16 July 2018, the IEs provided a "schematic for describing the frequency of an activity or event". The purpose was to achieve consistency in job descriptions and assessments. According to the schematic:
 - 68.1. "rarely" meant annually or less
 - 68.2. "occasionally" was measured over a period of several weeks or months
 - 68.3. "regularly" meant in a week or month
 - 68.4. "frequently" meant during a shift or daily and
 - 68.5. "continuously" meant that an activity or event was ongoing during a shift.
69. Consistently throughout their various briefings and plans, the IEs were careful to emphasise that their plans were only provisional, and would be developed to be suitable for the actual roles they were trying to compare.
70. The IEs started to devise level definitions at some point between the Stage 2 Batch 1 judgment and the receipt of the Stage 2 Batch 3 job descriptions in early 2022.
71. The IEs tailored the level definitions to suit the jobs that they were comparing. As Ms Spence put it in an answer to Mr Cooper,

"We were testing the scheme and making sure that it was appropriate for the types of jobs we were dealing with here. [We] looked at schemes used for other places, particularly public sector, so that if the wording started talking about procedures and council reports and things like that, that would be totally inappropriate for these jobs."
72. On receipt of the Batch 3 job descriptions, the IEs realised that some of the Batch 3 roles involved substantially different work from the roles in Batches 1 and 2. As a result, some of the language they had previously used was not apt to describe the demands of some the roles in the latest batch. They therefore made alterations to the wording of their provisional factor plan in order to reflect the new content.
73. Having refined their factor plan, the IEs began the exercise of scoring the job descriptions against the various factors. They scored the roles separately and independently of each other. Periodically they compared each other's results. If

one IE gave a job a factor score that was different from the other IEs' scores for the same job and the same factor, the IEs adjusted the level definition to produce consistency.

74. Before finalising the scores, the IEs checked them for consistency. Under each factor, they checked the level they had given to a lead claimant role, and compared it with the level that they had given other lead claimants for that factor. They undertook the same exercise amongst the comparator roles.
75. The IEs did not compare any of the lead claimant roles directly with any of the lead comparator roles at any time before the assessments were finalised. They did not, for example, compare Mr Ballard's role with Ms Hutcheson's role, to see if the similarities and differences in scores reflected equivalent similarities and differences in the demands of their roles. In the view of the IEs, that comparison was the purpose of the scheme. As the IEs saw it, there was a danger that a direct comparison between roles would influence their thought processes as they continued with their assessments.
76. Nor did the IEs compare their assessments under one factor against their assessments under a different factor. Ms Spence was quite candid about that in her answer to one of Mr Cooper's questions:

"I don't see how you can compare how we've assessed Training [and Mentoring] with how we've assessed Mental Demands. It's not something I would have thought of doing.

When we wrote the factors... we considered every factor and we considered how it fitted into the jobs and we made sure that one wasn't counted in a different way to the others, which is why we have the same number of levels throughout the scheme.

But we didn't compare...one factor with another factor".

77. The IEs' first report was provided to the parties on 31 January 2023. They subsequently prepared a corrected version in response to points raised by the parties. It is to this corrected version that both parties referred throughout the hearing, and we do too.
78. A preliminary hearing for case management took place on 23 April 2023. Following that hearing, a case management order was sent to the parties on 26 April 2023. Part of the order required the IEs to provide substantial further information about their assessment scores. One piece of further information required was about the IEs' use of "conventions", and if so, to say what those conventions were. The IEs were ordered to provide a detailed rationale for a selection of roles. Contrary to the submissions of Asda, our employment judge limited the selection to 6 claimant roles and 9 comparator roles. These were:

Claimants

- (1) Linda Darville (Home and Leisure)
- (2) Judith Forrester (Edible Grocery)
- (3) Ellen Hills (Personal Shopper)
- (4) Pauline Ohlsson (Chilled)
- (5) Julie Wilby (Produce)

(6) Susan Ashton (Checkout Operator)

Comparators

(7) Craig Dennis

(8) Paul Devenney

(9) Martin Dolan

(10) Danilo Han

(11) Shaun Hore

(12) Peter Makin

(13) Paul Matthews

(14) David Prescott

(15) Marcin Uchanski.

79. The detailed rationales were set out in a Supplementary Report dated 31 October 2023.
80. As also ordered in the 29 April 2023 case management order, the Supplementary Report provided “conventions” for 5 of the 11 factors. Conventions are rules of thumb that explain how certain terms have been applied consistently across jobs. For example, under the modifier for Knowledge, the IEs explained that a “limited” range of equipment meant the range of equipment that a jobholder would use during their probationary period.
81. The case management order also provided for the parties to put questions to the IEs, which they did. The IEs’ answers to those questions were dated 12 January 2024.
82. Once the party-instructed experts had completed their joint report, the IEs added their own comments, which they subsequently confirmed on oath represented their professional opinion.

The IEs’ scheme and conclusions

83. The IEs scheme was ultimately based on 11 factors. These were:

Factor 1 - Knowledge

Factor 2 - Planning & Organising

Factor 3 - Responsibility for assets

Factor 4 - Responsibility for health and safety

Factor 5 - Communication and customer service

Factor 6 - Training and mentoring

Factor 7 - Mental demands

Factor 8 - Problem solving and decision-making

Factor 9 - Physical skills

Factor 10 - Physical demands

Factor 11 - Working conditions

84. The demands of the work under each factor were divided into five levels. They were labelled A to E, with A being the most demanding and E being the least demanding.
85. It was important to the IEs that there should be the same number of levels for each factor. In their opinion, a different number of levels for different factors would risk attributing disproportionate value to the factor with the greater number of levels.
86. Each level had a separate definition, tailored to the factor being considered. Each role was assessed at one level for each factor.
87. The broad scheme of the factor levels was:
- A High demand
 - B Moderately High
 - C Standard
 - D Moderately Low
 - E Low
88. Roles scored points for each factor according to their level. The mark scheme was:
- A 70 points
 - B 55 points
 - C 40 points
 - D 25 points
 - E 10 points
89. Within each level, a role could be adjusted upwards or downwards using a “modifier” or “moderator” (the terms have been used interchangeably). A “plus” (+) modifier would attract an additional 5 points. A “minus” (-) modifier would result in 5 points being deducted. For example, Level C+ was worth 45 points and Level B- was worth 50 points.
90. Here is the IEs’ scoring table showing the effect of the modifier:

LEVEL	DESCRIPTION	Modified “ – “	Standard	Modified “ + “
A	High	65	70	75
B	Moderately High	50	55	60
C	Moderate	35	40	45
D	Moderately Low	20	25	30
E	Low	5	10	15

91. The report assessed every iteration of every role. Each role iteration was placed into a level for each factor, with or without a modifier. The scores for each factor were then added to produce an aggregate score for each role iteration. The aggregate scores were then ranked.

92. Where a claimant's aggregate score was the same or greater than a comparator's score, the report expressed the opinion that the claimant's role was of equal value to the comparator's role.
93. Some claimants' aggregate scores were slightly lower than those of a comparator. The IEs' report set out three alternative tests for determining equal value in such a case. We will return to these tests.

Outcomes of the IEs' report

94. In crude summary:
 - 94.1. All the claimant roles were found to be of equal value to at least one of the comparator roles;
 - 94.2. Most of the claimant roles were found to be of equal value to a large number of the comparator roles.
 - 94.3. Section Leader scored highest of all the roles and was therefore found to be of equal value to all the comparator roles; and
 - 94.4. The lowest-scoring claimant role was Personal Shopper, which was found to be of equal value to three comparator role iterations.

Preparation of the Leigh Day experts' report

95. The Leigh Day experts are Ms Virginia Branney, Professor Susan Corby and Mrs Sue Hastings.
96. They met whilst the IEs were still preparing their first report. They studied the proposed factor plan and some of the job descriptions from the earlier batches. They formed a preliminary view that the factor plan undervalued some demands, such as responsibility for customer service and emotional demands. This view was based on a "picture" of the jobs, and some comparison between the relative demands of working in store and working in a depot.
97. Mrs Hastings was asked about this approach by Mr Cooper. She answered:

"Inevitably as you read the jobs and background information, thoughts start emerging about whether that sounds right or doesn't sound right."
98. The Leigh Day experts began assessing roles on receipt of the IEs' first report of 31 January 2023. They went on to take a series of steps towards production of a report:
 - 98.1. The first step was to make an assessment of the IEs' overall approach. The purpose of this exercise was to answer this question – "Is this a suitable methodology for comparing this range of Claimant and Comparator jobs in these equal value claims against ASDA?"
 - 98.2. The second step was to review the IEs' application of their methodology.

- 98.3. Third, they reviewed and took account of the additional information provided by the IEs in their Supplementary Report and answers to questions.
- 98.4. In the light of that information, they then reviewed the comparative outcomes of the IEs' assessments of the claimant and comparator jobs. Their consistency checking process is explained in a little more detail below.
- 98.5. Finally, they reached their overall conclusions on the IEs' methodology and their approach to equal value.
99. At each step, the Leigh Day experts summarised their views, based on their findings up to that point.
100. The second step (review of IEs' application) included a "test assessment" of a sample of the roles. The Leigh Day experts chose not to analyse every single role in detail. Instead, they chose a sample of 18 roles, to which they later added two more, making a total of 20.
101. Each Leigh Day expert assessed each sample role independently of the other Leigh Day experts. They did not look at the IEs' assessments when carrying out their scoring. After they each provisionally scored their roles, the experts met on Teams to compare their results.
102. The Leigh Day experts assessed their first pair of roles on 27 March 2023. In the first pair was Ms Hills, Personal Shopper, whose role was the lowest-scoring in any of the stores. She was paired with Mr Malcolm Opelt, a Warehouse Colleague at the Lutterworth Integrated Distribution Centre (IDC).
103. The Leigh Day experts continued assessing pairs of roles until 8 December 2023.
104. Successive roles were assessed with the benefit of their experience of assessing previous roles.
105. Once all the sample roles were scored, the Leigh Day experts checked them for consistency with the IEs' scores. By this time, the Leigh Day experts had received the IEs' supplementary report. Their consistency-checking exercise also included comparing outcomes between and within the sample jobs. They reviewed the rank order of scores for the factor in question, and looked for anomalies. In particular, they looked for:
- 105.1. Roles with similar activities where individual Leigh Day experts had assessed differently, and whether they were adequately explained by their rationales;
- 105.2. Roles where the Leigh Day experts had given split level assessments
- 105.3. Differences between the Leigh Day experts' assessment for a role and those of the IEs
- 105.4. Relative demands between the lead claimant and comparator roles. Their report summarised this aspect of the consistency check in this way:
- "...where LDXs have given Claimant and Comparator jobs the same level/modifier, does that seem right in the light of the job information used for assessing; where LDXs have given different

levels, does that reflect a fair difference in demand between the jobs?”

106. A further consistency check was carried out once the two additional comparator jobs had been assessed.
107. There was no documented thought process of comparing steps in demand between factors. Mr Short likened this kind of comparison to “comparing apples with spoons”. This, in Mrs Hastings’ opinion, is “really difficult”, and opens up the possibility of discrimination.
108. The Leigh Day experts did not, however, ignore this comparison altogether. In Mrs Hastings’ opinion, some equivalences could be discerned from other JES and EVA schemes. If the IEs’ choice of level definitions in two different factors was similar to the level definitions for the corresponding factors in other schemes, that tended to suggest that the in-built judgements about the value of steps in demand (relative to the steps in the other factor) were more likely to be right.
109. The Leigh Day experts also checked the scheme against many head-to-head comparisons. For example, they compared Mr Devenney against “most SFAs”, Bakery against Mr Darville, the Section Leader against Mr Haigh and Mr Opelt against Ms Forrester.
110. Once the Leigh Day experts had test-assessed and consistency-checked the 20 roles, they analysed the IEs scores and level definitions, setting out their results in a series of appendices.
111. The end result of the Leigh Day experts’ work was an amended version of the IEs’ scheme and a set of assessments under that scheme. The principal changes were:
 - 111.1. Changes to the wording of level definitions to make it easier to differentiate between levels;
 - 111.2. Changes to the wording of level definitions to refer to features that would affect the level of demand (for example, in the Responsibility for Assets factor, they included careful handling of stock at multiple levels); and
 - 111.3. The replacement of the IEs’ Factor 5 (Communication and Customer Service) with three new factors: 5A Responsibility for Customer Service, 5B Communication Skills and 5C Emotional Demands).

Outcome of the Leigh Day experts’ report

112. Here is a brief summary of the outcomes produced by the Leigh Day experts’ report:
 - 112.1. In the Leigh Day experts’ opinion, all the claimant roles were of equal value to at least one of the comparator roles;
 - 112.2. All-but-four of the claimant roles were found to be of equal value to all-but-two of the comparator roles.
 - 112.3. As with the IEs’ report, Section Leader scored highest of all the roles and was therefore found to be of equal value to all the comparator roles; and

- 112.4. As with the IEs' report, the lowest-scoring claimant role was Personal Shopper. This role was found to be of equal value to five comparator role iterations.

Preparation of the Asda experts' report

113. Meanwhile, the Asda experts were working on their report.
114. At some stage in the preparation of their report, the Asda experts analysed the IEs' scheme. In their minds, that scheme had substantial problems. Despite their misgivings about the IEs' scheme, they conducted their own assessments of all the roles using the IEs' level definitions. They did this for all the IEs' factors except one, which was Planning and Organisation.
115. This leads us to a finding about the Asda experts' main purpose in carrying out these IE-scheme assessments. The Asda experts were trying to expose the conceptual problems with the IEs' scheme design. They did not have any genuine conviction that they had captured the relative demands of the roles.
116. Likewise, the Asda experts' decision not to assess roles under the Planning and Organisation factor owed more to their desire to emphasise the problems with the factor than to an unsuccessful attempt to be faithful to the IEs' scheme. Their view about this factor was that the level definitions could not be applied meaningfully. But they also thought that about other factors, but that opinion did not stop them from persevering in showing their assessments for those factors. In her oral evidence, Ms Waller also exaggerated the number of levels which the Asda experts thought could have applied to Mr Opelt under the IEs' scheme.
117. Having concluded that the IEs' scheme was not fit for purpose, the Asda experts set about building their own scheme.
118. This is the Asda experts' account of how they went about their work:
- “4.1.1 The first stage of our process was detailed job analysis to identify the key demands of these jobs and what drives the level of demand for each of them.
- 4.1.2 We then identified the relevant factors using the principles we have set out in Chapter 2 and our experience of commonly used factors.
- 4.1.3 Having identified the factors, we produced a 'mark 1' scheme with draft level definitions based on our job analysis.
- 4.1.4 We then undertook an extensive and iterative process of testing and refinement to ensure that the scheme properly captured the features relevant to these jobs and is capable of fair, consistent and transparent application. As part of this process, we refined our factor and level definitions and developed conventions where they were helpful.”
119. The Asda experts did not show any of their earlier iterations from the iterative process described in their paragraph 4.1.4. Nor did they show any of their contemporaneous observations that caused them to refine their scheme.
120. The Asda experts' factor plan was markedly different from that of the IEs. The main differences were:
- 120.1. They removed the IEs' Communication and Customer Service factor and replaced it with Communication Skills

- 120.2. They inserted a new factor: Emotional Demands
- 120.3. They removed the IEs' factors for Planning & Organising and Training and Mentoring.
121. The Asda experts did not think it was essential to have five levels within each factor, although most factors did have five levels.
122. The broad framework for their levels was:

A	Very frequent and intense requirement for a very high level or complexity or difficulty of demand
B	Frequent and high levels of complexity or difficulty of demand
C	Moderate demands as a frequent and expected part of the role
D	Some demands, but at a low or basic level and/or infrequent
E	Demands very minor and/or rarely occurring

123. The scores for each level in the Asda scheme were:

- A 50 points
- B 40 points
- C 30 points
- D 20 points
- E 10 points

124. The level definitions for most factors were divided into two "Elements". In the opinion of the Asda experts, the Elements were the "key drivers of demand" for each factor. For example, in their Knowledge factor, the Asda experts thought the key drivers were range and complexity of knowledge and the training and experience required for the job. So their first Element was "Range and Complexity" and the second Element was "Training and Experience". Each element was assessed separately. Only the highest-scoring Element was taken into account. This, for example, is the Asda experts' scoring table for Mr Opelt under the Knowledge factor:

Overall score	C
Range & Complexity	D
Training & Experience	C

125. Generally speaking, the Asda experts preferred a “best fit” approach to assessment. When placing roles into levels, they asked themselves whether the role met the level definition more closely than the definition of the level above or the level below. It was a favourite phrase of Ms Waller’s that she was “looking at the jobs in the round”.
126. There were no modifiers. If the Asda experts thought that a particular role was close to the borderline between levels (for example, only just a Level C), they recorded the decision as marginal in their rationale.

Outcome of the Asda experts’ report

127. The outcomes produced by the Asda experts’ report were strikingly less favourable to the claimants than those produced by the IEs and the Leigh Day experts. With one exception, none of the claimant roles was found to be of equal value to any of the comparator roles. The exception was Section Leader, whose work was found to be of equal value to all but four of the comparator roles.

Chapter Four - Admissibility and weight of the experts’ evidence

128. After several weeks of oral evidence from opposing experts, it was inevitable that the parties would make submissions that some experts’ evidence were more reliable than others. It was equally inevitable that those submissions would draw our attention to weaknesses in particular schemes and opinions. We have had to analyse those submissions and express our own view, where to do so would help us determine the issues.
129. There is a danger of being misunderstood here. By concentrating on weaknesses in the expert evidence, it might appear that we do not appreciate the effort and thought that each of the experts has devoted to this case over the past months and (in the IEs’ case) years. They have had to marshal a huge array of factual information and turn it into something that can help us assess the relative demands of the jobs. As our employment judge remarked during the hearing, it also takes a considerable effort to sit and be cross-examined all day. It takes even more effort to remain calm and good-humoured, which our experts did. None of what we say should detract from our acknowledgment of that. But we do have to resolve many a clash of expert opinion, and explain how we did it. Before we descend to the detail, here are some general observations.

Admissibility

130. The parties agreed that the expert evidence was admissible. Nobody will be surprised by that.
131. We initially thought there might be some issue about which sorts of opinions we could admit into evidence. In particular, we queried the status of an expert’s opinion about the demand of one job relative to another job under a factor, based on a given set of facts. One example (out of many) was Ms Branney’s opinion that the working conditions of Ms Ashton on Checkout were no less demanding than

the working conditions of Ms Forrester in Edible Grocery. In his opening submissions, Mr Cooper told us that these judgements were “not complex”. (To put his submission into the context of the example, we would not need an expert to tell us what the store environment was like for Ms Ashton compared to Ms Forrester.) Mr Cooper developed his submission by saying that the value of the expert evidence was in designing a scheme to capture these judgements and in saving us the effort of forming those opinions for ourselves. In his written closing submissions, however, Mr Cooper positively relied on numerous statements of expert opinion that one role was more or less demanding than another. In response to a question from our employment judge, Mr Cooper confirmed orally that these were admissible opinions that were potentially of value, and on which we could place weight. Mr Short warned of the danger of accepting an expert’s opinion on the final issue to be determined by the tribunal, but did not go as far as to oppose the admissibility of an expert’s opinion of relative demands under a particular factor. Both counsel reminded us that the value of the expert evidence was not merely “an impressive CV” and a bald statement of opinion. It is the quality of the expert’s reasoning that counts.

132. From time to time an expert’s oral evidence was challenged on the ground that it was allegedly based on an assumption, or some new fact that was not in the job descriptions. For example:

132.1. Ms Branney gave us an assessment of the decision-making demands of the Personal Shopper role based, in part, on an assumption that Ms Hills was required to apply the same written product guidance that Mrs Wilby had been given to follow.

132.2. Ms Waller told us that it was relevant that Mr Dolan had to “manage expectations” by telling Flow Pick colleagues how long they would have to wait before they could expect him to attend to their empty pick slot.

133. Where we thought that an expert had taken an inadmissible fact into account, we did not exclude the whole of that expert’s evidence, but disregarded the opinion that was specifically based on that fact.

Credibility

134. The parties’ closing submissions each, in their own way, sought to distance themselves from any personal attacks on the credibility of any of the witnesses. They were right to take this approach. Credibility is not a particularly useful concept in this case. The six testifying experts were all doing their best to explain their opinions. What matters is how persuasive or not their opinions were on each individual point.

Independence as a factor affecting weight

135. All parties agree that an IE’s report has no special status, but also that due weight should be given to the expertise of the IEs. How much weight is due? In our view, the weight should recognise not just the expertise of the IEs, but also their independence. The value of their independence is likely to be greater where the opinions of the party-instructed experts happen to achieve the outcome sought by the party instructing them. The greater the alignment between the party-instructed experts’ opinions and their instructing party’s case, the higher the premium to be attached to the IEs’ neutrality.

136. In this case, the outcomes of the party-instructed experts' opinions are stark. If we were to accept the opinions of the Leigh Day experts in full, all claimant roles would be of equal value to a significant number of comparator roles, and most claimant roles would be of equal value to most comparator roles. If we were to prefer, wholesale, the opinions of the Asda experts, we would find that none of the claimant roles (apart from Section Leader) were of equal value to any of the comparator roles.
137. Independence is not a trump card. An IE's independence will count for little where the IE's reasoning is obviously less persuasive than that of another expert. But it can help to resolve a conflict between opinions that both appear to be reasonable. Where there is a reasonable basis for the IEs' opinion, it is open to the tribunal to give greater weight to that opinion than that of a party-instructed expert whose opinion also has a reasonable basis.

Transparency and detail of assessments

138. We were able to place more reliance on an assessment of a role if we understood how the expert had made the assessment. Bearing in mind that every expert made their assessment under a points-based scheme, assessments were more likely to be transparent if:
- 138.1. Their level definitions (and modifiers, if used) were easy to understand;
 - 138.2. They provided a rationale to explain why each role satisfied the relevant level definition;
 - 138.3. Under a modifier-based scheme, they provided a rationale for why the role did or did not satisfy the requirements for the modifier; and
 - 138.4. Their rationale was consistent with other evidence of what that expert actually thought.
139. We did not, however, generally hold it against any expert that they did not go into more detail. All we needed from each expert was enough information to explain how they had reached the opinions they expressed. As our employment judge put it to the IEs in the 23 April 2023 case management order, they "should err on the side of being too concise, rather than prolix".

Was it necessary for the experts to assess every role?

140. The Leigh Day experts did not assess every role. This means that they did not take account of the full features of the jobs under comparison. Some of the omitted roles had distinctive features that might affect the demands of their work. For example, George, which the Leigh Day experts did not assess, was the only role in a clothing department.
141. Asda say they that this approach significantly affects the weight that we can put on the Leigh Day experts' evidence. As Mr Cooper put it to Mrs Hastings, "You deliberately deprived yourself of two thirds of the job information". We do not think this is a fair characterisation. Many of the roles were, in truth, very similar. The features of their work overlapped considerably. For example, roles such as Mr Opelt and Mr Welch had enough common features to render the Leigh Day experts' assessment of Mr Opelt's work potentially of value when considering the demands of the work of Mr Welch. There were, however, some roles, such as Mrs O'Donovan in George, and Mrs Webster's role on Counters, that were sufficiently

distinct that we would have found it helpful to have an assessment of her role from both party-instructed experts. It would also have been helpful to have the Leigh Day experts' input into a role (such as Mr Dolan's) whose most demanding feature was Letdowns and Putaways.

Transparency in preparation of the report

142. We have previously observed that the Leigh Day experts' report set out their views at each step of their preparation of the report. This approach gave us a helpful window into their thinking as it evolved. Sometimes, it exposed what we have found to be errors in their reasoning. It also laid bare some of the difficulties they had in applying the IEs' scheme. But at least we knew what they were actually thinking.
143. By contrast, the Asda experts' report displayed the experts' fully-formed opinions and no more. It marked the end of a whole series of iterations which we have not seen. Although it was set out in analytical stages (for example, their dissection of the IEs' scheme appears in earlier pages than their own scheme), that does not tell us when they went through each thought process. One advantage of their approach was that it made their report more user-friendly – it was easier to find where their finalised opinions were in relation to each factor and each job. The disadvantage was, at times, a lack of transparency. All we saw was the top coat of paint. Their scheme, as all schemes, embedded important judgements about the relative demands of certain types of activity (for example, that it takes more mental effort to drive a LLOP than to concentrate on date code checking). We were not able to tell by looking at the Asda experts' scheme whether that was a decision they made whilst testing the IEs' scheme, or developing their own scheme, or at their first glance at the job descriptions.
144. That said, it was not always important for us to know exactly when the Asda experts had settled upon a particular view. Where it was clear from their scheme design and rationales what their judgements were, we could tell how those judgments had influenced their assessments. A paradigm example was the Asda experts' use of Elements. We could see, almost at a glance, that a LLOP driver was guaranteed a Level C for Knowledge. Likewise, it was plain that a Warehouse Colleague who had personal performance targets was regarded by the Asda experts as achieving Level B for Emotional Demands.

Asda experts' assessments using the IE's scheme

145. We did not place any reliance on the Asda experts' assessments under the IEs' scheme. Those assessments did not tell us anything about what they really thought about the real demands of the roles.
146. Here our approach differs from the one taken by EJ Malone's tribunal in *Forward*. They chose to use the IEs' methodology as "the main system" for measuring job demands. This was partly because it had practical advantage of being the only scheme under which all three experts had scored the roles. There is no such advantage here. As we have observed, the Asda experts' scoring exercise was primarily a forensic stunt, aimed at persuading the tribunal to prefer their own scheme.

Chapter Five - General principles and scheme design

147. Before examining the assessments of the roles in detail, it is worth setting out some of our views on points of principle that emerged during the hearing. Some are uncontentious, others are disputed.

What are “demands”?

Demands are not the same as tasks

148. Everyone agrees that a demand is not the same as the activity that gives rise to it.

149. It is also common ground that the same task may make multiple demands of a jobholder. For example, when Mr Opelt drove a LLOP,

149.1. he had to know the rules of the road, where the controls were, and how to conduct a pre-operation check,

149.2. he took responsibility for careful handling of a valuable piece of machinery,

149.3. he took responsibility for health and safety of his colleagues,

149.4. he needed to use some physical skill, and

149.5. he had to make the mental effort of concentration.

All of these were separate demands. None of the experts sought to persuade us that any of these demands should be ignored.

Categories of demand

150. Job evaluation schemes and equal value assessments, and section 65 itself, all recognise that there are different kinds of demand. Some reflect the weight of responsibility for something important, some arise from the need to acquire knowledge, others from the need to exercise skill. Experts from all three teams comfortably used phrases such as “skills factor”, “responsibility factor” and “effort factor”.

151. How helpful are these categories? Do they tell us anything about how to design an assessment scheme and, in particular, about what the factors should be? As the parties orally opened their cases, it appeared that there might be some dispute of principle here. Mr Short put the claimants’ case this way:

“... the factors that are chosen should not combine more than one type of demand. So you shouldn’t, with one factor, try to measure knowledge and effort or effort and responsibilities. It should be one demand, one type of demand, being measured at any one time, and that will ensure transparency and clarity and it will avoid double counting...”

152. Mr Cooper does not accept that any such rule exists. He put it to Mrs Hastings that categories of demand do not serve an analytical purpose in deciding what the factors should go into a scheme. Mrs Hastings appeared to agree.

153. We agree with Mr Cooper up to a point. Rigid categories of demand are not determinative of what the factors should be. A rule like that would make equal

value assessment unduly mechanistic. It also runs the risk of distracting the tribunal from the real question of how demanding the roles are overall.

154. But that does not mean that categories have no analytical value at all. As Ms Spence said, listing the types of demand serves as a useful checklist for the demands of any particular feature of a job. Assessors should be asking themselves, "What is it that makes this feature of the job more demanding?" If the activity involves physical effort, there should be a physical effort factor. If it cannot be done without acquiring a demanding level of knowledge, there will need to be a knowledge factor. And so on. Depending on the answers, it may be better to isolate each type of demand into a separate factor, or to measure it together with other demands in the same factor.

The demand of taking responsibility

155. Some activities are demanding because they involve taking responsibility for something. Here, it is the weight of the responsibility itself that drives the demand, rather than the skill or effort or knowledge required to do the activity.

156. There is no fixed number of responsibility demands in any selection of roles. Consequently, there is no fixed number of responsibility factors in any assessment scheme.

157. In *King v. Sutton & Merton Primary Care Trust* 2508788/06, the number of responsibility demands was considered by another tribunal chaired by EJ Malone. At paragraph 50, he observed,

"It seems to us that the number and descriptions of the factors must vary according to the level and type of job. For senior management posts one would expect to see a large number of responsibility factors and little in the way of factors relating to effort and adverse working conditions; for totally unskilled jobs, one would expect heavy weighting towards effort and working conditions."

158. One of the main controversies in this case is what kinds of responsibilities should be recognised as separate demands, worthy of assessment under a separate factor. In particular, should there be separate factors for responsibility for (a) Planning & Organising, (b) Customer Service and (c) Training and Mentoring?

159. To our minds, this dispute is not entirely divorced from the dispute about categories of demand. Ms Spence's notion of a checklist has some value here. If an activity appears to involve taking responsibility for something, the assessor should ask whether that responsibility gives rise to a demand which is not measured elsewhere in the scheme. Failure to do so may risk undervaluing the demands of that activity and of the roles in which that activity is done.

160. But the checklist only gets the assessor so far. They still need to think about what makes the responsibility demanding.

161. The experts all agree that they should not try to assess responsibility for a task merely because it is something that the role holders have to do. All roles will involve tasks and all role holders will be responsible for doing the tasks in their role. Nor should there be a responsibility factor merely to describe a task that has a particular purpose.

162. In our view, for a responsibility to be sufficiently demanding to be measured, it is likely to satisfy all of these broad tests:
- 162.1. it will represent a measurable degree of trust placed on the jobholder;
 - 162.2. for something of general importance in the world of work;
 - 162.3. for which unlike jobs may take responsibility;
 - 162.4. that at least one jobholder is in a position to influence through their work;
and
 - 162.5. that is distinct from the other objects for which responsibility is measured.
163. Neither party formulated this set of principles. We raised them for ourselves and offered counsel for both parties the chance to comment. Both Mr Short and Mr Cooper broadly agreed.
164. These principles are more easily understood with a little knowledge of the competing assessment schemes. All the experts agree that Asda workers had demanding responsibilities for assets, and a separately and distinctly demanding responsibility for health and safety. In some jobs, there may well be a demand of responsibility for the environment, or for legal and regulatory compliance, but none of the experts assessed those demands amongst the Asda workers. Doubtless, these aims are prized by Asda, but the Asda jobs had little influence over them and bore no weight of being entrusted with them.
165. Perhaps more surprisingly, not all the experts thought it would be a good idea to assess the demand of responsibility for people, whether colleagues or customers. This aroused our curiosity. It is almost trite to say that people are of vital importance to employers. (The slogans “Investors in People” and “Human Resources” embody this concept). As we examine in more detail, responsibility for people is commonly found in job evaluation schemes and equal value assessments. At least two of the roles under comparison (Section Leader and Haigh) were supervisory roles which involved taking responsibility for colleagues.
166. The omission to recognise the demand of responsibility for people informs our thinking when we come to examine the disputed responsibility factors.

Frequency and duration as drivers of demand

167. It is universally recognised that some demands (for example, knowledge) are unaffected by how often a role-holder has to do any particular task. If the worker needs the knowledge, they need it, regardless of whether they need it for occasionally administering first aid, or constantly scanning items through a checkout. (This is a more controversial proposition in relation to skill-based factors, to which we return).
168. Everyone also agrees, however, that some demands are directly affected by the frequency and duration of the activity that engages that demand. This accord extends to all the demands that in some way take their toll on a person’s reserves of energy.
169. Our preliminary discussion relates to these latter kinds of demand. They all engaged a recurring dispute. Should duration of effort be measured across a fraction of a shift, or across an entire shift, or across an entire working week or month? Was it, for example, as mentally demanding for Ms Hutcheson to drive a

forklift truck for 10% of her working week as it was for Mr Ballard to operate his CBT for a whole shift, but only once or twice per fortnight? Do two roles have the same physical demand if they involve lifting the same aggregate weight of cases over a week? Or is there a greater demand for the role-holder who does a large amount of lifting one day and relatively little the next? Is it more emotionally demanding to work to an individual pick target on every shift than it is to work on just a few shifts a month?

170. It is important to get the answers to these questions right. This is because of the different working patterns in the stores and the depots. The Shop Floor Assistants generally did the same job every day. Warehouse Colleagues, by contrast, typically worked on different activities from one shift to the next. Any assessment of frequency or duration that was solely measured across the most demanding shift would risk overvaluing the demands of the warehouse worker's overall work in comparison to the overall demands of working in a shop.
171. We therefore, generally approached this question on the basis that it was generally fairer to assess duration over the course of a week than over the course of a shift, unless there was a logical reason to make the assessment shift-specific. We return to whether there was such a reason in the case of roles that involved the highest aggregate daily lifting.
172. Another consideration we had in mind was the effect of part-time working. Ms Waller agreed with Mr Short that the demands of part-time work should be assessed pro-rata to the demands of full-time work. This principle was easy to understand when looking at responsibility factors: Ms Hutcheson's 3-day week did not mean that she had any less responsibility for assets than a full-time warehouse colleague. One thing we had to be careful about, however, was operating the pro-rata principle so as to achieve a result that could never have happened. Mr Opelt, for example, would never have done 5 consecutive shifts of stock picking, even if he had worked full time. Asda would never have let him do it.

Assessment schemes

The purpose of an equal value assessment scheme

173. Any equal value assessment scheme is a means to an end. It should facilitate comparison of the demands of the respective jobs within the scheme. The absolute demands of each role are not important. What matters are the *relative* demands. None of the experts disagree with that proposition.
174. The parties used the helpful word, "relativities" to mean the demand of one role, or group of roles, relative to another.
175. Some assessment schemes compare roles directly. A pair of roles goes head-to-head under each factor. The assessor establishes the relativities using the "GEL" formula, which is to say, "Greater, Equal or Less".
176. A GEL comparison often works well when there is one claimant role and one comparator role. But where multiple roles are being compared, the experts favour a numerical scoring system instead.
177. In this case, the parties agree that a points-based scoring system is the only manageable way to assess the relativities amongst all the different roles in this case. That has to be right. The parties are asking us to determine the equal value

question for 16 lead claimant iterations against 32 comparator role iterations by reference to between 10 and 13 factors. GEL-based assessments would involve making somewhere between 5,120 and 6,656 comparisons of job demands. Even if that were possible, it would only be the beginning of the task, because there would need to be a process of checking those thousands of comparisons to make sure that the same differences in demand had been reflected in a consistent way across all the jobs.

178. There is a tension inherent in the design of any points-based scheme. It gives each job a numerical score. That number is absolute: if the demand of a job satisfies the relevant level definition for a factor, the numerical score stays the same irrespective of the scores for the other jobs by reference to that factor. The scheme only directly compares any two jobs at very end, when the aggregate scores of the claimant role and the comparator role are both known. Except where the numerical scores are within a close margin, the equal value question will be answered simply by looking at which job had the higher score. But the purpose of the scheme is not to attribute an absolute value to a job; it is there to assist in comparing relative demands between one job and another. So the scheme will be worthless unless the *differences* in scores reflect genuine differences in demand, and two jobs having the same score have broadly equivalent demands.
179. One way of testing the effectiveness of a larger numerical scheme is to take a sample pair of roles and subject them to a GEL comparison under each factor. In theory, the numerical scheme should produce the same result as the GEL comparison. As Mrs Hastings put it, "You will get the same result overall; you will have explained it in a different way."
180. Three consequences follow from this.
181. First, a difference of 20 points between a claimant role and a comparator role means the same whether the scores are 50-30 or 30-10.
182. Second, there is a risk that an equal value assessment scheme may be misunderstood by the reader. They may see a job that has been assessed at the lowest level (Level E in all our experts' schemes) and think, "That must be easy". The actual jobholder may perceive that the demands of their role have been trivialised. Mrs Hastings made that point when giving evidence about Responsibility for Assets. Nothing could be further from the truth. All the assessor is saying is that the lowest-level role is less demanding than the other roles that they have to compare.
183. Third, and fundamentally, the only way a points-based scheme can compare the demands of the jobs is in the design of the scheme itself. Any numerical scheme will necessarily embed the designer's judgments about what makes one role more demanding than another. These relative judgments permeate decisions about:
- 183.1. How many factors there should be;
 - 183.2. What those factors should assess;
 - 183.3. How many levels there should be for each factor; and
 - 183.4. How the levels are defined.

Common faults with assessment schemes

184. Sometimes these decisions wrongly overvalue or undervalue demands. Equal value cases have generated their own terminology to describe these sins.

Examples include:

- 184.1. **Double-counting** – counting the same demand under two different factors
- 184.2. **Omission** - failing to count a demand by omitting a relevant factor
- 184.3. **Elision or conflation** – using the same factor to count two distinct demands
- 184.4. **Compression** – creating level definitions that are too wide, so that large differences in demand are only reflected in small differences in scores and
- 184.5. **Stretching** – creating level definitions that are too narrow, so that small differences in demand lead to disproportionately wide gaps in scores.

185. Concepts like these are helpful analytical tools, but that is all they are. They help to focus our attention on the judgements that the scheme designer has written into the scheme about what makes the roles relatively more or less demanding.

Equal value schemes and job evaluation schemes

186. The more jobs an equal value scheme tries to assess, the more that scheme will start to look like a job evaluation scheme (“JES”). Both types of scheme involve placing jobs into levels under factor headings. The experts are all agreed, however, that the two types of scheme serve different purposes and should not be confused.

187. We accept Ms Waller’s evidence that the essential differences are:

- 187.1. A JES attempts to measure the value that each role brings to the commissioning organisation. By contrast, an equal value scheme assesses how demanding one role is compared to another role.
- 187.2. Typically, a JES will encompass more roles and aims to group them into broader salary bands. One permissible outcome of a JES is that roles of differing value may be paid the same.
- 187.3. A JES is often the product of negotiation and compromise between management and staff-side representatives. The exercise under section 65 does not allow room for such compromises. It is simply the application of law to the facts of the jobs under comparison.

188. So far, so uncontroversial. More contentious is the debate about whether these differences actually matter. Does the difference between the two types of scheme prevent meaningful comparison with a JES in order to resolve the issues between these claimants and Asda? The argument tended to come to the surface when deciding whether the scheme for the Asda jobs should include various responsibility factors. Mr Short would take Ms Waller to one or more JES from a sample of organisations. He would make the point that those schemes contained the equivalent of the responsibility factor (such as Planning and Organisation) for which he contended. Ms Waller would reply that this was a JES and not an equal value scheme.

189. Our view, generally, is:

- 189.1. The existence of an equivalent factor in a JES cannot be determinative of whether it should be a factor in the equal value assessment of the Asda jobs.
- 189.2. For some factors it is straightforward to differentiate between value to the organisation and demand on the worker. For example, it is plain that there is a difference between the value to Asda of certain kinds of knowledge and the demands of acquiring that knowledge (see paragraph 503).
- 189.3. Evidence of equivalent factors in one or more JES may nevertheless provide support for the existence of a demand, and lend weight to the argument that that demand should be separately recognised in the Asda equal value assessment. This is particularly true of responsibility factors.
- 189.4. The weight to be attached to the JES would be undermined if there were some evidence of:
 - (a) the commissioning organisation valuing a responsibility for something that was undemanding to take responsibility for; or
 - (b) the commissioning organisation having reached a particular compromise, or having fudged a solution, that explained why the JES had been designed in a particular way.

Errors in a scheme

190. No scheme of this size can hope to be perfect. Any scheme will produce some anomalies. The fact that a party has been able to spot imperfections in a scheme would not of itself be a reason for rejecting it as a tool for assessment. As a tribunal, if we find that a scheme has got assessments wrong, we may:

- 190.1. Correct the scheme by adjusting scores;
- 190.2. Prefer a different scheme;
- 190.3. Prefer the erroneous scheme as the “least worst” scheme; or
- 190.4. Re-assess all the relative demands for ourselves.

191. The more glaring the anomalies, and the greater the number, the more likely it is that the scheme is failing to identify significant and measurable differences in demand. That would be a reason for preferring a different scheme.

192. When deciding whether a scheme can be remedied and what corrections to make, we must avoid unintended consequences. Adjusting the scores for one role might cure one anomaly but create two more elsewhere in the scheme.

Modifiers

193. We turn now to a recurring dispute between the Asda experts (on the one hand) and the IEs and Leigh Day experts (on the other). Should there be a modifier? That is to say, should there be a mechanism for adjusting the score within a level?

The purpose of a modifier

194. A numerical scheme puts jobs into levels, with a step change in scores between each level. Ideally every job would fall squarely within the relevant level definition. But where there is a large number of jobs, with subtly different demands, it is likely that some of those jobs will be close to the borderline with the level above or the level below.
195. The IEs recognised that problem. Their solution was to use a modifier to shade small differences in demand.

Modifiers in principle

196. In our view, there is nothing inherently wrong with a modifier. As a matter of pure logic, it must be open to an assessor to say, "Her role is a little more demanding than his role, but less than a full level step, so I will give a few more marks to her role than to his role". We also accept Mrs Hastings' evidence that the IEs' scheme is not unique in its use of modifiers. Other equal value assessments have also used them.

Modifiers and levels contrasted

197. The Asda experts say that the IEs' use of the modifier effectively turns a 5-level scheme into a 15-level scheme. That appeared also to be the position of the Leigh Day experts in their report. Mrs Hastings qualified that opinion in her oral evidence. She accepted that the use of modifiers created 15 "scoring points", but did not regard these as being the same as "levels".
198. It is true to say that there are 15 scoring points. They are evenly spaced with a 5-point gap. The table at our paragraph 89 sets it out clearly. Level C+ scores 5 points more than Level C= and 5 points less than Level B-, and so on. The spacing of scoring points necessarily reflects a judgement that the steps in demand between these scoring points are the same, or at least not measurably different. But that does not, by itself, give the modifier the same importance as a level definition. It may be possible to perceive small differences in demand within a level and greater differences in demand between levels. A role assessed at Level B- may only be 5 points higher than Level C+, but it is still a full 15 points higher than a role that has been assessed at Level C-.
199. If the only criticism of the modifier was that it created 15 levels, we would therefore reject it.

Effect on consistency

200. Another of Asda's attacks on the modifier is that must be hard to apply consistently, because the Leigh Day experts' application of the modifier was inconsistent with the IEs' application of the modifier for the same factor for the same role. They point to an analysis of the assessments under the IEs' scheme, comparing the Leigh Day experts' assessments with the assessments made by the IEs. Ignoring the modifier, the average consistency between the Leigh Day experts' scores and the IEs' scores was 73%. If the modifier was taken into account, the average consistency was only 56%. To our minds, this is not surprising. It is explained by consistency being defined by reaching the same aggregate points score at the end of the assessment. The more granular the

scoring mechanism, the less likely it is that two different assessors will produce exactly the same score.

201. Of greater concern to us were inconsistent applications of the modifier between experts within specific factors. We saw this in the Leigh Day experts' application of the Knowledge modifier. As our paragraph 521 shows, their results had a low degree of consistency with the IEs' use of the modifier for that factor.
202. More worrying still were the examples of where the same set of experts applied the modifier inconsistently between roles. An example is the IEs' assessments of Physical Skills. We had a number of difficulties understanding the modifier at a conceptual level. One thing that was plain, however, was that the IEs did not treat equivalent demands consistently when applying their multiplier. Roles that required the same physical skills (for example, Checkout, Service Host and Section Leader, who all operated a checkout) received different modifiers. The same effect could be seen amongst different Warehouse Colleagues whose most skilful activity was driving a LLOP, or an HRT.

Risks of using a modifier

203. Inconsistency of application was not the only problem. There are inherent risks when building a modifier into a scheme.
204. The main two risks we identified were:
- 204.1. Risk of opaque findings; and
 - 204.2. Risk of compression and stretching.

Risk of opaque findings

205. We have already recorded our view that an expert's assessment is more reliable if it is transparently explained (see paragraph 138). This applies to the application of the modifier, just as it does to the placement of a role into a level.
206. The consequences of opaque modifiers are mitigated by the limited points difference that a modifier makes. But they are also amplified by the number of times the modifier is mysteriously used. This is partly because of the number of opportunities for incorrect judgements to go unnoticed, but also because it inhibits comparison of the modifier between levels and between factors. As Mrs Hastings put it,
- “It's impossible to tell whether they are because we are dealing with small differences in demand and an imprecise way of measuring those demands”.
207. Here is an example from the IEs' assessments under the factor of Responsibility for Health and Safety:
- 207.1. The IEs assessed Mrs Fearn's Customer Service Desk role at Level C. They then awarded Mrs Fearn a plus modifier (C+). They did not initially provide a rationale for doing so.
 - 207.2. If they had wished, they could have provided a rationale such as, “I assessed Mr Opelt at C= for health and safety, and I think Mrs Fearn's health and safety responsibility was a little more demanding than Opelt's,

because...". But, as we know, the IEs did not attempt that kind of direct comparison.

- 207.3. What the IEs did instead was to set a definition for the modifier. Under Responsibility for Health and Safety, the modifier definition was "moderated (+ or -) by proportion of regular duties impacted by active consideration of [Health and Safety] issues." When ordered to do so, the IEs then provided rationales to explain why certain roles (for example Customer Service Desk) satisfied the "active consideration" criterion for a "plus" modifier. As we will see when examining this factor in more detail, problems emerged in trying to understand what "active consideration" meant. We were still left guessing.
208. Sometimes the IEs provided a more general modifier definition (such as, "modified (+ or -) depending on frequency of demand"). This is reasonably transparent if some jobs within the level clearly involved an activity (such as handling cash) more frequently than other jobs that were assessed at the same level. Comparison of the facts of the roles, aided by the expert's rationale, would then enable us to see what the normal frequency was, the better to understand whether the modifier was justified.
209. Problems can still arise, and did arise. For example, all the roles in Level D for Mental Demands ended up being given a "plus" modifier, so there was no benchmark against which to compare them. The same problem occurs where only one role is assessed into a level. (As the Leigh Day experts noted when assessing Personal Shopper under Mental Demands, the modifier was "difficult to apply in relation to a single job".)
210. Particular care is needed when deciding what elements to include in a modifier definition. They can allow fog to descend onto the scheme. This is especially true if the same element appears in both the modifier and the level definition. It will take a clear rationale to explain why that element should be reflected in the modifier, rather than by assessing the role into the level above or below.
211. Take, again, the IEs' factor plan for Mental Demands. One of the components of the level definitions was whether a jobholder was normally interrupted in their work or not, and the disruptive effect of those interruptions. The modifier could be awarded, in part, according to "frequency of interruptions". Giving evidence about Mental Demands, Mr Walls accepted that this element of the modifier was being used to "shade up or down".

Risk of compression or stretching

212. A scheme will be more transparent if the element that is used for the modifier is different from the elements that are used in the level definitions. But there is another danger if a scheme designer separates the drivers of demand in this way. The risk stems from the relatively small points range governed by the modifier, compared to the points range across the level steps. As can be seen in the table at paragraph 89, the IEs' scheme creates a 10-point difference between C- and C+, but a 60-point difference between Level E and Level A. By confining a particular element to the modifier, the scheme designer is impliedly valuing differences in that element at one-sixth of the importance of the other elements of demand. There is nothing wrong with doing that if, in fact, the modifying element is much less important to the demands of the role than the elements contained in the

level definitions. But where the element in the modifier has the potential to be a decisive driver of demand, it can result in the role holder being trapped at the wrong level.

213. An example from the IEs' Training & Mentoring factor should help to make the point clearer. Roles were placed into levels based on rare (sometimes less than annual) occasions of being paired with a less experienced colleague. At the risk of some over-simplification, the level definitions reflected the formality of the arrangement. The frequency of demand was the criterion for the modifier, but was not taken into account in the level definitions. All the party-instructed experts (at one time or another) observed that this resulted in an unfair stretch.

Modifier for some levels, but not others?

214. This brings us to a further question. Can a fair equal value assessment use modifiers for some factors, but not for others? If we were to adopt that approach, we would effectively be saying, "There are shades of difference under this factor, but not under that one". Such an opinion would be more likely to be robust within a single scheme where the same assessors had considered whether there were shades of difference in each factor. That is not what has happened here. If we mix and match the IEs' factor assessments with those of the Asda experts, there is a real danger of distortion. Under each factor, the IEs have used their modifier to capture what are, in reality, quite significant steps in demand. If one of those modifier-based factors were brought into one scheme alongside an Asda experts' factor, there would then be a risk that the Asda experts' factor would be more heavily weighted. Differences in scores under the two factors would not proportionately reflect the differences in demand.

Identifying factors

215. The choice of factors in a scheme is not a neutral act. The inclusion or exclusion of a factor involves making a judgement about the demands that the factor captures, and the importance of those demands relative to other demands. By including a factor, the scheme designer is effectively saying, "These jobs involve a demand which I am not assessing under the other factors." The designer is also saying, "I can detect some differences in demand between the roles under this factor," and, "I can broadly equate these differences to the differences in demand under other factors". Conversely, by omitting the factor, the scheme designer is making a judgement that it is not capturing a demand of any of the roles, or everyone has the same level of demand, so that it is not worth assessing, or any differences in demand have already been adequately assessed elsewhere in the scheme.
216. As we have seen, the parties often disagree about what the demands of the Asda jobs truly were, especially when it comes the demands of taking responsibility.
217. In our view, the logical approach to a disputed factor is:
- 217.1. first, to identify whether a disputed factor does capture a distinct demand;
 - 217.2. second, to identify any measurable differences in that demand amongst the jobs;

- 217.3. third, to ask whether the demand is adequately assessed under other factors; and
- 217.4. fourth, to ask whether the inclusion of a separate factor is a proportionate reflection of that demand.

Number of levels

218. The three sets of experts have differing positions on the number of levels that an equal value assessment scheme requires:
- 218.1. The IEs regard it as axiomatic that there needs to be the same number of levels for each factor. Ms Spence told us that this was their way of ensuring consistency from one factor to another. (For example, ensuring that the difference in demand between Level D and Level C for Knowledge was broadly equivalent to the difference in demand between Level D and Level C for Problem Solving and Decision-Making.)
 - 218.2. This is disputed by the Asda experts, whose scheme has only four levels for Physical Skills, but five levels for the other factors. They criticise the IEs for including levels (for example, Level A for Knowledge), that none of the Asda jobs could ever seriously reach.
 - 218.3. The Leigh Day experts appeared to take a position somewhere between these two poles. In their report, they appeared to criticise the use of redundant top levels (such as Knowledge Level A). In her oral evidence, however, Mrs Hastings acknowledged some value in an unused base level. She also saw some merit in importing levels and level definitions from other schemes.
219. To resolve this dispute, we need to go back a step. There is no magic number of levels. Nor is there any point in including a level for the sake of it. What is needed for each factor is enough levels to capture the measurable differences in demand for that factor. The steps between those levels should be evenly spaced, and broadly equivalent to the steps between levels in other factors in the same scheme.
220. Where there is a narrow range of demand (for example, in the physical effort required for a cohort of office roles), two or three levels may well be perfectly adequate. They could be Levels A to C, with a range of 40-70 points. But equally they could be Levels C to E, with a range of 10-40 points. The outcome will be the same. All that matters is the relative scores. The scheme designer would need to check that a 15-point difference in physical effort was truly equivalent to a 15-point difference in knowledge demands.
221. It follows, in our view, that the IEs' approach is unduly dogmatic. They did not need to wed themselves to five levels for every factor.
222. That is not to say that the IEs' approach was necessarily harmful to their assessments. Unused levels, such as the IEs' Levels A and E for Knowledge, do not *of themselves* detract from the fairness of the scheme. They should, however, act as a warning sign. They alert the scheme designer to the risk of compression. If no jobs could fit into the top or bottom levels, the designer should ask, "Are these roles being unfairly squeezed into a narrower set of levels than truly reflects the

differences in demand?" If the answer is yes, the top and/or bottom level would need to be redefined to allow the most and/or least demanding jobs to be assessed into them. If the answer is no, the redundant levels could be removed altogether, like an appendix, with no ill effects. Or the scheme designer might prefer to leave the bookends in place, with their definitions, to help explain why none of the roles were demanding enough to meet that top level, and they were all too demanding for the bottom level.

223. So the question is factor-specific: how many levels do we need for this factor? Of course, the question is easier to ask than to answer. One of the most challenging aspects of scheme design is to achieve equal steps in demand across different factors. As Mrs Hastings (Leigh Day expert) put it, "It is genuinely difficult to identify equivalent levels in demand across different factors. It is comparing apples and pears." (We have already credited Mr Short with moving the analogy on to "apples and spoons".) Nonetheless, the scheme designer must not side-step this question just because it is difficult. They should try their best.
224. An expert comparing steps in demand across factors will be guided by two important considerations:
- 224.1. First and foremost, the facts related to the question. The expert must analyse the facts of each of the roles and make some preliminary assessments of what makes each role more or less demanding under the relevant factor. How many identifiable steps in demand do there appear to be?
- 224.2. Second, equivalences derived from other schemes. Here we accept the evidence of the IEs and the Leigh Day experts. There is some value in examining other schemes. To the extent that the Asda experts say otherwise, we think they are wrong.
225. It is worth illustrating this latter point with a hypothetical example. A previous equal value assessment in another case may have ascribed a two-level difference for physical effort between an entirely sedentary office role and a role that requires daily walking site inspections. The same scheme may also provide for two levels of difference under the Decision Making factor between a data input role with few decisions and a role that involves making disputed or escalated decisions within a policy framework. The experts there have made the judgement that these differences are broadly equivalent. There is nothing wrong in our view with a scheme designer drawing on those external judgments when designing a scheme for a new set of jobs.
226. Perhaps more controversially, we do not see anything fundamentally wrong with an expert drawing on a JES for the same purpose. This follows from our analysis at paragraph 189.
227. So far, we have been discussing the levels at the extreme end of each factor, and whether to include or omit them. What about intermediate levels?
228. Everyone agrees that there may be circumstances where a placeholder level is needed. The circumstances are where there is a large difference in demand between one role and its nearest rival. If the difference is truly greater than a single level step, a blank level needs to be maintained to avoid unfair compression.

229. There is one point of dispute: How detailed should the definition be for the placeholder level? This dispute has crystallised around the Asda experts' scheme for Responsibility for Assets. The Asda scheme divided this factor into two Elements, one of which was Financial and Data. Noone was awarded a Level B under this Element. The Asda experts included a short nominal definition, but did not fully define that Element of the level.

230. The Leigh Day experts say that this omission detracts from the Asda experts' scheme. We disagree. All that was needed was enough information to explain why the Asda experts placed the relevant roles into Level C or Level A.

Level definitions

General

231. Some of the issues in the case turn on the wording of level definitions. There are disputes of principle about what a good level definition looks like.

232. Before turning to the disputes, it is worth restating that a good level definition must be clear. We have already set out our view that transparent expert opinions are generally weightier ones, and that clear level definitions are one of the ways in which transparency is achieved in equal value assessments.

233. Level definitions are not clear if the assessor has to strain their interpretation of the language of the level definition in order to reflect the true demands of a role. As Mr Cooper puts it, the scheme should facilitate sensible judgements about relative demands, not get in the way of them. Or, in the words of EJ Malone in *Forward* at paragraph 209,

“It...seems to us to be useful to have level definitions as well as factor definitions, so long as they are not interpreted like a statute... the definitions are intended as a guide and not as a constraint...”

Terminology

234. Some of the disputes are about the use of terminology.

235. The Asda experts and Leigh Day experts agree that level definitions may permissibly use “graduated terms”. An example can be found in the Leigh Day experts' proposed amended level definitions for Physical Skills. Part of their Level C definition is “...requiring dexterity”. Level B includes, “...requiring a high degree of dexterity” and for Level A, the work must require “a very high level of dexterity”. Where the party-instructed experts fall out is on the use of “relative terms”. For example, in the Asda experts' scheme for Communication and Relationships, the Level D definition begins, “Wider but still limited range of interactions...”, and Level C begins, “Wider range of interaction with [examples]”. The claimants criticise this terminology. Mrs Hastings made the point that the assessor ends up having to “define it twice”. We understand the point. Asda's Level C definition begs the question, “Wider than what?” The answer, presumably, is “Wider than in the roles we have assessed at Level D”. How did the Asda experts know which roles to assess at Level D? Presumably because their interactions were “wider” than those the roles they had put into Level E. A similar observation may be made of the Asda experts' scheme for Physical Skills.

236. These are legitimate criticisms. But the same criticisms could also be made of the graduated terms in the Leigh Day experts' Physical Skills definitions. In the abstract, it is hard to know what is "high degree of dexterity" and what is a "very high degree of dexterity". These terms only acquire meaning after some kind of comparison with the roles assessed at the level below. Moreover, at some point in their analysis, both sets of party-instructed experts actually did directly compare the demands of a role directly with another.
237. We do not, therefore, find the distinction between relative and graduated terms to be of particular use to us when examining the reliability of a scheme.

Precision vs. "best fit"

238. Another dispute is about the degree of precision to be used in a level definition. Should each definition consist of tightly-defined gateways, demarcated by "Either...or...and..."? Or is it preferable for the definition to contain broad descriptors, possibly supplemented by a non-exclusive list of examples? Mr Walls (IE) recognised the advantages and disadvantages of each. The bright-line definition achieved better clarity, but, he acknowledged, could "hamstring" the assessor. Sometimes, he told us, they had to adopt a "best fit" approach.
239. In our view, there is nothing wrong in principle with seeking the "best fit". Equal value assessments on this scale will inevitably encounter the occasional square peg which will fit better into one round hole than another. We would qualify that view by adding:
- 239.1. it is helpful, where this happens, for the assessor to provide an individual rationale for the roles that were difficult to place; and
 - 239.2. the more roles that are assessed on a "best fit" basis, the less transparent the level definitions are likely to be.

Objective indicators of demand and "proxies"

240. One of the IEs' favoured methods of defining levels of demand was to think of ways in which that demand could be measured objectively, without the assessor having to form a subjective judgement that one role is more demanding than another. For example, a key ingredient of the IEs' level definitions for Knowledge was the length of time it typically took a role holder to acquire the knowledge needed for the job.
241. The IEs generally favoured these indicators of demand over a descriptor that relied on the assessor's value judgment. They had a good reason and a bad reason for doing this.

Eliminating judgements

242. First, the bad reason. In answer to Mr Short's questions, Ms Spence said, that, if a job description contained broad words such as "complex", she would ask for the job description to be re-written. We can readily understand why Ms Spence would hold that view at the stage of writing job descriptions. But this does not of itself mean that adjectives or broad descriptions are inappropriate in an assessment scheme. In an equal value case, the job description represents the tribunal's findings at Stage 2. It is supposed to contain the facts related to the equal value question, rather than any judgement about demands, whether absolute or relative.

But at the stage of writing level definitions, scheme designers have moved on from Stage 2 to the final hearing stage. The whole purpose of writing level definitions is to embed the experts' opinions about what, amongst the facts in the job descriptions, makes the roles more or less demanding.

Eliminating bias

243. We turn to the IEs' good reason. In theory at least, objective indicators of demand carry a significant advantage. The more objective the measure, the less likely it is that it will be tainted by bias or discrimination. Biases may influence value judgements about whether, for example, it is more demanding to learn how to operate a piece of mechanised equipment than it is to know whether a range of fresh food items are fit for sale. If we could find a true proxy for the demand, it generally would be more reliable than either graduated or relative terms, because of the reduced risk of bias in the assessment.

244. The search for objectivity permeated the IEs' whole factor scheme. For example, this is what they wrote in the joint report, under the factor of Mental Demands:

"The IEs believe that the most appropriate and fairest way of recognising differences in demand is to consider the external stimuli or circumstances that result in a need for more or less concentration, rather than focusing on the relative subjective impact as experienced by the jobholder. Focussing on such workplace phenomena as interruptions, deadlines or conflicting priorities allows a more empirical approach to assessing relative demand."

245. But there are also risks inherent in objective measurements. If the objective measure is used as the sole or main determinant of the level definition, (or "proxy", as Mr Cooper called it), it must be a true measure of the real-life demands of the roles. Otherwise, there is a risk of overvaluation or undervaluation of demand.

246. As Ms Waller put it,

"The trouble with writing too much into the scheme or into the level definitions of the scheme is you get tied in knots."

247. As we go through the individual factors, we examine some of the ways in Ms Waller's warning turned out to be well-founded. One of them can be found in the Responsibility for Health and Safety factor. The IEs took the existence of health and safety procedures to be an objective indicator of the weight of responsibility. The aim was laudable, but it got in the way of a proper assessment of health and safety demands. Everyone had to follow health and safety procedures.

248. Conversely, where a factor scheme was reliant on the individual judgement of the assessor, rather than an objective measure, we scrutinised it more carefully for signs of bias in the assessments.

Relevance of the burden of proof

249. Any assessment scheme must correctly reflect the burden of proof. Where the output of the scheme is two roles with equal scores, the burden of proof is satisfied. At the prior stage of assessing roles into levels, the burden of proof is very much alive. It is always for the claimants to persuade the tribunal that their roles should

not be assessed at a lower level, and that the comparators should not be assessed at a higher level.

Chapter Six - Using scheme results to determine the equal value question

Issues

The problem

250. Judges produce judgments. Schemes only produce scores. The parties and IEs disagree about how to turn the output of a scheme into a determination of the equal value question.
251. The scores ought, in theory, to enable a tribunal to answer the equal value question without the need for anything more than a calculator. A perfect scheme will have precisely measured all the demands of all the roles, capturing all the equivalences and the measurable differences. Once all the assessments are done, the assessor should be able to take any claimant, add up all her scores for each factor, then take any comparator, add up his scores for each factor, and compare the claimant's aggregate scores with the comparator's scores. In that imaginary world, if her aggregate score were less than his aggregate score, even by a few points, her work would not be of equal value to his. Even the slightest shortfall would represent a significant and measurable difference in overall demand.
252. Real schemes are not like that. To borrow Mrs Hastings' phrase, they incorporate "layers of judgment". All those judgments may be fair and sensible, but when applied in combination, they may result in the demands of one job being slightly over-valued or under-valued in comparison with the demands of another job.

Automatic finding of equal value

253. We should make clear straight away that, at this stage of the analysis, we are only concerned with claimants whose aggregate scores fall short of the aggregate score of a comparator. If a claimant manages to tie with a comparator's total score, they are home. The finding of equal value follows automatically.
254. That idea seemed to be taken by everyone to be axiomatic. This is so, despite the fact that the "layers of judgment" anomaly described above could just as easily work in reverse. It could result in a tie in scores that actually masks a significant difference in demand.

Margin of potential equal value

255. All the experts also agree that a difference in aggregate scores is not the end of the story. Some further analysis is needed.
256. It is agreed between the party-instructed experts that, at least, the starting point for the analysis is to identify a margin, which is to say, a difference in scores that is small enough to indicate that the claimant's work might be of equal value notwithstanding the gap. (The IEs do not quite agree. Under their proposed test, it

is theoretically possible for a claimant's role to be of equal value without her score coming within a defined range. In practice, however, the only roles to satisfy their test did come within that range.)

257. There are disputes about terminology here. The phrase "margin of tolerance" might risk giving the impression that we think work is equal if it is nearly equal. *Hovell* makes plain that such an approach would be wrong in law. "Margin of error" might imply that a difference in scores was due to something wrong with the scheme. We prefer the neutral phrase, "margin of potential equal value".

258. There is broad agreement on the size of the margin. Leigh Day and Asda say it is two whole levels of demand. The IEs (as we see below) effectively set the limit at one level plus one modifier.

Further analysis

259. Once the margin of potential equal value is established:

- 259.1. The IEs recommend further analysis of the data (their Tests Two and Three);
- 259.2. The party-instructed experts do not recommend such analysis;
- 259.3. The Asda experts take the view that some further analysis is required in order to establish whether the difference in scores may have resulted from the scheme overvaluing trivial differences in demand, but that analysis should be rooted in the way the scheme was applied to the two roles under comparison;
- 259.4. The Leigh Day experts say that it is *permissible* to engage in such analysis, but it is not *necessary*: in the context of this scheme, the mere fact that a claimant has got so close to her comparator is sufficient to establish equal value.

260. Further issues arise if the tribunal takes up Asda's invitation to look again at the application of the scheme to a pair of roles that are within the margin of potential equal value. What further analysis should the tribunal carry out?

261. During the oral evidence, our employment judge explored with the experts what kinds of further analysis might be appropriate. These exchanges prompted the parties to address the point in their closing submissions. Our proposed methods were:

- 261.1. Examining whether score of either of the roles had been affected by marginal decisions; and
- 261.2. Comparing (between the roles) a demand that had not been properly assessed under any of the factors in the experts' schemes.

262. (We also floated a third idea, but it quickly sank. None of the experts was in favour of it. This was our suggestion that we might use the equal value test to correct any perceived unfairness caused by the use of "elements" in the Asda experts' scheme. All the experts thought that if we found that a particular role had been overvalued or undervalued by a scheme, the solution would be for us to change the assessments. We were persuaded by the experts' unanimous views.)

The IEs' equal value testThe three tests

263. The IEs recognised that something more might be needed than a simple comparison of aggregate scores. They therefore proposed three equal value tests, each based on some degree of analysis of the data. Their report sets out the three tests:

“TEST ONE

The first test is whether or not the claimant has scored within 3 percentage points of the percentage point score (out of the maximum 75 points in this case) for each of their comparators. If this is the case, then in our view there is at least a strong case to answer in terms of Equal Value.

TEST TWO

The second test counts the number of factors in which the work of the claimant has been assessed as equal to, or higher than, their comparators(s). Given the 11 factors employed in this scheme, the claimant will have a case for their job being potentially of equal value if this number is 6 or more. Although the actual scoring system used involves a range of scores at each level, we believe it is simpler for this second test to deal only in terms of the actual levels allocated, “A”, “B”, C etc, rather than attempt to encompass the more subtle variations of scores within the levels...

TEST THREE

The third test is to conduct a comparison on a factor by factor basis whereby we award 0 where the claimant has scored the same as a comparator; +1 where the claimant has scored a whole level up from the comparator (again excluding the – or + modifiers); + 2 where the claimant has scored two whole levels up from the comparator and so on. The same process is applied in reverse where the claimant scores a level or more less than the comparator.

By totalling the positive and negative score differentials, we can establish a cumulative comparative score of plus or minus X over the whole eleven factor results. A cumulative score of 0 or greater may be considered to indicate possible Equal Value.

...

In this case, the Independent Experts have concluded that instances where two or more out of the three tests detailed above indicate that the claimant's role is at the same level or more than that of their comparator, there should be a strong presumption of Equal Value.”

IE Test One

264. Although expressed in percentage terms, Test One was really just another way of comparing aggregate scores. Test One was satisfied if a claimant's score was 5 points, 10 points, 15 points or 20 points less than a comparator's score. If the gap

between the claimant and the comparator was 25 points or more, Test One was not satisfied.

265. As we see it, all Test One did was to identify a margin of potential equal value. In his oral evidence, Mr Walls accepted that Test One would not be sufficient to establish equal value by itself. This is because a shortfall of 20 points (a level plus a modifier) would represent a significant and measurable difference in overall demand.

IE Test Two

266. Test Two set a low bar. It ignored the modifier, and simply looked at whether the claimant had been assessed at the same level (or higher) than their comparator in at least 6 factors.
267. The test was capable of being satisfied where a claimant role was plainly not of equal value to a comparator role. Mr Cooper devised an extreme scenario to illustrate this point. In that scenario, a claimant's aggregate score could be 410 points lower than the comparator's score and Test Two could still be met.
268. Mr Walls described Test Two as a "check". It could not establish equal value by itself. We could see how it might be used as part of a wider control mechanism. It might weed out cases where a claimant had benefited from a wide gap in scores under a small number of factors. Passing Test Two could give the IEs some confidence that this had not happened. Conversely, a claimant's failure to meet Test Two could cause the IEs to look again at how that claimant had managed to satisfy Test One, and check that they had got their assessments right.
269. In reality, this never happened. Test Two was actually met every time a claimant satisfied Test One.
270. In our view, Test Two did not enable us to identify any cases where a claimant with a small shortfall in scores was nonetheless doing work of equal value.

IE Test Three

271. What Test Three did, in effect, was to isolate the level assessments and remove the impact of the modifier. It put up a higher bar than Tests One and Two. Higher than Test One, because on Test Three a claimant would be defeated by the slightest difference in net scores, whereas Test One allowed for a 3% margin. Much higher than Test Two, because the claimant had to achieve an equal score across all eleven factors, and not just her best six.
272. Again, Test Three had something to offer by way of a consistency check on the operation of the scheme. If a number of claimants were passing Test Three whilst achieving lower aggregate scores than their comparator, that might shine a light on a problem with the modifiers. It might suggest that the modifier was working generally to the advantage of comparators and might not fairly be shading the differences in demand.
273. What we are concerned with, however, is the value of Test Three in helping us to answer the equal value question in a direct comparison between a claimant and her comparator. Looked at in that way, we could not understand how Test Three could really help us. By definition, the IEs were setting up a test that ignored measurable differences in demand that the IEs had tried to capture in their modifier.

274. As it turned out, Test Three did not have any impact on the equal value question under the IEs' scheme. If a claimant passed Test Three, she also passed Tests One and Two. If she failed Test Three, she also failed Test One.

The Leigh Day experts' equal value test

275. The Leigh Day experts disagree with the IEs' approach. Their view is that it is sufficient to identify the margin of potential equal value.

276. As they put it in the joint report:

“If the system adopted is fair and non-discriminatory and the level assessments and scores have been carefully consistency-checked, then the predetermined range of points is sufficient to determine equal value. A further assessment is not necessary.”

277. This expression of opinion has to be understood in the light of the Leigh Day experts' rationale for having margin of potential equal value in the first place, and setting that level at two level steps. According to their contribution to the joint report,

“The Leigh Day experts formed the deliberately conservative view that the appropriate range was equivalent to two factor steps on the scoring system... The Leigh Day experts' justification was that one step reflected the inevitable inconsistencies from use of evaluation techniques; the second step reflected the potential for exaggeration of minimal differences from adopting the IEs' scoring system, including modifiers.”

278. This was another way of identifying the phenomenon described by Mrs Hastings: the application of multiple “layers of judgment” might create distortions in the scores, such that claimant role might achieve a slightly lower aggregate score than her comparator, despite the demands of her work actually being the same as his.

279. It is easy to see how this might happen. What is harder to understand is why the Leigh Day experts think this is a good reason for automatically finding equal value where a claimant comes within a short distance of a comparator.

280. The Leigh Day experts' solution works like a ratchet. It can only ever work to the claimant's advantage. Their underlying premise appears to be the assumption that the “inevitable inconsistencies” and “exaggeration of minimal differences” could only have worked in the comparators' favour. But if the scheme is “fair and non-discriminatory”, as the Leigh Day experts think theirs is, the claimants would be just as likely as the comparators to benefit from any distortion in the scores. In which case, we might rhetorically ask, why not find that a claimant with an equal score was doing work of unequal value? We know the answer to that question, of course. None of the experts would say that was right.

281. We have reached this conclusion without taking account of the burden of proof. Mr Cooper says this is a further reason why an automatic finding of equal value would be wrong in law. It may be open to debate how much room there is for the burden of proof in what is essentially the exercise of judgement on established facts. If the burden of proof makes a difference, it will not be a difference that works in the claimants' favour.

The Asda experts' equal value test

282. The Asda experts suggest that, where a pairing of roles falls within the margin of potential equal value, the tribunal should look again at how those two roles were assessed under the scheme. According to the Asda experts' contribution to the joint report, this further assessment:

“should involve an assessment of whether differences in factor assessments where the comparator scored higher were marginal judgments or reflect significant and measurable differences.”

283. In their report, the Asda experts used the term, “boundary review” to describe what they were doing. The boundary review worked like this:

4.4.10 For roles within the 20 point boundary, we reviewed the factors where the claimant was assessed one step level below a comparator. For factors where there is more than one step difference, this is clearly not a marginal difference and so was not reviewed.

4.4.11 Each such factor evaluation for both claimant and comparator was assessed again to verify whether any of the decisions driving the outcome would be considered marginal compared to the adjacent step levels.

4.4.12 If this review of the factors indicates, in our judgement, a net one step difference which could be considered marginal, we would assume this indicates equal value to be met, although the scores themselves would not be changed.

284. Whenever the Asda experts carried out their boundary review, they found that the gap in scores was not the product of marginal decisions and the roles were therefore (in their opinion) of unequal value.

285. Ms Waller explained to us the logic behind the boundary review. We summarise her explanation in our own words. It was possible, she said, that a small difference in scores might result from only a trivial difference in demand. This may have occurred where the Asda experts had made a marginal decision that a role squeezed into a level. That might cause the score for that role-holder to be higher than it would have been if the Asda experts had placed the role in the level below, just the other side of the borderline. If another role-holder had not had the benefit of a marginal decision like that, the scores could give the impression that the first role was significantly more demanding than the second role, when in fact the difference in demand was only trivial.

286. There were a number of ways in which this could have happened under the Asda scheme. A comparator could have received the benefit of a marginal assessment, which could have:

- 286.1. placed the comparator in a level above a claimant's role when they could easily have been in the same level;
- 286.2. placed the comparator two levels above the claimant's role when they could easily have been only one level apart;
- 286.3. placed the comparator in the same level as the claimant's role, when her role could easily have been one level higher than his; or
- 286.4. placed the comparator only one level below the claimant's role, when his role could easily have been two levels lower than hers.

287. Each of these scenarios would have the same impact on the score. Yet the Asda experts' boundary review only investigated the first of these possibilities. In his closing submissions, Mr Cooper recognised that this was too narrow.

Alternative methods of further analysis

288. As we have said, there are other ways to decide the equal value question for roles within the margin of potential equal value. We accordingly return to two of the proposed methods canvassed by our employment judge with the expert witnesses.

Marginal decisions

289. One option is to carry out a more wide-ranging review of the impact of marginal assessments. Such a review would not be confined to decisions that had caused a comparator role to be assessed at a higher level than a claimant. It would include all the kinds of marginal assessment listed at paragraph 286 above.

290. In his oral submissions, Mr Cooper positively encouraged us to conduct such a review. He agrees that this is a better analysis than the more limited boundary review that the Asda experts carried out.

291. Mr Short would have us go a little further. His submission is that there is room for more nuance. We should not just take into account assessments that were next to the borderline. The claimants contend that our assessments under each factor should record a "plus" or a "minus" for any role that we think is "closer to the boundary than to the mid-point of the level". This would look rather like the modifiers that the IEs have used. If we do not use the modifiers for scoring, we should add up the pluses and the minuses at the end to determine the equal value question. (The claimants' main submission, of course, is that each modifier should have its own scoring point. If we agree with that, the marginal decisions would already be reflected in the scores, without any need for further analysis.)

Unassessed demands

292. Another way to resolve the equal value question is to take account of demands that have not been assessed in the scheme. During the course of the evidence, our employment judge gave the example of Responsibility for Customer Goodwill, if we find that this demand had not been properly assessed under any of the factors in the scheme.

293. The IEs warned against making our own direct head-to-head assessments on the ground that it might introduce bias. Mrs Hastings thought the test might be appropriate, but had not had long to think about it. Ms Waller had the chance to think about it for a few hours. Her support was qualified by the need to take care to ensure that it did not unbalance the other scores.

294. By the time of the parties' oral closing submissions:

- 294.1. Mr Cooper positively endorsed the use of head-to-head comparison of unassessed demands;
- 294.2. Mr Short's preference was for us to assess the demand comprehensively under our own factor scheme; and
- 294.3. Mr Cooper's fall-back submission was that, if we were to build our own scheme, it should be confined to two levels.

Our decision

295. We prefer the submissions of Asda about the test for equal value. There plainly has to be a further analysis within the margin of potential equal value. Otherwise, we would be saying that work is equal if it is nearly equal, which is wrong in law.

Marginal assessments

296. Building from the starting point that some further analysis is necessary, Asda's proposed method is more straightforward than that proposed by the Leigh Day experts. The steps in demand between levels do not allow for three scoring points at each level. Otherwise, as we have pointed out, we could simply use a modifier as the IEs have done.
297. The Asda test is relatively simple to administer. Under the Asda approach, the marginal assessments are binary. An assessment achieved a level either fully or marginally. If the assessment was marginal, that fact can be recorded. The points score for a marginal assessment is the same as for a full one. The impact of marginal assessments is only taken into account at the end - to decide between roles within the margin of potential equal value. Once the assessments are complete, the marginal assessments can be counted. Where a comparator has had the benefit of two marginal assessments, and a claimant has not had any such benefit, it is legitimate to conclude that the differences in demand between the roles were trivial, despite their scores being two level steps apart. The same conclusion can permissibly be reached where the scores are one level step apart, but the comparator role had one more marginal assessment in their favour than the claimant did.
298. This test can be expressed mathematically. In our scoring system, each marginal assessment counts as minus one (-1). The marginality score will be the aggregate of all the minus marks for each marginal assessment. If there were any marginal assessments, the marginality score will always be a negative number. If all the assessments were full assessments, the score will be zero. Where two roles (Claimant A and Comparator B) are compared head-to-head, the impact of marginal decisions is determined by subtracting the marginality score of Comparator B from that of Claimant A. If Comparator B had the benefit of more marginal decisions than Claimant A had, the difference will be a positive number. That number is then multiplied by the value of a level step (for example, 10 points), then added to Claimant A's score. If the marginal decisions all cancelled each other out (for example, they had two each), there will be no score to be added to the claimant's aggregate score. Claimant A's enhanced score is relevant only to the direct comparison with Comparator B. So far as the other comparators are concerned, the original score is unaltered.
299. Here are two worked examples:

Claimant A has an aggregate score of 260 points. Comparator B has an aggregate score of 280 points. Claimant A had the benefit of one marginal decision. Her marginality score is therefore -1. Comparator B had the benefit of three marginal decisions. His

<p>marginality score is -3. When his marginality score is subtracted from her marginality score, the difference is +2. This is worth an extra 20 points to be added onto Claimant A's score. Her score is now 280 points. Her work was of equal value to Comparator B's work.</p>
<p>Claimant C has an aggregate score of 290 points. Comparator D has an aggregate score of 300 points. Claimant A had the benefit of two marginal decisions. Her marginality score is therefore -2. All Comparator D's assessments were full, without any marginal assessments. His marginality score is 0. When Comparator D's marginality score is subtracted from her marginality score, her score remains unchanged at -2. Notionally this would result in a subtraction of 20 points from Claimant C's score. It means that Claimant C remains adrift of Comparator D and their work is not of equal value. It does not, however, affect the equal value question as between Claimant C and Comparator B. Her score remains higher than Comparator B's score and her work remains of equal value to his.</p>

Unassessed demand

300. Where we identify an unassessed demand, we have to decide whether to score it under a factor plan or leave it to a head-to-head assessment within the margin of potential equal value. Our decision, and reasons, appears under the heading of the relevant factor.
301. Where we decide to leave an unassessed demand to the end-stage determination, we have decided to proceed as follows:
- 301.1. First, we identify two roles within the margin of potential equal value. For want of a better label, we call them Claimant E and Comparator F.
 - 301.2. Second, we decide whether it is possible to assess one role as being clearly more demanding than the other. If the answer is unclear, the determination of the equal value question remains as it was before.
 - 301.3. If Comparator F's role is more demanding than Claimant E's role, we revisit any finding of equal value that resulted from the comparison of marginal assessments. If the scores had been exactly equal, we determine that Comparator F's additional demand means that the roles were not of equal value.
 - 301.4. If Claimant E's role is more demanding than Comparator F's role, we assess the extent of additional demand. Is there just one level step, or obviously more than one level step?

- 301.5. Having established the correct number of level steps' difference, we add the equivalent score to Claimant E's total.
- 301.6. If the new total is equal to or greater than Comparator F's aggregate score, the roles are of equal value.
302. A further worked example ought to make our methodology clearer:

Claimant E has an aggregate score of 250 points. Comparator F has an aggregate score of 270 points. Following comparison of marginality scores, Claimant E's score is increased to 260. Claimant E has an obviously more demanding responsibility for customer goodwill than Comparator F had. The difference is equivalent to two level steps. Claimant E's score is increased further to 290. This means that Claimant E's work is of equal value to Comparator F. It does not, however, mean that Claimant E's work was of equal value to Comparator B (whose score was 280). This is because Claimant E and Comparator B were not within the margin of potential equal value.

Burden of proof

303. When comparing roles directly, we must keep in mind that the onus is always on the claimants to prove that their work was of equal value. This is particularly important to bear in mind when factoring in any unassessed demands at the final stage of the equal value test.

Chapter Seven - Knowledge

Issues related to the Knowledge factor

304. It is common ground between the experts that knowledge is a distinct demand which should be assessed using a separate factor. The knowledge factor should capture the demand in terms of the knowledge that the jobholder needs to acquire in order to carry out the role competently. The factor should attempt to measure the range of required knowledge. There should also be an assessment of the complexity of that knowledge. (Mrs Hastings preferred the word, "depth", but we did not see any real difference of substance.)
305. The experts agree that the frequency of any particular task or activity is irrelevant to how demanding the knowledge requirement is. For example, Mr Sayeed (Iteration 2) needed to know how to do the work in the Battery Bay whether he did it once per week or once per month. It is also undisputed that the knowledge needed for a role is distinct from the skill or effort that is needed to carry it out.

306. Measuring the range, or breadth, of knowledge involves a quantitative assessment of how many different things that the role holder has to learn, and a qualitative judgement about how similar or different they are. That proposition, which is Asda's positive case, was put to Ms Branney, Leigh Day expert, and she agreed with it.

307. The key disputes of principle appeared to us to be:

- 307.1. What, if anything, should be measured in addition to the breadth and depth of knowledge, in particular:
 - (a) The Asda experts say that an additional driver of demand is "the difficulty of ... demonstrating that knowledge"; and
 - (b) the IEs take the view that the factor should also assess "how that knowledge is obtained";
- 307.2. Whether differences in breadth (or range) of knowledge were small enough to be adequately captured in the modifier, or whether they gave rise to differences in demand that should be reflected in the level definitions;
- 307.3. Whether depth of knowledge could be adequately measured by the length of time it took to acquire that knowledge;
- 307.4. Whether level definitions should include terms (such as "greater knowledge") that were defined by reference to other level definitions; and
- 307.5. The extent to which the rigour of testing made a role more or less demanding.

308. Another issue which we raised for ourselves was the extent to which this factor double-counted the demands that the experts all measured under the factor of Physical Skill.

Relativities

309. When it came to the individual assessments, there was some measure of agreement between the experts about the spread of roles across the knowledge factor. The Personal Shopper role was acknowledged by all the experts to be the least demanding of all the roles. All the experts agreed that Miss Gibbins' Section Leader role was the most demanding of the in-store roles. They also agreed that Mr Haigh's role had the highest knowledge demands of the depot roles (although the Asda experts also placed Mr Morris at the same level as Mr Haigh).

Facts relevant to the knowledge factor

Recruitment

310. Asda did not stipulate any required level of physical skill or knowledge for job applicants. We take this to mean that Asda anticipated that the skills and the knowledge could all be learned and honed during the jobholders' training.

Demands of induction training

311. All colleagues, whether in-store or in the depots, received two-day Best Welcome induction training where they learned about Asda's policies and

procedures. It is agreed that the demands of induction training were broadly comparable as between lead claimants and comparators.

- 311.1. All the lead claimants received induction training called “Best Welcome”. This consisted of a two-day course. During the course, store colleagues were taught about Asda’s core policies and procedures. Amongst other things, they learned:
 - 311.2. policies for recycling.
 - 311.3. a 60-minute training on Warm and Friendly Customer Service, including a 30-minute video
 - 311.4. the main equipment used in store: roll cages, hand pump truck (HPT), Dalek (kick-stool) and replenishment trolley, and how it was used safely.
312. All new starters were familiarised with the Challenge 20 policy, which was designed to ensure that chilled goods were never left out of a chilled environment for more than 20 minutes.
313. Each component of the Best Welcome training was concluded with a testing process or “validation”. The test consisted of a “quiz” of 20 questions. The role holder was required to achieve a score of 100 per cent in the test. If she did not answer all 20 questions correctly, her manager would coach her through the answers. The time and date of the coaching would be noted on the quiz book and initialled by the colleague and the manager. If the jobholder answered 4 or more questions incorrectly (80% score or less), she had to retake the quiz. On the re-test, she was required to achieve 100% or she would have to undergo the Best Welcome course again.
314. Warehouse colleagues also had a two-day induction course. They learned about Asda’s policies and procedures. They were taught the “rules of the road” in the depot. This included the signs which showed the driver the direction of travel for each lane. Training emphasised the importance of health and safety, accuracy and targets.

Demands of continuation training

315. All store colleagues received annual mandatory training. Shop Floor Assistants were required to complete a multiple-choice test to check their knowledge of health and safety and diversity. Additionally, they underwent annual refresher training, which lasted 30 minutes.
316. Warehouse Colleagues underwent brief refresher training on their activities and equipment. In broad terms, the demands of the refresher training were equivalent to the Shop Floor Assistants’ annual training.

Role-specific knowledge

317. We concentrate here on the knowledge that the role holders had to learn that was specific to their roles.

Personal Shopper

318. Ms Hills, the Personal Shopper, had to know how to use a Multi-Order Picking Trolley. This trolley contained two stacks of totes (deep trays), each of which could be pulled out like a drawer. There was a separate tote for each order.

Each stack of totes was 4 or 5 high, depending on the precise period under consideration.

- 319. She had to operate a Palm Pilot, a hand-held device with a screen, which informed her which item to pick next. She had to know how to use the mobile printer for the Palm Pilot.
- 320. If an ordered item was not on the shelves, she had to pick an item that was “Equivalent, Bigger, or Better”. A laminated printed decision tree was supplied to her to help her choose an appropriate substitute. Her own knowledge would be needed to judge what was a higher quality brand. She had to know how to respond to customer queries, primarily about where products were located. As she gained experience, she learned more about the location of the items in store, and was expected to use that knowledge to assist customers.
- 321. Her role-specific training included learning about how to respond to customer queries and complaints.
- 322. Training in these aspects of the role was delivered to Ms Hills “on the job” over a four-week period.

Checkout

- 323. Ms Ashton worked as a Checkout Operator at Asda’s Accrington Superstore. The knowledge that Ms Ashton needed, over and above the knowledge required for all SFA roles, was:
- 324. Knowledge of all the equipment at the checkout, including the conveyor belt, bagging area, till drawer, keyboard, scanner, hand-held scanner, electronic payment card reader and de-tagging equipment
 - 324.1. Scanning and security techniques
 - 324.2. Knowledge of payment processes. This included knowledge of how to detect counterfeit banknotes, common errors with payment card chips, procedures to follow when taking payment for items that were “not on file”, and what vouchers (for example, “Healthy Start” vouchers) were accepted for different transactions.
 - 324.3. Knowledge of sale restrictions. This included quantity restrictions, such as paracetamol. It also included Challenge 25, which required Ms Ashton to ask for proof of age to a young-looking customer wishing to buy age-restricted items. These included alcohol, knives, fireworks and classified videos on DVD. Ms Ashton did not have to memorise every restricted item, but in practice she knew what they were.
 - 324.4. Knowledge of the prohibition of proxy sales.
- 325. Training on all these topics was delivered over a 4-week period. We do not know what proportion of that training was made up of learning the physical scanning and de-tagging techniques.

Edible Grocery

- 326. Judith Forrester’s role title was Shop Floor Assistant – Edible Grocery. She worked at the Asda Superstore in Ashton-under-Lyne. Her core role was to replenish supermarket shelves with packaged ambient food. Over the relevant

period, she worked in the confectionary, biscuits, cereal, cosmetics and baby and toddler sections.

327. She needed to know where each product was located within those aisles. She had to arrange items to the correct depth, which is to say, the correct number of items to put on the shelf, front to back. The required depth was stated on the product label. Ms Forrester had to know where to find that information.
328. Ms Forrester had to remember her induction training about how to use a roll cage. She was not just familiar with what a roll-cage did, and how it should be used. She also became more practised at putting it together and manoeuvring it skilfully. (We mention this in a separate paragraph, because it foreshadows a debate about how to measure the demand of acquiring that skill.)
329. One of Ms Forrester's subsidiary activities was "breaking down". She would go to a pallet that had been brought in from the Warehouse, remove items from the pallet and put them into roll cages for different departments. She was required to know how to use a hand pump truck and safety knife. She had to know which products were sold in which departments in order to choose the correct roll cage. This was not complex knowledge. For example, a mixed delivery regularly consisted of baby food, pet food and electrical items. It was relatively easy to work out the departments in which they were sold.
330. Ms Forrester was required to know what to do with surplus stock. Sometimes she would take it to the overstock area of the warehouse, and needed to know where to put it. Some items were "top-stocked". This is a piece of Asda-jargon. It refers to the top shelf of the supermarket aisles that are slightly out of reach for customers, usually accompanied by a sign informing customers that the shelf is not for customer use. Top-stocked items were stored on that shelf. Ms Forrester needed to know which items were for top-stocking, instead of taking to the warehouse. If an item was to be top-stocked, she needed to know which shelf to use and how to use a three-step top-stocking step-ladder.
331. When replenishing, Ms Forrester was expected to know the difference between "Use By" and "Best Before" labels, and to use her own judgement about whether a product was of satisfactory quality, by applying the "Would I Buy It?" guidance. She was trained on date codes and markdowns as part of her job-specific training.
332. Ms Forrester learned about Challenge 25 and volume restrictions but did not have to apply that knowledge, because those policies were enforced at point of sale.
333. Ms Forrester needed to know to respond to customer queries. Some of that knowledge was gained from the 30-minute video shown in her Best Welcome induction. But that video essentially just taught her to smile and be polite, and why it was important. As well as that, Ms Forrester also needed to know:
 - 333.1. Product locations: which products could be found in which aisles, and where promotional items were usually displayed;
 - 333.2. Information about products, which she gained either from her own knowledge, reading product labels in response to a query, or by asking a colleague or manager;

- 333.3. Promotions. Ms Forrester was not required to educate herself about new lines and products, but was required to deploy the knowledge that she picked up from replenishment;
 - 333.4. What questions to ask in order to clarify a customer query (for example, if a customer asked where to find baby milk, Ms Forrester needed to know that there were different kinds of milk for babies of different ages and weights, and that some milks were suitable for babies with colic; she also needed a similar level of knowledge to assist customers with selecting disposable nappies);
 - 333.5. Polite words and phrases and manners, drawing on social interactions outside of work.
334. Ms Forrester was required to know how to check shelf-edge labels, to know that they corresponded accurately to the grocery goods she was putting on the shelves. She had to know the guidelines for “facing up” (explained in more detail at paragraph 642 below).
335. As part of her 4-week Grocery training, Ms Forrester was shown a Telxon handheld terminal. She was not trained on any particular process or way to use that piece of equipment.
336. Grocery-specific training was validated by demonstrating tasks for her manager and then sitting a written test consisting of 10 questions. If she answered a question incorrectly, her manager would explain the correct answer, which she and the manager had to acknowledge by initialling the answer on the form. There was no such thing as a “pass” or “fail”. Wrong answers would not have required Ms Forrester to re-take the training.

Chilled

337. Pauline Ohlsson worked in the chilled aisles at Asda’s Huyton Supercentre. Like Edible Grocery, her role mainly consisted of replenishing stock. She used similar equipment. She did not need the same depth of product knowledge of items such as baby food that Ms Forrester needed to have. The range of some chilled foods, however, was much greater. For example, Asda sold 338 different types of cheese.
338. Ms Ohlsson received four weeks of job-specific training, as Ms Forrester did.

Home & Leisure

339. Linda Darville worked in the Home & Leisure Department of the Boldon Supercentre in Tyne & Wear. Her role was primarily to replenish non-edible stock ranging from light bulbs to televisions.
340. We give a more detailed description of Ms Darville’s role under the heading of Planning & Organising.
341. Ms Darville received four weeks’ on-the-job training. This included specific training on how to store and sell fireworks. The fireworks training was refreshed annually with a short video and a two-page form for her to sign.

Bakery

- 342. The Hamilton store (where Ms Hutcheson happened to work) had an in-store bakery. Mrs Catherine Gardner was employed to work there. Her role was Shop Floor Assistant - Bakery In Store.
- 343. Following her induction training, Mrs Gardner was trained on the job for a period of 12 weeks.
- 344. For her role, Mrs Gardner needed to know how to use a Telxon to “mark down” bakery products for a quick sale.
- 345. Some of the bakery items were prepared from frozen. Mrs Gardner collected these items from the freezer, and had to know the defrosting times so they could be baked at the correct time.
- 346. There were about 200 bakery products in store. Mrs Gardner had to know which products were baked from frozen, which were freshly baked in store and which were pre-baked and thawed.
- 347. Mrs Gardner knew how to remove hot-baked goods (such as rolls) from the ovens, place them onto cooling racks and move them around the bakery. She had to know the cooling times for the hot goods.
- 348. She acquired the skill of flipping items such as pancakes off a hotplate.
- 349. Once the freshly-baked rolls were cool enough, Mrs Gardner had to package them. For this, she needed to know how to use an “L-sealer”: an L-shaped heat clamp for heat-sealing plastic wrapping. She also needed to know how to print a label for the new package.
- 350. Mrs Gardner used other equipment, such as a pricing gun and mechanical bread slicer.
- 351. One of the novelty features of the bakery was a Photo-cake machine. It had relatively simple controls. As well as knowing how to operate it, Mrs Gardner had to know which kinds of photographs were allowed and which photographs were prohibited.
- 352. In the iteration with which we are concerned, Mrs Gardner had to fill doughnuts in addition to her other tasks. She acquired the physical skill of injecting the doughnuts with filler using a syringe, and had to know what the different toppings were.
- 353. Mrs Gardner was expected to acquire knowledge of the types of product in her department by attention as she replenished, and then used that knowledge in her interactions with customers.

Produce

- 354. Julie Wilby’s job title was Shop Floor Assistant – Produce. The main purpose of her role was to replenish fruit and vegetables in Asda’s store in Hull.
- 355. Her training took 12 weeks.
- 356. As part of her training, she was given a Product Quality Guide with guidance about what to look for when deciding whether fruit and vegetables were acceptable to display. It contained photographs showing examples of different types of produce that were fit for sale. They were shown alongside photographs

of the same fruit or vegetable in an unsaleable condition. Her ultimate decision was, Would I Buy It? That needed to be an informed decision, and for that decision to be informed, she needed to know what good and bad looked like, either from the Product Quality Guide or from her own knowledge.

357. Mrs Wilby was also trained on how each item of produce should be stored.

George

358. The Asda Superstore in Aintree, Merseyside, had a clothing and footwear department, known by its household brand name, George. Janet O'Donovan worked there. Her main task was to replenish and display "Girls' Kidswear".

359. As with other Shop Floor Assistants, Mrs O'Donovan was entrusted with a Telxon for certain activities. For markdowns, Mrs O'Donovan was also issued with a Paxar handheld terminal. The Paxar had an in-built portable printer.

360. Mrs O'Donovan worked on the George till and needed to know how to operate a checkout.

361. During her first two weeks, she was tested on generic policies.

362. Mrs O'Donovan had a 12-week probationary period. We do not know how much of that time was spent in on-the-job training. At some point during that time, she was tested on her job-specific knowledge.

363. In addition to her induction training, she also had to know:

- 363.1. The basic legal framework relating to clothing and footwear
- 363.2. General principles of replenishment and the use of the Telxon, similar to other roles
- 363.3. How to dress mannequins
- 363.4. How to use and maintain the Paxar
- 363.5. How to display Point of Sale signage
- 363.6. Policies relating to markdowns and
- 363.7. The George 100-day guarantee.

Process

364. Pauline Trickett worked in Asda's Rawtenstall Superstore as a Shop Floor Assistant – Process. Her main responsibility was to keep the Perpetual Inventory system up to date for her store. In practice, this meant reconciling the quantities of actual stock on display and in the back-ups with the quantities of stock recorded in the Perpetual Inventory as being in those places.

365. The Perpetual Inventory was hosted by a platform called SMART.

366. Mrs Trickett used a Telxon to gain access to SMART and input changes to the data. She had to be familiar with the Be A Merchant (BAM) system on the Telxon, by which Asda House raised queries. She had to know how to review OSCA alerts and how to undertake price change searches. Asda was legally responsible for compliance with product labelling requirements. Mrs Trickett was required to know the essential information in a Shelf-Edge Label and check that it

was accurate for the products on display. This was reinforced by job-specific training on Trading Standards requirements.

367. Mrs Trickett needed to know how to use all the equipment (roll cages, Dalek) that replenishment workers needed for their roles. Her role took her all over the store and she needed to be familiar with its layout.
368. She was expected to use her product knowledge in the same way as other Shop Floor Assistants. She had knowledge of the markdown process similar to George and Produce.
369. Like Mrs O'Donovan, Mrs Trickett had a 12-week probationary period which included a knowledge validation test. We do not know when in that period the test came.

Counters

370. Mrs Webster worked on Counters at the Asda Supercentre in Wigan. There were four counters: Deli, Rotisserie, Pizzas and Fish. Mrs Webster had to know how to work at each of them. She had to know how to cook food in an oven using pre-programmed settings, and test the temperature of sample items in a batch.
371. At the Pizza counter, she prepared pizzas and cooked them in an oven. Asda offered 16 different core-range pizzas, plus made-to-order bespoke pizzas using up to 12 different ingredients. These were set out in the Product Information Guides (PIG). Mrs Webster was not obliged to learn the different ingredients for each topping by heart, but she could work faster if she sprinkled the ingredients from memory, and in practice, that is what she did.
372. Mrs Webster had to learn how to gut, fillet, de-bone fish in such a way as to minimise waste and eliminate food safety risk. She learned the process. She also practised and mastered the technique. Mrs Webster had to understand how to rotate seafood and arrange it properly in a bed of ice to ensure that it was kept chilled. Food on the fish counter was quality-checked at 20-minute intervals: Mrs Webster had to know how to carry out those checks.
373. Mrs Webster learned how to handle cooked and cold meats hygienically, and how to recognise potentially unsafe meat from its colour. Like Edible Grocery and Produce, she learned the difference between Use By and Best Before dates. She knew how to divide whole rotisserie chickens into portions.
374. Like other Shop Floor Assistants, she needed to be familiar with how to use the Telxon so she could mark down stock.
375. Mrs Webster received 4 weeks of job-specific training. Additionally, she underwent a fish course, delivered by a specialist trainer who came into store. The course lasted one week. We do not know how much of that training was devoted to the physical skill of preparing and gutting fish.

Warehouse

376. Readers will remember that Ms Hutcheson worked in the store warehouse in Hamilton. She received 12 weeks of training. She needed to know how to drive the forklift truck ("FLT"). This training was delivered by an external trainer over 3 days. At the conclusion of her training, she was tested by practical observations

and questions. She also drove a Reach Fork Lift, for which she received an additional day's external training.

377. Ms Hutcheson needed to know how to store fireworks, how to operate the scissor lift and clean the compactor. She needed to know how to build and break down a pallet of stock. She also had to know how to check and scan goods as they arrived.
378. Ms Hutcheson was a Queue Buster, although she was rarely called upon at the checkout after 2010. To be a Queue Buster, Ms Hutcheson needed to be checkout-trained and have the same level of knowledge as Ms Ashton.

Service Host

379. Ms Billings worked as a Service Host at the Queslett store in Birmingham. In broad terms, she managed queues in the checkout areas, dealt with individual issues at the checkout, and supervised the Self-Scan tills.
380. Before being considered for a role as Service Host, Ms Billings was required to be trained in the Checkout role and to have all the knowledge that that role required.
381. Additional knowledge requirements of the Service Host role included:
- 381.1. Knowledge of the Self-Scan checkouts and how they worked;
 - 381.2. Knowledge of common problems with the Self-Scan tills and how to troubleshoot them
382. Ms Billings' initial period of on-the-job training lasted 12 weeks. After she completed her probationary period, she did annual refresher training which consisted of watching a 30-minute video.
383. Additional post-probation training that was provided to Ms Billings included:
- 383.1. Training in relation to "shrinkage" (losses due to unwanted causes such as theft or errors)
 - 383.2. Refunds, fast lanes, customer care
 - 383.3. Unmanned checkout security (consisting of reading an information sheet and signing it)
 - 383.4. A runner coaching session split over 2 days and including a practical marshalling exercise.
384. Ms Billings was awarded a City and Guilds Certificate in 2011 to recognise her qualification as a Service Host.
385. Ms Billings also assisted on the Customer Service Desk and Kiosk. This additional work was identified by the Asda experts separately and assessed in its own iteration. They called it Iteration (b).

Customer Service Desk

386. Gillian Fearn worked in Chadderton, Manchester. Her full role title was Shop Floor Assistant - Customer Service Desk. She dealt with customers, one after another, and the various issues that they raised. In order to do so, she needed to know:

- 386.1. how to operate the checkout,
 - 386.2. how to sell National Lottery tickets,
 - 386.3. how to complete VAT forms,
 - 386.4. the refunds, returns and exchanges policies,
 - 386.5. how to operate the Customer Product Quality Claims (CPQC) system using a Personal Computer,
 - 386.6. consumer rights under the Sale of Goods legislation,
 - 386.7. policies on age-restricted goods such as alcohol and tobacco,
 - 386.8. how to operate PayPoint for payment of bills and
 - 386.9. the fireworks policy.
387. Electric mobility scooters and wheelchairs were available for customers with impaired mobility. This facility was called the "Scooter Club". Mrs Fearn needed to know how to operate the scooters and how to adjust the seat. She had to know how to train the customer to do the same.
388. As with the replenishment roles, Mrs Fearn was required to know the layout of the store and what products were sold where.
389. Mrs Fearn's job-specific training lasted 12 weeks.

Section Leader

390. Suzanne Gibbins was the Section Leader for Services at Asda's Byker Superstore in Newcastle-upon-Tyne. She was responsible for a team of about 90 colleagues on the shop floor.
391. Before starting the role, Miss Gibbins worked as a Checkout Operator, Service Host and on the Kiosk. As a pre-requisite to become Section Leader, she was required to have at least 6 months' experience, including experience or knowledge of the Key Colleague role. She had to have experience or knowledge of the Recruitment Squad and being a Training Buddy and Queue Buster. As part of her training, she spent 10 days at a Store of Learning. This was followed by on-the-job training spaced over a 100-day plan. She received job-specific health and safety training.
392. Miss Gibbins was required to know how to use 16 different systems and reports, including the FAST work scheduling system. She had to have the requisite knowledge for the Customer Service Desk.

Opelt

393. Mr Opelt's only activities were Large Case Pick and Manual Store Pick. He had 5 days of formal training. Two of those days consisted of the Best Welcome induction.
394. Mr Opelt learned to drive a low-level order picker (LLOP). This was a battery-Power Pallet Truck. The forks were adjustable in height, but only by a few centimetres: enough to move pallets without them scraping along the ground. Mr Opelt drove the truck by standing on a platform. He had to learn how to drive and park the LLOP safely, and how to do these things in circulation with pedestrians and the drivers of other mechanised handling equipment. He also

carried out a pre-operation inspection of the LLOP at the beginning of his shift. He needed to know what potential defects to look for. There were 15 simple checks, such as whether the horn was sounding and whether the hydraulics were leaking. Mr Opelt was provided with a checklist as a memory-jogger for each pre-operation check.

395. In order to learn how to drive the LLOP, Mr Opelt was required to undertake a total of 4 hours' training. The first part of the training was classroom based. Mr Opelt learned the theory, for example, about some of the basic provisions of the Provision and Use of Work Equipment Regulations. The theory session was followed by a 15-minute theory test. The questions had multiple-choice answers. The answers to some of the questions (for example Question 1) would be obvious to most candidates whether they had done any training or not. Mr Opelt could get up to three answers wrong and still pass. If he got a question wrong, the answer was explained to him.
396. When he passed the theory test, he was given a chance to practice driving a LLOP around a course. He sat a 20-minute practical test, which was assessed in a similar manner to a DVLA driving test. If he failed the practical test, he was required to retake both the theory and practical training.
397. Once he had passed the test, Mr Opelt was considered safe to drive solo around the depot.
398. Mr Opelt was issued with a hand-held scanner which he had to learn how to operate.
399. Picking was sequenced using automated voice commands sent to his headset by a device known as a Talkman. Mr Opelt had to know how to turn the Talkman on and off, and to input his details so the Talkman would be set to the pick designed for him. During the pick he had to use simple but correct voice commands to tell the Talkman what he had picked. As soon as he had confirmed the pick, the Talkman would direct him to drive to the next pick slot. Before 2011, he received equivalent instructions from an RDT screen mounted on the LLOP.
400. When Mr Opelt reached the bay to which the Talkman had directed him, he had to know which side of the aisle to park. He had to know that there were two or three pick slots per bay, and be able to identify the correct one.
401. As he stacked cases onto his pallet, he had to know to overlap the cases, rather than building separate towers on the same pallet. He had to know that safe stacking required heavier items to be at the bottom and lighter ones nearer to the top. He needed to know how to shrink-wrap his pallet once he had closed the pick.
402. In addition to the LLOP, Mr Opelt also had to use basic equipment such as empty pallets, roll cages, a safety knife and a printer.
403. As with all depot roles, Mr Opelt's first 13 weeks were treated as a probationary period. The purpose of the probationary period was to check that attendance was reliable, his attitude was satisfactory and his performance had reached the required level. No additional training was provided. Three reviews took place during the probationary period, spaced about three weeks apart. At the review, Mr Opelt's supervisor noted his attendance, his attitude, pick rate, accuracy rate, and careful handling. This was a check on standards and consistency of

performance. After his first week, he gained little extra knowledge, but would undoubtedly have become more skilled at driving and parking his LLOP quickly and safely. His picking targets were progressively increased, so he was required to pick at full speed by the time his probation period ended.

Devenney

- 404. Paul Devenney worked at the Didcot Ambient Distribution Centre, where Mr Ballard worked.
- 405. During his probation, Mr Devenney's only activity was Stock Pick. Once he had passed his probation, his range of picking activities expanded. He started a further activity called Handballing. This involved picking up loose cases of stock and stacking them on a pallet. When the stack had reached the correct height, Mr Devenney would shrink-wrap the pallet and put a label on it. To build up a pallet safely, Mr Devenney needed to remember to overlay cases rather than building separate towers on the same pallet. This was knowledge he already had from picking, just as Mr Opelt had. He was given 4 hours' training on this activity.
- 406. Mr Devenney was required to know how to operate a Power Pallet Truck, essentially a smaller version of a LLOP. He received 5 hours' training alongside colleagues. He also used a Pedestrian Power Pallet Truck, but does not appear to have had any separate training for this smaller piece of equipment.
- 407. Other activities done by Mr Devenney included Trammig, for which he was trained for 10-15 minutes, Chase Pick, which was taught in 20 minutes, Flow Pick, for which he was also trained for 20 minutes, and Pick By Line, which required 30 minutes' training. (We discuss Trammig and Pick By Line in more detail in relation to Mr Dennis' role, but they were essentially the same for Mr Devenney).

Uchanski

- 408. Mr Uchanski worked at the Lutterworth IDC. At the start of the Relevant Period, Mr Uchanski had been a Warehouse Colleague for about 3 months. Like Mr Opelt, he had to pass his LLOP test and pass his probationary period whilst doing stock-picking activities.
- 409. During his probationary period, Mr Uchanski received some training on handling flammable materials. This training lasted 1-2 hours.
- 410. By the end of his probation period, he had also learned to do the activity known as "Hygiene". This involved collecting waste material, such as shrink-wrapping, from around the depot, and moving it away using a LLOP. No separate training was required for Hygiene, as basic manual handling awareness was considered sufficient.
- 411. On 17 May 2009, Mr Uchanski attended a 1-2 hour briefing for Small Case Decant. This activity was a manual process of breaking apart full pallets of stock into individual cases, sorting them by product type, and placing the different products into totes. On 14 July 2010, he was given a 30-minute briefing on the new layout for small cases.
- 412. On 25 November 2009, Mr Uchanski learned a new activity, called Multishuttle Exceptions. The Multishuttle was an automated system which stacked totes of small cases from a conveyor onto dollies. He was responsible for the smooth

operation of the Multishuttle, including infeeding empty dollies and removing full dollies once they had been stacked. He had to identify and address any issues with totes being rejected by the Multishuttle. He had to know how to check a dolly for four functioning wheels, to operate a scanning gun and to operate the Multishuttle computer terminal. His training consisted of one day's practical demonstration and exercises.

- 413. After each of these new activities, Mr Uchanski given a few back-to-back shifts on the activity for his newly-acquired knowledge to "bed in".
- 414. This profile of activities was built up between August 2008 and March 2011. The period was broken down by the IEs into three iterations, but the Asda experts preferred to assess the whole period collectively as Iteration (a).
- 415. From March 2011 (IE Iteration 4 and Asda Iteration (b)), Mr Uchanski also worked on Putaways and MSP Replenishment. "MSP" stands for "Manual Store Pick". Both of these activities required him to drive a High-Reach Truck (HRT). He received 1-2 days' training in these activities. That training would normally have lasted 5 days, but an exception was made for Mr Uchanski. This was because he had independently completed an HRT course whilst working for a different employer.

Han

- 416. Mr Han was also based in Lutterworth. Over the relevant period, he learned how to do 11 different activities, although he ceased to do five of them. For some of these activities he had to learn how to use a Power Pallet Truck (like Mr Devenney's) as well as a LLOP.
- 417. Mr Han did three different types of picking activity, plus Small Case Replenishment. This latter activity involved putting totes of small cases onto a conveyor, scanning them, and then placing them at the rear of the small case pick shelves. For this, he needed to know how to use a scanning gun. Practical demonstrations and exercises for 1-2 hours were enough for him to become proficient at this activity.
- 418. Another of Mr Han's activities was End of Chutes. Mr Han stood by an automated conveyor that distributed totes into chutes, each one destined for a store. He took the totes from the conveyor, put them on a dolly, strapped the totes down and put the dollies into a holding area. He received one day's training for this activity, supplemented by a short training session on straps a few months later. The session lasted 5 to 10 minutes.
- 419. From October 2008, Mr Han added SCR4 Replenishment, which involved taking cases from pallets and putting them into totes, which he then moved using a LLOP. His RDT screen told him what stock to replenish. We do not know whether any additional training was needed, but we cannot imagine that it would have lasted very long.
- 420. Shortly afterwards, Mr Han learned three different Goods In activities: Rear Tipping and Checking, Handballing and Infeeding. When Infeeding, Mr Han had to know how to operate the computer terminal to update the Perpetual Inventory. The automated system had up to 29 different reasons for rejecting a pallet. Mr Han had to know what to do if a pallet was rejected. The reason displayed on the screen (for example, overhanging), would generally give Mr Han the answer.

He had to know the difference between a sound pallet and a defective one to avoid rejection in the first place. For these three activities combined, Mr Han received 3 days' training, which included practical demonstration and supervised work.

421. The addition of the three Goods In activities was thought by the Asda experts to merit a separate iteration (labelled "(b)"), but they did not give it a different score for the Knowledge factor.

Hore

422. Mr Hore worked in the Chilled Distribution Centre in Skelmersdale. As well as picking, Mr Hore was engaged in an activity called, "De-Kit". Essentially, De-Kit involved removing items such as empty pallets and collapsed roll cages from trailers, so that they would be ready to load with stock for delivery to stores. He moved the collapsed roll cages using a Beast. This evocative name describes a piece of manual handling equipment, similar to a LLOP, but with elongated forks. Before starting to drive the Beast, he passed a 4-hour training course which was additional to his LLOP training.
423. Another of Mr Hore's activities was Goods In. He "tipped" trailers of frozen stock, which is to say that he took containers of stock out of the trailers and deposited them for a colleague to check and scan. Mr Hore needed to be aware of different tipping procedures for different types of trailer.
424. For Tipping, Mr Hore drove a Power Pallet Truck (like Mr Devenney did in Didcot). It took him 4 hours to learn how to drive the Power Pallet Truck. The training course included a 15-minute theory test and a 20-minute practical skills test. He underwent refresher training on this piece of equipment at 2-3 year intervals.
425. Other equipment used in Tipping was relatively simple, such as bay door controls and a dock leveller.
426. The Goods In activity was learned over a period of approximately one week. For some of that week, Mr Hore was left to work unsupervised.

Makin

427. Peter Makin also worked at Skelmersdale. He was trained as a Loader. Like Mr Hore, he learned how to drive a Beast with 4 hours' training, and a Power Pallet Truck, also with 4 hours' training.

Ballard

428. Mr Ballard was the Warehouse Colleague at Didcot whom we mentioned in our introduction. He was engaged in four picking activities, each similar to the others. He also did Goods In activities, including Tipping, Trimming and Yard. (We have heard that Mr Ballard was also a Colleague Circle Representative, but none of the experts thought this made any difference to the demands of his role under this factor.)
429. Mr Ballard's Tipping activity involved removing stock from incoming trailers. When Rear Tipping, his work was essentially like Mr Hore's work. But ambient deliveries also arrived in containers and in curtain-sided lorries. It was for this

kind of tipping that he needed to use the Counter-Balance Truck (CBT) that we mentioned at the start.

430. Mr Ballard learned how to use additional, fairly simple, equipment such the controls for the bay doors and light switches, as well as a dock leveller and pallet inverter, and a scanning gun.
431. When side-tipping trailers, Mr Ballard was required to know how to pull back curtains on a curtain-sided trailer and how to lower the top decks of double-deck trailers, and some simple health and safety checks to be done before lowering the deck.
432. Learning to drive a CBT involved learning:
- 432.1. how to manoeuvre the CBT and adjust the forks;
 - 432.2. to drive the CBT backwards if the load on the forks blocked his line of sight;
 - 432.3. the requirement to tilt the forks after he had loaded a pallet, and that this was particularly important when operating in the rain or snow;
 - 432.4. how to carry out the pre-operation checks, using a template checklist that was slightly longer than the checklist for a LLOP, and covering checks that were not required for a LLOP, such as tyres, hydraulics, lifting and tilting mechanism, and the condition of the gas tank;
 - 432.5. how to refuel the CBT with liquid petroleum gas, and the additional safety precautions involved in refuelling;
 - 432.6. how to use a “slip sheet” attachment, designed to lift loose materials from the floor so they could be pushed onto a pallet;
 - 432.7. when operating a double-handed CBT, how to expand and collapse an additional set of forks; this was done by pushing a button;
433. To drive a CBT, Mr Ballard was required to undergo a week-long training course. At the end of the course, he was given a 20-minute theory test and a 35-minute practical skills test. Mr Ballard received refresher training every 2 or 3 years.
434. Whilst doing his Yard activity, Mr Ballard unloaded empty pallets from trailers using a CBT. There was no formal training on the yard. He learned by observing and asking colleagues on the first shift.
435. Mr Ballard also did Handballing, but unlike Mr Devenney, he did not receive any separate training. Asda considered that his basic manual handling training gave him sufficient knowledge.

Dennis (a) and (b)

436. Craig Dennis was another of the Didcot Warehouse Colleagues. Readers will become familiar with his name, because of the more specialised activities he did after September 2009 (Asda Iterations (c) and (d)). Before then, he did mainly picking and Hygiene, plus an additional activity known as Tramming. The IEs assessed this period as Iteration 1. The Asda experts decided on four iterations, two of which covered the IEs’ Iteration 1 period. These facts concentrate on the period from February 2009 to September 2009, which the Asda experts assessed as Iteration (b).

437. Mr Dennis started with Hygiene after he completed his probation. Mr Dennis was given a one-hour briefing and practical instruction. The main thing he needed to know was how to drive a LLOP, which he had already learned in his first week.
438. One of Mr Dennis' picking activities was called, "Pick By Line". He started the activity itself in February 2009, some 5 months after he had finished his probation.
439. Essentially, Mr Dennis was given a pallet or roll-cage of the same, fast-moving stock. He would then distribute cases of that stock into different containers, each for a different store. To learn Pick By Line, Mr Dennis was trained in the use of a Hand Pump Truck. It took about an hour to learn how to operate the truck. In addition, he was given a briefing on the Pick By Line process. This was all part of his initial stock-picking training during his first week.
440. Tramming, which Mr Dennis also started in February 2009, involved transporting goods around the depot at ground level. Generally, Mr Dennis did this using the LLOP. For tramming, Mr Dennis had to learn how to use the radio. The instruction took 15-30 minutes. Tramming took place in a different part of the depot, but no training was thought necessary to familiarise him with that.
441. Whilst engaged in Tramming, Mr Dennis had to know how to read a Tramming sheet. He had to be familiar with the Marshalling area and the Pick By Line grids, in order to know where various containers of stock should be deposited. He needed to know the most efficient way of getting from one side of the depot to the other. The Didcot depot was laid out in a grid. The most efficient way would almost always be the nearest permissible unobstructed lane across the depot.
442. Mr Dennis was not allowed to begin Pick By Line or Tramming until he had completed his 3-month probation, but there was no other reason why he could not have started these activities immediately. He did not need extensive picking experience in order to begin either Pick By Line or Tramming.

Dennis (c)

443. Iteration (c) under the Asda scheme, and the beginning of the IEs' Iteration 2, runs from September 2009. At that time, Mr Dennis was introduced to a new area of operation: Goods Out. Within Goods Out, the activity that demanded the most knowledge was Loading. Mr Dennis loaded containers of stock onto trailers for delivery to stores. The containers were pallets, roll cages, dollies and "shippers" (large boxes of items such as eggs).
444. Some of the knowledge required for Goods Out was broadly equivalent to the basic knowledge for Goods In. For example, Mr Dennis had to know how to operate the bay doors, scanning gun and Dock Leveller, just as Mr Ballard did.
445. The most complicated part of this activity was planning the load. Different trailers had different weight distribution requirements. Mr Dennis had to know the weight limits across each section of each type of trailer. He had to know where to place the straps across the load, and what type of strap to use. For example, on a curtain-side double-deck trailer loaded with roll cages, Mr Dennis knew that he should use two 1000kg curtain-to-curtain restraint straps.
446. He was given thirteen diagrams of load configurations for different types of trailer, and was expected to know about each of those configurations.

447. The configuration rules allowed for some leeway, or “flex”. Provided Mr Dennis knew what the limits were, he could vary loads by mixing containers (for example, placing pallets alongside roll-cages).
448. Trailers could be loaded more efficiently if pallets or roll-cages were consolidated. Sometimes, consolidation was necessary because the number of containers Mr Dennis was given exceeded the maximum number that would fit into the trailer. So, Mr Dennis would take two partially-stacked pallets of stock, remove the wrapping, and put the stock from one pallet onto the other pallet. This also required knowledge of rules about which kinds of product could be combined. (For example, non-edible products were not to be mixed with food.) Similar rules governed the consolidation of other containers such as roll cages, and Mr Dennis had to know those, too. He had to know how to scan the consolidated load in order to record the consolidation. He also had to know the capacity of each trailer, in order to work out how many containers to consolidate.
449. Mr Dennis was required to complete a Load Card for each trailer that he loaded. The Load Card indicated which pallets and other containers had been consolidated.
450. It took a one week’s training before Mr Dennis could start Loading.
451. Mr Dennis also learned a separate process called Tipping Dee-set Trailers. This involved taking fast-moving stock from one side of the depot to the other. There was a separate procedure for checking weights and restraints that Mr Dennis had to learn.

Dennis (d)

452. In October 2011, Mr Dennis learned how to drive a High Reach Truck (HRT). This was so he could begin a new activity called Putaways. Essentially, Putaways involved lifting pallets of stock up to the high racking shelves and safely depositing them there. A year later, he began Letdowns. This was essentially the same procedure in reverse.
453. The training course for the HRT was one week. He needed to know how to conduct the pre-operation checks. The pre-operation checklist was similar in length to the checklist required for a CBT. He had to learn how to operate the controls. Part of this training, of course, involved learning which controls did what. That was the simple bit. Mr Dennis then had to practise using those controls to manoeuvre pallets in and out of small spaces, sometimes outside his direct field of vision. To a large extent, what Mr Dennis was doing here was honing his physical skills.
454. For both Putaways and Letdowns, Mr Dennis needed to learn the procedures to follow if he noticed an unstable pallet on the high shelves. This was distinct from learning a physical skill.

McDonough

455. Mr McDonough also did Putaways and Letdowns using a HRT, but in the Frozen Chamber at Skelmersdale. He did not do any Loading work.

Welch

456. Paul Welch also worked in the Skelmersdale CDC. As well as Stock Pick, Mr Welch was engaged in Hygiene and Pick By Line (similar to Dennis (a) in Didcot). He needed to know how to use a LLOP, Power Pallet Truck and Hand Pump Truck.
457. Towards the end of the Relevant Period, Mr Welch started doing Goods In – Breaking Down. This activity required little if any additional knowledge. Such knowledge was not thought by any of the experts to make a difference to the overall demand.

Matthews

458. Paul Matthews (also at Skelmersdale) did Goods In (Tipping). This activity was similar to what Mr Hore did, but in the Chilled Chambers, rather than the Frozen Chamber. For Tipping, Mr Matthews used a Power Pallet Truck or a Hand-pump Truck. This was different from Didcot, where Mr Ballard drove a CBT for Goods In.
459. Another of Mr Matthews' activities was Goods In (Receiving). Here, Mr Matthews had to learn how to input commands into the Receiving Trolley or scanning gun in order to book containers in as they arrived. He had to operate a printer.
460. Like Mr Welch, Mr Matthews also did Pick By Line and Breaking Down. He was engaged in Marshalling, similar to Mr Dennis.

Sayeed (a)

461. Ahmad Sayeed worked at the Lutterworth IDC. As with the other depot workers, he gradually expanded his portfolio of activities.
462. By May 2012 (the end of Asda experts' Iteration (a)), Mr Sayeed had learned LLOP-based picking activities, Marshalling, Hygiene, Small Case Pick, SCR4, Small Case Replenishment, Small Case Decant and Large Case Replenishment and Loading. He also operated Lifts, which involved transporting containers safely in and out of a goods lift using a Power Pallet Truck.
463. Until July 2010, Mr Sayeed also worked in the Battery Bay. (His Battery Bay attribute was assessed as a separate iteration by the IEs, but included by the Asda experts as just one of his general profile of activities he had to learn). To work in the Battery Bay, Mr Sayeed had to learn:
- 463.1. How to carry out a pre-operation check of a battery cart and how to operate one;
 - 463.2. How to identify damaged batteries;
 - 463.3. How to change batteries between each type of mechanised equipment, and to understand why it was important to do it safely;
 - 463.4. How to connect and disconnect a battery charger and how to turn it on and off; and
 - 463.5. How to deliver first aid in the event of an accident in the Battery Bay area.
464. He needed to know how to use the same range of equipment as Mr Ballard, but also used a Beast (as Mr Devenney did). For De-Kit, Mr Sayeed usually used a

Power Pallet Truck. If it was available, Mr Sayeed preferred to use a Drive-on Low Level Order Picker. This piece of equipment had its own acronym: a DOLLOP. It looked just like a LLOP, but was designed for driving over a dock leveller. Mr Sayeed's job description does not mention any separate training he received on a DOLLOP.

Sayeed (b)

465. The second Asda iteration of his role begins in May 2012, when Mr Sayeed was trained to use a CBT. This was for loading semi-deck trailers. He later learned to drive a Beast, but that did not require significant additional training.

466. Mr Sayeed did not need to know how to work in the Battery Bay for this second iteration.

Beaumont and Dolan

467. We return to Didcot and two more colleagues who worked there. Their names were Paul Beaumont and Martin Dolan.

Beaumont (a)

468. Until August 2009, Mr Beaumont's mix of activities was similar to that of Dennis (c), which is to say, picking and Loading.

Beaumont (c)

469. In August 2009, Mr Beaumont also started driving a HRT and, by the end of 2009, he was working on both Putaways and Letdowns. This feature was singled out for Mr Beaumont's Iteration (c). It broadly equates to Dennis (d).

Dolan (b)

470. Mr Dolan drove a HRT all through Relevant Period, doing Putaways and Flow Racking Replenishment. This is his Iteration (b). Broadly speaking, he did what Mr McDonough did, but in an ambient environment.

Beaumont (b) and Dolan (a)

471. Late in 2009, Mr Beaumont trained to be a First Aider. Mr Dolan was already trained, but did not take on the responsibility until 2013. First Aid was recognised all round to be an attribute worthy of separate assessment, which we see in the Asda experts' Beaumont (b) and Dolan (c). First Aid knowledge was assessed cumulatively with the knowledge needed for the HRT iterations of their roles.

472. Mr Dolan's First Aid training consisted of:

472.1. A 4-day external training course in 2005, provided through Wakefield College,

472.2. Two two-day refresher courses in 2008 and 2009, and

472.3. A 4-day external training course in 2013 to renew his accreditation following his transfer to Didcot.

473. Mr Beaumont went on a 18-hour First Aid training course in 2009. The course was administered by an external body, Prime First Aid. He had a 12-hour refresher course in 2012.

Morris

474. Andrew Morris worked in the Skelmersdale CDC. As with Mr Beaumont and Mr Dolan, Mr Morris had a First Aid attribute. He also had other attributes which were assessed along with First Aid. The additional attributes were:

474.1. Mechanised Handling Equipment Instructor; and

474.2. Manual Handling Instructor.

475. Together, the attributes were added to his core role and assessed as Asda Iteration (a). Without the attributes, his core role (Iteration (b)) was similar to that of Mr Beaumont's Iteration (c) and Mr Dennis' Iteration (d). He drove a HRT and loaded trailers.

476. To be an effective instructor, Mr Morris needed to know the principles of manual handling that he had learned on induction, but in enough depth to be able to teach them and not just apply them. He needed to know how to use pre-prepared materials to deliver a training session, including how to adapt his methods to suit the different people in the room. He had to learn how to assess and evaluate other peoples' operation of LLOPs and PPTs.

477. Before he started as an equipment instructor, Mr Morris attended an external course, which lasted somewhere from three to five days. His manual handling instructor's course lasted two or three days. This was on top of his First Aid training.

Haigh

478. Andrew Haigh was recognised by all the experts as having the most demanding role amongst all the depot workers. He was based at Lutterworth.

479. It is agreed that we should assess four iterations of his role.

480. Iterations (a) and (c) relate to the period August 2008 to June 2009. Iteration (a) included two attributes:

480.1. Mr Haigh acting up as Team Supervisor on Small Case Decant and End-of-Chutes; and

480.2. Mr Haigh's involvement in the Recruitment Team.

Haigh (c)

481. The purpose of Iteration (c) was to strip out these attributes to reveal Mr Haigh's basic role during this period. His basic role was similar to that of Mr Ballard in Didcot: a small range of activities requiring relatively little time to learn, but with the addition of having to know how to drive a CBT.

Haigh (a)

482. To participate effectively in the Recruitment Team, Mr Haigh had to know:

482.1. how to assess and evaluate candidates through observation and interview;

482.2. how to conduct an interview, including leading and responding to questions and evaluating responses;

482.3. how to complete an assessment centre form;

- 482.4. techniques for explaining and demonstrating depot processes and activities to candidates during their tour of the depot; and
 - 482.5. knowledge of Asda's policies, benefit schemes and the nature of the role in sufficient detail as to provide this information to new recruits.
483. Mr Haigh underwent two days' dedicated training in order to join the Recruitment Team. Once he started, his recruitment work was monitored for 12 weeks. No doubt he developed his communication skills during that time and demonstrated his abilities satisfactorily. There is no evidence that he was expected to learn anything new during that 12-week period.
484. As a Team Supervisor on both Small Case Decant and End of Chutes, Mr Haigh was required:
- 484.1. To know how to carry out the substantive role.
 - 484.2. To learn how to set up and close down a shift. This involved knowing how to interpret a Shift Plan to work out how many workers were needed on the shift.
 - 484.3. To gain an understanding of the experience of each of his colleagues, in order to allocate combinations of workers appropriately to each floor.
 - 484.4. To know some fairly basic information to share with colleagues during the "huddle" at the start of the shift. This included break times, the planned workflow, how many replenishments were needed during the day.
 - 484.5. To know how to complete a holiday request form.
 - 484.6. To learn how to review and interpret information on the Warehouse Management System. He needed this knowledge for two broad purposes. One was to manage the flow of containers. The other was to monitor the performance of members of his team.
 - 484.7. To know how to operate the Tannoy public address system.
 - 484.8. To understand the procedures to follow when handling shift swap requests.

485. Mr Haigh was not separately trained to be a supervisor.

Haigh (b)

486. In early 2010, Mr Haigh stopped driving the CBT. He remained in the Recruitment Team. His supervisory responsibility moved from Small Case Decant (etc) to Large Case Replenishment. These two attributes were assessed at Iteration (b).
487. Mr Haigh was trained for 2-3 days on Large Case Replenishment. As a supervisor, he needed to acquire similar types of knowledge to what was needed as a supervisor on his previous activities. Because we are assessing a separate iteration, we assume (artificially), that he had to acquire this knowledge from scratch.

Haigh (d)

488. In Iteration (d), without the attributes, there was little to tell Mr Haigh's role apart from Mr Han, or Mr Uchanski's Iteration (a).

The IEs' scheme for Knowledge

489. Here are the IEs' level definitions and modifier definition for knowledge:

Considers the depth and breadth of general education and specialist knowledge/skills jobholders require to carry out duties, and how this knowledge is obtained.	
Moderated (+ or –) for size of range in relation to equipment or processes.	
LEVEL	LEVEL DESCRIPTION
A	A thorough knowledge of the policy framework, corporate aims and procedural architecture of the whole workplace will be required to manage one or more operations, staff groups, or both. The experience necessary to achieve this level of technical and organisational expertise will be obtained through exposure to several annual work cycles in at least two or three different operational areas.
B	Experience in a wide range of technical/practical skills in several roles will be necessary to carry out duties effectively. A thorough understanding of the operational procedures of the whole workplace/premises will be necessary and this knowledge is likely to have been gained through hands-on working through at least one full annual cycle.
C	Experience/training in a range of technical/practical skills will be necessary to fulfil the duties of the role. Jobholders will also have a good understanding of the work of associated teams in their workplace. This knowledge will have been gained through a combination of on-the-job guidance from colleagues and supervisors and more formal, certificated in-house training. A few months exposure to regular work cycles will be necessary to achieve standard competence.
D	Basic literacy and maths skills sufficient to read and understand work related documentation such as operating instructions or H&S advisory materials is required. Some experience of team working, customer service or the use of tools, equipment and/or IT will be expected. Essential knowledge of ASDA-specific procedures, rules, standards, equipment and IT systems will be learned on the job over a few weeks.

E	No experience or academic qualifications are required, and the skills and organizational knowledge required for adequate performance in the role will be learned within hours.
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490. None of the roles under consideration could realistically fit within Levels A or E. The IEs were not assessing management roles, of the kind that would require the extensive policy knowledge for managing operations or staff groups. All the roles were too demanding to be “learned within hours”.
491. All the comparators were assessed at Level C, with or without a modifier. The IEs spread the assessment of claimant roles across Levels D to B.

Knowledge of the work of others

492. Levels C through to A were defined, in part, by the extent to which a jobholder knew what others were doing. At Level C, what was apparently required was a “good understanding of associated teams in the workplace”. To get to Level B, “a thorough understanding of the operational procedures of the whole workplace/premises [was] necessary”.
493. Ms Spence told us that, for some roles assessed at Level C, such as Checkout, a “good understanding of associated teams” included knowing to call a Service Host if the jobholder did not know how to deal with a query herself.
494. It emerged during Ms Spence’s evidence that this strand of the level definition provided useful context, but did not need to be satisfied in every case. As she put it,
- “...every single bit in each of the single definitions doesn’t have to be met by each...job. I mean, that would be ludicrous... Not every job will meet every single bit of it, which is one of the reasons why there is a definition at the end of how long it takes for someone to learn that.”
495. In practice, however, the IEs appeared to place considerable weight on the need for knowledge of other peoples’ work. Where the IEs provided detailed rationales for comparator assessments, those rationales explained why the comparator had not reached Level B. The explanation was, typically, “The jobholder did not have knowledge covering the whole work place and was not required to have worked a full annual cycle.”

Depth of knowledge and “time to learn”

496. The IEs sought to measure the complexity (or “depth”) of knowledge by looking at how long it took the role holder to acquire that knowledge. Thus, each level definition incorporated a timescale, such as “learned within hours” for Level E. Ms Spence’s oral evidence, quoted in our paragraph 494, reinforced the importance of time to learn in the IEs’ scheme.
497. The IEs’ initial definition for Level C concluded with, “A few months’ exposure to regular work cycles will be necessary to achieve standard competence”. The corresponding part of the Level D definition was “....learned on the job over a few

weeks". At paragraph 1.4.3 of their Supplementary Report, the IEs clarified that Level C would actually require "expected time to learn the job between one and three months". Level D was clarified as "Expected time to learn the job under one month".

498. In practice, the IEs assessed roles at Level C where the on-the-job training had lasted for four weeks.
499. When undertaking their assessments, the IEs had to decide how to apply their "time to learn" strand to the comparators in the depots. Many of the depot workers had learned multiple activities. The IEs recognised that it would be too crude simply to count the time that elapsed between the start of employment and the beginning of the latest new activity, which might have been several years. What they did instead was to look at each activity separately and examine the training for each one. Where the effect of learning a new activity was such as to increase the cumulative demand measurably, the IEs assessed a separate iteration.
500. They applied this approach to their assessments of Mr Uchanski's role. They identified 5 separate iterations in total. Iterations 1 to 3 were assessed at Level C-. By the end of the period covered by those three iterations, Mr Uchanski had learned a variety of overlapping picking activities as well as, Hygiene, Multishuttle Exceptions and Small Case Decant. In iterations 4 and 5, Mr Uchanski remained at Level C, but the IEs removed the "minus" modifier. The only change to the rationales for these last two iterations was to recognise Mr Uchanski's HRT training. This was stated as an additional reason for reaching Level C.
501. The opinion that the IEs were reflecting in their assessments of these iterations was that Mr Uchanski's additional activities (Hygiene, Multishuttle Exceptions, Small Case Decant) did not significantly add to the demand of learning how to pick cases and drive a LLOP.
502. Mr Dennis was assessed at Level C- in Iteration 1, and Level C+ in Iteration 2. The flip of the modifier from "minus" to "plus" was explained by Mr Dennis' driving a HRT and his knowledge of Loading in Goods Out. Ms Spence told us that the IEs realised during their site visit to Didcot ADC that Loading was a more complicated operation than they had previously thought. The rationales suggested that the IEs believed themselves to be constrained by the scheme to keep Iteration 2 in Level C. The addition of an activity requiring more complex knowledge expanded the *range* of processes (thus attracting the modifier), but the scheme did not allow them to reflect the increased *complexity* unless it was so complex that it would take a year to learn.

Validation

503. Part of the IEs' and Leigh Day experts' level definitions attach importance to whether training or knowledge was "validated" or not. When asked about this by Mr Cooper, Ms Spence told us that this was an indicator of the value of the training to Asda.

The Knowledge modifier

504. In their Supplementary Report, the IEs provided a convention for the operation of the modifier:

“ ‘Limited’, in reference to the range of equipment, means the probationary period equipment (LLOP, HPT etc).

+ Awarded for additional, higher skill machinery such [as] HRT.”

505. Ms Spence was asked by Mr Cooper about how the “probationary period equipment” convention worked in relation to store-based roles. What equipment, for example, did Ms Forrester use that she had not learned to use in her probationary period? In answer, Ms Spence told us that the IEs had only intended this convention to apply to the specific assessments they had made of probationary periods. This explanation was not borne out in the assessments the IEs actually made. For example, they assessed both Mr Devenney’s iterations at C-. Mr Devenney passing his probation made no difference to the assessment. It may be that what Ms Spence really meant was that the IEs only applied this convention to jobholders who had probationary periods in which their activities were limited. If that was what she meant, it would be an unfair convention. The only people who could incur a minus modifier under this convention would be people who worked in depots.

How the IEs assessed Personal Shopper and Edible Grocery

506. The IEs assessed Personal Shopper at the lowest level of all the roles, as did all the other experts. Ms Hills was placed into the IEs’ scheme at Level D+. They gave this rationale for the choice of level:

“The jobholder knew how to operate and safely use all relevant equipment. The jobholder knew the layout of the store. The jobholder knew how to pack items. The jobholder has undertaken a programme of in-house training which was validated.”

507. The IEs also explained why Ms Forrester had not attained Level C. They said,

“The jobholder was not required to have product knowledge or keep knowledge up to date.”

508. Ms Forrester (Edible Grocery) was assessed at C=. This reflected almost a whole level step up from Personal Shopper. Again, this was fairly uncontroversial: the party-instructed experts both assessed Edible Grocery and Checkout at the same level as each other, and both higher than they assessed Personal Shopper.

509. The IEs’ rationale gave this reason for placing Ms Forrester in Level C:

“The jobholder knew how to use all relevant equipment... The jobholder knew policies/legal requirements relating to the sale of specific products... The jobholder knew how to merchandise products effectively... The jobholder has undertaken a programme of in-house training which was validated... The jobholder was trained to use hand-held pallets.”

510. Level D was considered by the IEs to be too low for Edible Grocery, because,

“The jobholder attended mandatory in-house training, with written tests validated by manager and re-tested yearly.”

511. The respective rationales appeared to demonstrate that, in fact, both roles required experience and training in “a range of technical/practical skills”. From

the rationales, it appeared to be the requirement for re-testing that explained why Ms Forrester was assessed at a level higher than Ms Hills. That criterion did not appear in the level definitions at all.

512. Ms Spence was asked numerous questions about why these two roles had been assessed at different levels. She agreed with Mr Cooper that, in terms of knowledge of equipment, Ms Hills' role was at least as demanding as that of Ms Forrester. She also agreed that their range of processes was broadly equivalent. Both had been trained on the job over a period of 4 weeks. Mr Cooper put to Ms Spence that the real explanation for Edible Grocery being at a higher level was, "an assessment of the overall range and complexity of the knowledge". Ms Spence's answer to that was that the word "processes" could be defined "loosely" so as to allow Ms Forrester's wider product knowledge to take her into a higher level. The word, "processes" was not part of the definition for Level C.

First Aid

513. The IEs assessed Mr Beaumont's and Mr Dolan's First Aider attributes separately. In each case, they awarded a "plus" modifier. Their rationale for Mr Dolan indicated that it was the "first aid training" that made the difference.

The Leigh Day experts' assessments of Knowledge

514. When the Leigh Day experts first examined the IEs' scheme, they looked at the Knowledge factor and expressed the following reservation:

"The IEs' factor definition reads as though taken from a job evaluation scheme with little or no relation to the jobs in question."

515. Their critique continued,

"It includes reference to skills, as well as knowledge, so there is a potential risk of double counting with other skills factors, notably Physical Skills, where specific training and certification are relevant..."

The level definitions

516. In the result, the Leigh Day experts assessed all roles at the same level (B-D) as the IEs.

517. Ms Branney told us that the Leigh Day experts did not regard any one element of the level definitions as determinative of the level of demand. They considered each level definition as a whole. This meant that, in theory at least, it was possible for a role to achieve Level B without the requirement to have "a thorough understanding of the operational procedures of the whole workplace". Similarly, Level C was attainable without any "knowledge of associated teams in the workplace". The Leigh Day experts expressly waived that requirement when placing Mrs Gardner's Bakery role into Level C.

518. The Leigh Day experts also thought the element of a "full annual cycle" was also an optional part of the definition. Having carried out their assessments, they noted that,

"the IEs' assessments indicated that in practice they had not applied this degree of firmness – which had initially influenced the Leigh Day experts' assessments. Consequently, during their consistency checking, the

Leigh Day experts revised their assessments and adopted the convention of **'likely to be'**, instead of **'will be'**, mirroring the less prescriptive approach that the IEs had taken."

519. An example of this relaxed approach to "time to learn" in operation was the Leigh Day experts' assessment of Service Host. Her role was assessed at Level B. In fact, Ms Billings' job could be done without a year's experience. The Leigh Day experts' rationale for Level B was that Ms Billings "undertook several roles". The additional role that Ms Billings appeared to have done was her previous work on the checkout.
520. All the comparators were assessed in Level C. Most of the comparators performed several different activities. Some of those activities were markedly different from each other (for example, Mr Dennis in Iteration 2 doing Letdowns and Goods Out). It was not easy for us to understand why the Leigh Day experts thought that Ms Billings' Service Host role was so far removed from checkout as to amount to a "different role"; and yet fail to reach that conclusion in respect of Mr Dennis' Loading and Letdown activities.

The Knowledge modifier

521. The Leigh Day experts adopted the modifier from the IEs' scheme, apparently using the same definition. In the individual assessments, their use of the modifier diverged considerably from that of the IEs. Only 12 out of the 20 assessed jobs received the same modifier.
522. As we have observed, the Leigh Day experts' first test assessment was of Personal Shopper. They found it hard to decide whether her role should be placed in Level C or Level D of the IEs' scheme. They opted for Level D, but applied the "plus" modifier. Their rationale for the award of the "plus" was,
- "Size of 'range of equipment' does not justify a + modifier. But 'size of range of processes' does on the basis that 'processes' could be, or had been regarded by the IEs, as component parts of 'Activities'.
523. This comment was accompanied by a summary of the knowledge that Ms Hills would need for different tasks such as cleaning up spillages, finding products on promotion, operating the Palm Pilot, and assessing product quality. It looked as if the Leigh Day experts regarded each of these tasks as a component part of her core activity of order picking, and therefore a "process" for the purpose of the modifier.
524. Mr Opelt also performed activities that could be sub-divided into a range of component tasks, for example, using a Talkman, driving a LLOP and stacking pallets. When the Leigh Day experts assessed Mr Opelt's role, they gave it a "minus" modifier. According to their rationale, Mr Opelt's "activities...were limited to large case pick and manual store pick – narrow range."
525. The Leigh Day experts grappled with the modifier again in their assessment of Edible Grocery. On their first test-assessment, they put the knowledge demands into Level D+. As we have set out, by the time of their first test, the Leigh Day experts had seen the IEs' corrected report, but not their Supplementary Report. When the IEs' Supplementary Report arrived, and the Leigh Day experts carried out their consistency check, they noticed that the IEs had generally placed roles into Level C for knowledge if they required 4 weeks' on-the-job training. That

caused them to amend their assessment and place Ms Forrester's role into Level C. They again applied the modifier, but this time, they gave her a "minus". This was "to recognise limited range of activities". The Leigh Day experts went through essentially the same thought process when they assessed Ms Ohlsson's role in Chilled.

526. We find this particular use of the modifier surprising. The Leigh Day experts had not discovered anything new about Ms Forrester's or Ms Ohlsson's role. They did not think that their range of knowledge had shrunk. There was, therefore, nothing that would appear to explain their apparent change of mind about how the modifier should apply. In answer to Mr Short's questions, Ms Branney explained this anomaly by saying that a modifier based on range of knowledge would not automatically transfer from one level to another. The difficulty with that explanation is that it tended to suggest an expectation that a job in a higher level would require knowledge of a greater range of equipment and processes than a job in a lower level. But if that is right, it would make more sense for the range of knowledge to be reflected expressly in the level definitions and not confined to the application of the modifier.
527. When the Leigh Day experts test-assessed Checkout, they decided that Ms Ashton's role should be at C-. Their rationale contained two reasons for applying the "minus" modifier. One was that Ms Ashton's knowledge demand "appears a little greater than Forrester and Hills, but lower than that of Darville C=". The other reason was that the IEs may have been wrong to place Ms Ashton into Level C at all, as it was "possibly in contravention of their level definition". Both of these reasons were potentially valid reasons for reducing Ms Ashton's score slightly, but neither reason had anything to do with the definition of the modifier that they were applying.
528. The Leigh Day experts attempted to use the modifier to separate Mr Dennis, Mr Han, Mr Ballard and Mr Opelt. Mr Ballard and Mr Dennis each performed a particular activity that required a greater depth of knowledge than Mr Han or Mr Opelt needed. (In Mr Ballard's case it was Tipping and Yard; for Mr Dennis it was Letdowns and Loading). The rationales were expressed in the language of the modifier ("range of processes"). The Leigh Day experts appeared to have believed themselves to be constrained to assess Mr Han's role as equal to Mr Dennis' role, and more demanding than Mr Ballard's because of the number of activities they each did.

The Asda experts' scheme for Knowledge

529. The Asda experts devised the following scheme for assessing the knowledge demand:

Level	E	D	C	B	A
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Range & Complexity	Requires and uses basic knowledge necessary for a limited range of routine tasks / processes / simple equipment. And / or basic knowledge of workplace / products relevant to	Requires and uses non-complex knowledge for a wider range of closely related tasks / processes / equipment. And / or wider range of non-complex knowledge of workplace / products relevant to	Requires and uses knowledge, sometimes of greater complexity, for a range of tasks / processes / equipment, which are sometimes unrelated. And / or varied knowledge of workplace/products relevant to the job, which is sometimes of greater complexity.	Requires and uses more detailed and complex knowledge, for a wide range of tasks / processes / equipment which are unrelated. And / or detailed, complex, and varied knowledge of workplace /	Requires and uses complex and detailed knowledge for a wide range of procedures and policies involving more than one discipline, including management processes.
Training & Experience	No previous training required. Requires general induction and on the job training in appointed role.	Requires on the job training in specific additional skills / tasks / processes, with basic testing to confirm competence.	On the job training and experience across more than one, unrelated skills / tasks / processes beyond the general induction and probationary period. And / or Requires additional training with rigorous testing to industry standard requirements.	On the job training and experience across a wide range of skills / tasks / processes beyond the general induction and probationary period. Requires significant training with rigorous testing to industry standard requirements.	Requires extensive experience and related training including specialist or managerial subjects.

530. The scheme was supplemented by conventions which included the following:

“References to whether tasks / processes / equipment are related or unrelated are intended to capture the extent to which they draw on the same or similar pools or knowledge or distinct kinds or separate pools of knowledge. References to whether the knowledge of the workplace / products is varied are intended to capture the same concept. For example:

The task of replenishment draws on a narrow pool of knowledge about the processes involved in that task and the products being replenished. We would regard that as closely related knowledge. The other main activity of the replenishment roles is customer service, which draws on the basic knowledge of the workplace relevant at Level E and is in any event is closely related to the knowledge of the workplace and products on which the jobholder draws for replenishment. Overall, these would therefore be roles which require non-complex knowledge to carry out a wider range of nevertheless closely related tasks at Level D.

Different picking activities such as Stock Pick and Pick By Line both draw on the same pool of knowledge about the use of the Talkman, MHE equipment and the warehouse layout (including the ‘rules of the road’ and workplace systems). These

would therefore be activities which require non- complex knowledge to carry out a wider range of nevertheless closely related tasks at Level D.

The set of processes that Customer Service Desk carries out to deal with returns, refunds and complaints are largely related because they are learnt as a single pool of knowledge connected with that function but do have some unrelated elements such as VAT. This is therefore a good example of a Level C role.

Conversely Counters – Webster draws on distinct pools of knowledge learned on separate occasions for each of the counters on which she works (Deli, Pizza, Rotisserie, Fish and SORM). These are good examples of unrelated tasks in the store roles and Counters is a good example of a Level B store role.

Similarly, comparators who undertake activities which use different equipment and different sets of knowledge such as Tipping, Putaways or Loading will be drawing on separate pools of knowledge and those activities should be regarded as unrelated. Comparators who do a range of such activities are therefore likely to be assessed at Level B.”

531. It can be seen at a glance that the Asda experts’ scheme used relative terms such as “greater complexity” and “greater knowledge” in their level definitions. It was difficult to know whether a role belonged at a particular level without knowing something about which roles belonged in the other levels. This is an example of the kind of level definition that Mrs Hastings criticised by saying, “you have to define it twice”. For the reasons we have given in paragraph 235, we do not think this fundamentally weakens the Asda experts’ scheme.

The Range & Complexity Element

532. The first element was designed to assess the range and complexity of knowledge. There was no single measure, such as “time to learn”.
533. The Asda experts’ conventions showed that they regarded certain types of activities (for example, replenishment and customer service) as being “closely related” as they drew on the same “pool of knowledge”. Other activities were thought of as “unrelated”. These included Tipping, Putaways and Loading.
534. Level C was for knowledge that was “sometimes of greater complexity” or “of greater complexity for a range of tasks [etc]” which was “sometimes unrelated”. The word, “sometimes” was hard to apply for a factor which everyone understood did not depend on how often the jobholder did any particular task.
535. The conventions did not tell us how to apply Level C Range & Complexity, so, at Mr Short’s bidding, we looked to Asda’s individual assessment rationales to help us:
- 535.1. The Asda experts assessed Dennis (a) at Level D for the time when he was doing Stock Picking and Hygiene. They assessed Mr Dennis’ Iteration (b) at Level C. As we saw, Mr Dennis’ additional activities in iteration (b) were Pick By Line and Trammings. None of them was any more complex than Stock Picking. Pick By Line was regarded as drawing on the same pool of knowledge as Stock Picking, and involved only one hour’s additional training. The only thing that could have up-

rated Mr Dennis to Level C was Trammig. The additional pool of knowledge required here appeared to us to be how use a radio and how to find the nearest accessible lane across the depot.

- 535.2. The Asda experts assessed Mr Devenney at Level C for closely-related picking activities, plus Trammig and Handballing, which had taken him only a few minutes each to learn.
- 535.3. Ms Ashton on Checkout was assessed at Level D. Her knowledge of Challenge 25, proxy sale restrictions, the signs of a fraudulent banknote, payment methods was all regarded by the Asda experts as drawing on the same “pool of knowledge”, and therefore insufficient, to their minds, for her to achieve Level C.
- 535.4. George was also placed into Level D. The things Mrs O'Donovan had to learn included how to dress a mannequin, how to use and maintain a Paxar gun, and how to operate the Telxon. Ms Waller accepted that these activities amounted to a wider range, but rejected the idea that the difference was enough to get into Level C.
536. These contrasting assessments led us to the conclusion that the Asda experts' real touchstone for “range of knowledge” was not how related or unrelated were the things that the role-holder had to know. Rather, their perception of the range depended on whether they had learned it by the end of their initial on-the-job training. This approach was comparator-friendly by design. Ms Ashton's “pool of knowledge”, in the Asda experts' scheme, was the knowledge she needed to work on the checkout. Mrs O'Donovan's pool of knowledge was the knowledge she needed to work in George. Mr Dennis' and Mr Devenney were treated as having acquired a new pool of knowledge when they started Trammig because it was not what they learned during their probation.

The Training & Experience Element

537. The second Element (Training and Experience) contained more than one gateway into the level. One of these gateways was “rigorous testing to industry standard requirements”. The phrase, “industry standard requirements” was contained in all the comparator job descriptions as a descriptor of the LLOP test. It effectively guaranteed every comparator a free pass into Level C. The application of this Element particularly benefited Mr Opelt, Mr Welch and Mr Dennis (in Iteration (a)), who would otherwise have been assessed at Level D for the Range and Complexity Element.
538. The Asda experts also looked for equivalents in the claimants' job descriptions. In their view, Ms Hutcheson's FLT test and Mrs Webster's fish course both met that definition. This treatment did not work to their advantage in the way that it did for Messrs Opelt, Welch and Dennis, because Ms Hutcheson and Mrs Webster were in any case in Level B.
539. Another way of getting into Level C for Training and Experience was to have on-the-job training beyond the probationary period. This automatically meant that a Warehouse Colleague who learned a new activity would be placed into Level C, even if they had not already got there by passing their LLOP test. That key into Level C was not given to many of the store workers. They generally learned all the core activities of their role during their initial on-the-job training.

540. The Asda experts did not see any unfairness in this approach. Ms Waller's evidence to us was that she regarded the whole of the probationary period as training. If that were correct, it would have been fair to recognise the additional demand of learning a new activity once that probationary period had finished. In fact, however, most of the probationary period did not involve imparting new knowledge to the Warehouse Colleagues at all. Probationers were just demonstrating that they could maintain the required attendance, attitude, accuracy and pace of work.
541. In coming to this view, we have naturally borne in mind that the target pick rates were stepped up during the probationary period. This was undoubtedly a reflection of Asda's expectation that probationary Warehouse Colleagues gradually became able to work more quickly. It would be wrong, however, to attribute speed of work purely, or even mainly, to improved knowledge. The increased pace of work could just as easily be due to enhanced physical fitness and improved skill at LLOP driving.
542. That is not to say that Mr Opelt was not continuing to learn anything during his probationary period. As the weeks went on, he would become more familiar with the locations of the pick slots in the depot and the commands to give to his Talkman. This sort of additional knowledge was not significantly demanding to acquire. The picking aisles were logically laid out and easy to navigate. The voice commands were basic.

First Aid

543. The Asda experts did not think that any significant additional knowledge was demanded of a First Aider. Their assessments of Beaumont (b) and (c) were the same, as were their assessments of Dolan (a) and (b).

Knowledge - discussion

What is the demand?

544. We have already noted the common ground that the Knowledge factor should assess the demand of acquiring the knowledge needed to do the job.

Acquiring knowledge

545. The demand is not necessarily driven by how much the role-holder needed to learn whilst employed by Asda. Nor is it driven by the mere requirement to be present at a training course. Anyone can do that. Many role-holders will have a substantial head start, whether by being competent car drivers, or experienced supermarket shoppers, or from experience in other retail or depot roles. We have to ignore those characteristics. What matters is the end-point: how much knowledge they need to *have learned* by the completion of their training, so they can perform their role. In our view, that demand is the same whether the role-holder is expected to acquire the knowledge during training or to have the knowledge prior to recruitment.

What is “knowledge”?

546. In one sense, “knowledge” may be said to include a physical skill. Mr Opelt “knew how” to drive a LLOP quickly and safely round a corner. That is really just the same as saying he had that skill. The same can be said of Mr Dolan’s ability to control a joystick sensitively to lift a pallet at height, or Mrs Webster being able to fillet a raw fish and divide a cooked chicken. The practice it takes to acquire these skills is, in our opinion, better assessed under a different factor. This is for the reasons we explain in detail at paragraph 1937 in our discussion of Physical Skills.
547. It might well be said that “knowledge” includes knowing how to communicate effectively. To the extent that this is a type of knowledge, it is measured separately under the heading of communication skills.

Distinguishing features of demand

548. The demands of having knowledge will be a function of the depth and breadth of that knowledge.
549. The Asda experts consider that there is a separate driver of demand where the employer tests a worker’s knowledge. There is additional demand, which they say consists of the effort involved in taking the test itself. We do not think this makes a meaningful difference to the overall knowledge demands, as we discuss below.

Validation, testing and demonstrating knowledge

550. We did not find “validation” as important a concept as the experts thought it was.
551. Ms Spence’s explanation of the importance of validation was that it showed how important various types of knowledge were to Asda. That would make validation a helpful differentiator in a JES. What we are concerned with in an equal value assessment, however, is how demanding it is to acquire the knowledge, as opposed to the value of that knowledge to the organisation. This is one of the cases (see paragraph 189.2 above) where the differing purposes of the two types of scheme make a difference to how they assess demand.
552. Validation of knowledge would also be evidence that a jobholder really needed the knowledge in order to perform their role. That consideration ought not, however, to sway our determination of the equal value question at the final equal value hearing stage. This is because the job descriptions contain the facts related to that question. They tell us what knowledge each jobholder had to have.
553. That is not to say that it is unimportant to have industry standards for testing operators of potentially dangerous equipment, or people preparing raw fish for the public. Clearly that is important. But the importance of the industry standard is in the organisation’s assurance that a person has the requisite knowledge to do a potentially dangerous thing. That, to our mind, is adequately reflected in responsibility for health and safety. It is also important to know how to serve customers. There is no industry standard test for that knowledge.
554. There may, of course, be aspects to the “validation” process that are demanding in themselves. For example, Ms Spence agreed that it is more demanding to have to pass a test (for example, the LLOP test) where the consequence of

failure is to have to retake the theory and practical training, than a test (for example, the Edible Grocery test) where wrong answers are addressed by the manager telling the colleague what the right answer is without further consequences. This is what we take the Asda experts to mean when they say they measure “the difficulty of ...demonstrating that knowledge”.

555. Our view is that such differences were of only marginal importance. This is because:

- 555.1. First, it was unclear to us what demand the experts thought they were assessing. By the start of the test, the candidates had either learned the knowledge or they had not. They may well have had to concentrate and they may well have been worried about the consequences of failing the test. Differences in mental or emotional demands, if there were any, could be assessed under other factors.
- 555.2. Second, if the test was mentally or emotionally draining, we had to bear in mind that the jobholders only had to put that effort in for a few minutes. We were assessing the demands of work over a 6-year period.
- 555.3. Third, the communication skills required to demonstrate the knowledge were all broadly equivalent, and did not give rise to any significant or measurable differences in demand.

556. In case we are wrong about that, we have in any case formed a view about how demanding it was to take a LLOP test. As a test of knowledge, it was no more demanding than the role-specific tests for the store-based roles. There was a small number of questions in the theory test, with a 70% passmark. The answers to some of the questions were easy to guess. The LLOP drivers would have to demonstrate additional knowledge during the practical test (for example, knowing the rules of the road and remembering to do the pre-operation check, using the checklist), but most of it was demonstrating that they had acquired the requisite level of physical skill.

557. There is, however, a sense in which “validation” is useful. It helps to establish a timeline. Employers do not generally set their new recruits up to fail: that would be a waste of everyone’s time. They will generally test a worker’s knowledge once the worker is expected to be ready. That will be at the conclusion of a period of training and learning. The more knowledge a role-holder needs, the longer the employer will generally wait between starting the training and conducting the validation process. The timing of the validation ought therefore to give an assessor a sense of how long it generally takes the jobholder to acquire the requisite knowledge.

“Time to learn” as a measure of demand

558. It will generally take a worker longer to learn a range of different complex tasks than to learn a single task of equivalent complexity. Likewise, it will generally take a person longer to learn any given number of complex tasks than an equivalent range of simple tasks.

559. Where the role requires a base level of knowledge prior to the start of training, the range and complexity of knowledge for the role can fairly reliably be measured by the time to acquire that base level, plus the length of training.

560. We are alive to the potential difficulties of using “time to learn” as a measure. As the sole determinant of demand, it would prevent us from capturing what everyone understands to be a significant step in demand between two roles that have the same training periods (such as Personal Shopper and Edible Grocery).
561. Simple addition of training periods might also mask differences in the intensity of the training. On a week-long course on preparing fish, one would expect Mrs Webster to acquire more knowledge than Mrs Wilby acquired during one of her weeks of on-the-job learning, or Mr Uchanski acquired during the back-to-back shifts to “bed in” his knowledge of a new activity.
562. In our view, however, time to learn is a useful starting point. It has the significant advantage of objectivity.
563. One difficulty tends to arise when some of the roles (usually in depots) involve activities that are introduced many months, or even years, after the end of their probationary period. In the meantime, the role-holder does the same activities repetitively without any further training. Does the “time to learn” include those intervening periods? Or should it be confined to an aggregate of the training periods for each activity?
564. In our view, the latter approach is likely to be the more reliable indicator of demand. These were repetitive activities that the jobholders were unlikely to forget how to do. On completion of their training, and after a few shifts of “bedding in”, the jobholder had the knowledge they needed. Apart from picking and LLOP driving, there was no activity that a jobholder needed to have experience of doing before they were ready to move onto a new activity.
565. Another complicating factor is the difficulty in measuring the time it took for Shop Floor Assistants to acquire enough product knowledge to assist customers. They did not stop learning about product locations and information when their four-week on-the-job training ended. When they learned something new, it was absorbed into their store of knowledge which they were then expected to use. Nevertheless, our view is that, by the completion of their on-the-job training, the Shop Floor Assistants had generally learned all they needed to learn in order to be competent at their roles.

Probationary periods

566. We have considered “time to learn”, particularly in the context of the 13-week probation period in the depots. In our view, most of the knowledge Mr Opelt needed was acquired in his first week. By then, he knew the rules of the road, how to drive a LLOP, how to stack and wrap a pallet, and how to use his Talkman.
567. Another way of looking at the same question is to look at what the other purposes of the 13-week probation period were. As discussed in paragraphs 403 and 540 to 542, the main purpose of probationary period was not to teach the worker anything new.

Pools of knowledge

568. Whilst we disagreed with Asda experts’ judgements about what sorts of knowledge fell within the same pool, we nevertheless considered the Asda experts’ concept of “pools of knowledge” to be a helpful tool. It helped us to

analyse the range of required knowledge amongst the jobs. Sometimes it gave us a more reliable indicator of a jobholder's range of knowledge than the time it took the jobholder to learn.

Choice of scheme

569. We did not find either scheme to be a reliable method of assessing the Knowledge demand.
570. The Asda scheme over-valued the taking of a test to "industry standard requirements". It gave artificial importance to the learning of a new activity after the initial period of training.
571. The IEs' scheme commendably aimed to measure Knowledge solely by reference to objective indicators, but the definitions ended up getting in the way of a proper assessment of the demand. The modifier was hard to understand and was inconsistently applied in practice.
572. Because of the fundamental problems with all the schemes, we did our best to establish the relative demands for ourselves.

Our levels

573. We started with the "basic architecture" of the Asda experts' scheme. This is because it was not dependent on the use of the modifier and allowed us greater flexibility.
574. We did not use the "Training and Testing" element. Rather, we used the aggregate training and on-the-job learning as a general indicator of the levels of demand within the Asda experts' Range and Complexity Element.
575. We proceeded on the assumption that a role-holder was expected to acquire substantially more knowledge during a day of dedicated training than during a "bedding-in" shift, or a day of on-the-job learning.
576. Where a role-holder (such as Service Host) was required to have been trained in a base role before beginning their job-specific training, we added the time it took to acquire the knowledge of the base role.
577. We disregarded training that only took a few minutes.
578. We regarded substantial knowledge of location and signs of quality of a product as being distinct from knowledge of equipment.
579. Like the Asda experts, we regarded additional picking activities as requiring only limited additional knowledge.
580. As a very rough starting point, our assessments were based on the following guide:

Level	Time to learn
A	As B, but with additional features
B	Substantially more than 12 weeks or multiple distinct periods of several days'

	dedicated training
C	Twelve weeks or several days' additional dedicated training
D	More than four weeks' on-the-job learning, multiple additional activities, each requiring more than a few hours to learn, or a few days' additional dedicated training
E	Less than four weeks' on-the-job learning or up to a week of dedicated training

581. We stress that these were starting points, but no more than that. We looked at each job in the round to see if there were features affecting range and complexity of knowledge that made the job a better fit with a different level. If there was, we moved the job from its starting point.

Relativities

582. Another guide to our assessment was our findings about the relative knowledge demands of certain features of the jobs. Again, these were broad comparisons only.

Baseline

583. We started by working out the lowest level of demand of all the Asda jobs.

584. All the experts agreed that Personal Shopper was at the lowest level. We did not interfere with this consensus, despite the fact that Ms Hills had received 4 weeks' on-the-job training. She needed a variety of different pools of knowledge, but none of it was complex.

585. We considered where to place Mr Opelt's work in relation to that of Ms Hills. In our view, his required level of knowledge was equivalent to hers. The Palm Pilot was about as complex as a Talkman. It only took Mr Opelt a few hours to learn the rules of the road, how to make the checks on a LLOP, and how to operate the controls. He acted on obvious signs of damage to a case, but did not have to know the quality signs of an individual product that would enable him to make a Would I Buy It decision.

586. At the baseline of demand we also included depot roles where the only additional activity required virtually insignificant additional knowledge. Into this category we placed Hygiene, Trammig, Breaking Down and Handballing.

587. Depot roles with a small variety of essentially picking activities were a little more demanding, but the difference was not enough to justify a whole level step.

Replenishment and Checkout v. Portfolio of depot activities and Loading

588. We next compared some of the replenishment roles, such as Home & Leisure and Produce. We found them to require broadly similar levels of knowledge that were equivalent to Ms Ashton's knowledge on Checkout. Chilled and Edible Grocery were only marginally within this group.
589. In our view, the knowledge requirements for these roles sits alongside that of the depot workers, such as Mr Matthews and Mr Uchanski's iteration (a). They had acquired a wide portfolio of activities which individually did not require high levels of knowledge, but which were varied enough to require separate knowledge pools. As Ms Branney agreed, knowledge of picking would not help a Warehouse Colleague to learn how to tip a trailer.

HRT and CBT driving v. Counters and Service Host

590. We have reached the view that the demands of learning to operate a HRT for Letdowns, Putaways and Flow Racking Replenishment were equivalent to the demands of CBT driving for Goods In at Didcot. This knowledge was about a level step up from what was needed for a range of simpler depot activities, and two level steps up from basic picking and Hygiene using a LLOP.
591. We see a broad equivalence between this learning demand and Service Host, who needed to know one complete role (Checkout) before acquiring a new set of knowledge about Self-Scans and product location within the whole store. Into this level we would also place Mrs Webster in Counters. Mrs Webster had to learn an additional activity (fish) in depth as well as a variety of unrelated processes such as preparing pizzas and cooking raw chickens. This also broadly matches the knowledge that Mrs Trickett needed – she learned the BAM and OSCA systems, but also needed to know how to do a replenishment role.

Loading, George, Bakery

592. We considered depot workers whose most knowledge-demanding activity was Loading. In our view, they just about achieve the same level, but sit on the borderline. The Loaders had sets of rules to learn for multiple trailers, but the rules were simple: maximum weights, heights, strapping points and products that should not be mixed. A layer of complexity was introduced by how the rules interrelated, but that complexity is better assessed as a problem-solving demand.
593. We also find George, Bakery and Process to be marginal. They do not quite reach the level of knowledge needed for Counters or Service Host or a portfolio of different depot activities including HRT or CBT driving.

Warehouse, Customer Service Desk v. multiple depot specialisms

594. At the next level we placed Customer Service Desk. In our view, what Mrs Fearn had to learn was on a par with Ms Hutcheson in the Warehouse, who needed to know how to drive a Forklift Truck but also had all the knowledge needed to work on a checkout.
595. What roles in the depots demanded an equivalent level of knowledge? The nearest we could find were the roles with multiple depot specialisms (such as HRT/CBT driving, Loading, First Aid and Battery Bay).
596. A combination of two of those kinds of activities marginally entered this level.

Section Leader v. Morris and Haigh

597. The leadership and trainer roles were more demanding still in terms of knowledge. Section Leader plainly fell within this level. She needed 6 months experience in multiple roles and a further 100 days training.
598. Mr Haigh (a) and (b) and Mr Morris only marginally reached the level. They did not need as much training or knowledge as Miss Gibbins did. Knowledge that Mr Haigh gained through the Recruitment Team was a pre-requisite for Miss Gibbins' role, but she had to know rota planning, multiple computer systems and reports, and all the knowledge needed for Customer Service Desk.

First aid

599. We generally regarded an iteration with a First Aid attribute to be marginally higher than an iteration without a First Aid attribute. Here we agree with the IEs. Mr Beaumont needed 18 hours of learning plus a two-day refresher course. Mr Dolan's total training lasted longer, but this appears to have been an accreditation requirement for transfer between depots, rather than because Mr Dolan had more to learn.

Comparison between factors

600. This is the first factor that we have examined in depth. Before writing this Chapter, however, we had already heard and considered the evidence in relation to all the factors. We calibrated these relativities against the level steps in other factors. Just to give two examples, we thought the step from CBT driving to multiple specialisms and to Customer Service Desk was proportionate to the step in Physical Demands from Picking to Handballing. The step in knowledge from driving a LLOP to learning how to work a checkout is proportionate to the step in Responsibility for Assets from Picking and Trimming to regular movement of pallets of stock at height.

Knowledge scores

601. Putting these relativities together, we score the roles as follows:

Level	Store roles	Depot roles	Points
A	Section Leader		50
Marginal A		Haigh (a) and (b), Morris (a)	50
B	Customer Service Desk, Service Host (b), Warehouse	Beaumont (b)	40
Marginal B		Beaumont (c), Dennis (d), Dolan (b), Morris (b), Sayeed (a), Sayeed (b)	40
C	Counters, Process, Service Host (a)	Ballard (a) and (b), Beaumont (a), Dolan (a), Haigh (c), McDonough, Uchanski (b)	30

Marginal C	George, Home & Leisure (a) and (b)	Dennis (c), Makin (a) and (b)	30
D	Bakery, Checkout, Produce	Haigh (d), Han (a) and (b), Hore, Matthews, Prescott, Uchanski (a)	20
Marginal D	Chilled, Edible Grocery		20
E	Personal Shopper	Dennis (a) and (b), Devenney, Opelt, Welch	10

Chapter Eight - Planning & Organising, Problem Solving and Decision Making, Training & Mentoring

602. We have considered the evidence and arguments in relation to these three factors together because:

- 602.1. there is a dispute about whether the first two factors should be separate or consolidated; and
- 602.2. there is an overlapping dispute about whether there should be a Training & Mentoring factor.

Issues

Planning, organising, decision-making

603. The parties agree that there should be a factor to measure the demand of problem-solving and decision-making. It is undisputed that the complexity of the decisions that a role-holder has to make will affect the level of demand.
604. The IEs and Leigh Day experts are of the view that there should also be a factor to measure what they say is the separate demand of planning and organising work. This is disputed by the Asda experts, whose opinion is that decisions about planning and organising are just one type of decision, which should be measured along with all the other problems and decisions.
605. During the preparatory stages for this hearing, the dispute about the Planning & Organising factor spawned a further issue about what the Problem-solving and Decision-making factor should try to measure. The Asda experts' position has always been that one of the distinguishing features of the demand is the "degree of supervision/autonomy the jobholders have in respect of ...decisions". In the joint report, the IEs have also expressed the view that the degree of autonomy is relevant. The Leigh Day experts initially took the view that autonomy should only be assessed under Planning & Organising, but in her oral evidence, Ms Branney accepted that autonomy was relevant to the demands of Problem Solving (etc) too.

606. A further dispute is about whether the level of demand is affected by the frequency of decision-making. Here, the IEs and Leigh Day experts are united in reflecting differences in frequency by using the modifier. Asda disagree that frequency affects demand at all.
607. To the extent that either factor seeks to measure autonomy, there appears to be some disagreement about what autonomy means. The Leigh Day experts prefer to look at the constraints on decision-making, for example, by receiving a constant stream of automated instructions. The Asda experts' idea of autonomy is essentially a positive one. The focus, they say, should not be on what decisions are *removed* from the jobholder (for example, by a Talkman, a list of instructions or a queue of pallets), but what residual decisions are *left* for the jobholder to make. Mr Holt (IE) agreed with that proposition. Mr Walls' agreement was qualified. His concept of autonomy was a "space" in which to make decisions. The type of supervision and instruction defined the boundaries of that space. We explore the difference between these positions below.

Training & Mentoring

608. There is a further dispute about whether there should be a factor to measure the demand of training and mentoring. The IEs chose this as a factor and the Leigh Day experts have adopted it.
609. If there is to be a Training & Mentoring factor, there appears to be some disagreement about what demand that factor should be trying to measure. The Leigh Day experts' position is that the demand stems from the weight of responsibility. During the course of Ms Spence's oral evidence, it emerged that the IEs might also be seeking to capture the skills required to deliver training and mentoring successfully.
610. The Asda experts oppose any Training & Mentoring factor at all. They object to its inclusion on the grounds that:
- 610.1. Training and mentoring are merely a tasks, rather than demands;
 - 610.2. Differences in demand are hard to detect, because the training and mentoring activities of most of the jobholders were so infrequent; and
 - 610.3. The demands of training and mentoring can be adequately assessed under the factors of Emotional Demands, Mental Effort and Communication and Relationships.
611. In making this latter point, the Asda experts fundamentally disagree with the IEs. Ms Spence gave her rejoinder squarely in answer to a question from Mr Short:
- "If we didn't have that factor, the specific bits of the training wouldn't be picked up at all. I can't see where they would be included."

Relativities

612. It is hard to establish any common ground from the experts' reports about where any roles sit in relation to any others under either factor. The Leigh Day experts and IEs' assessments of Problem Solving and Decision Making do not correspond to the Asda experts' assessments under the same factor, because the Asda experts' composite factor included demands of making decisions about

planning and organising. The Asda experts did not try to measure the demands under the Planning & Organising factor at all.

613. Possibly for the same reason, the Asda experts perceive 5 different levels of demand within Problem Solving (etc), whereas the Leigh Day experts say there are only 3 (expanded slightly by the use of modifiers).

Facts

Personal Shopper

614. Ms Hills picked items from supermarket shelves and put them into totes. Each time she selected a tote for a pick, she checked that the tote was clean. She checked her trolley before she started to use it. The main responsibility to check the equipment lay with the service team. Once every 5-6 weeks Ms Hills reported a fault in the equipment. Her Palm Pilot instructed her what to pick first and what to pick next until the pick was complete. Her picking rate and accuracy rate were fed into a performance analysis system known as the Engagement Board. She was informed of her pick rate every 1 to 2 weeks.
615. If a customer approached Ms Hills with a query, she would prioritise the customer over the home shopping pick.
616. Ms Hills was responsible for ensuring that her loads for each delivery wave were completed and in the loading area in good time.
617. Every time Ms Hills picked an item, she had to make a quick assessment of its quality, asking herself, "Would I Buy It?" When Ms Hills started picking fresh produce, she would reject items that were bruised, discoloured or overripe. When picking meat products, she would check for gristle or excessive marbling.
618. During the course of a pick, Ms Hills frequently had to make substitution decisions within the "Equivalent, Bigger, Better" framework (see paragraph 320, above). On average, 7.35% of her picks were either a substitution or a "nil pick".
619. Ms Hills had to decide how many bags to use. She tried to limit the number of bags whilst adhering to guidance about how many bags were required for certain products.
620. Sometimes, Ms Hills would find out that another personal shopper was behind on their pick and was at risk of not completing it in time for a scheduled delivery. In a situation like that, Ms Hills had the freedom to leave her own pick and help her colleague without seeking approval. She was responsible for keeping to her own pick rate.
621. About once per year, Ms Hills was asked to provide informal on-the-job training to a new starter. The fledgling personal shopper followed her typically for up to four hours. On one occasion during the Relevant Period, Ms Hills helped with a in a job trial for a candidate. In substance, that was the same as the informal training she provided.

Checkout

622. Ms Ashton was not told what to do from one moment to the next. The sequence of her work was largely dictated by a process: she just served the next customer

in the queue. A Service Host or Section Leader constantly monitored the checkout lanes. They would tell her when it was time for a break.

623. Ms Ashton decided how fast or slowly to scan items, but was aware that her scan speed was monitored. She balanced the need to optimise efficiency against the requirement to avoid making a customer feel rushed.

624. As Ms Ashton scanned items through the checkout, she made decisions, including:

- 624.1. If she noticed an item that might fail the “Would I Buy It” test, she had to decide whether to withdraw it from sale and call for a replacement.
- 624.2. When selling age-restricted goods, such as alcohol, Ms Ashton had to make decisions about whether to ask a customer for proof of age. The criterion (“Challenge 25”) was whether the customer appeared to be 25 years old or over.
- 624.3. If she suspected that a customer was attempting a “proxy” sale for an underage consumer, she had to decide whether to refuse to sell the item.
- 624.4. She checked notes and coins and decided whether they were counterfeit.
- 624.5. She decided whether to offer a Smiley voucher, for example, when offering a substitute product, or to encourage the purchase of an Asda own brand equivalent. She issued about 2-3 vouchers per month.
- 624.6. She assessed each customer’s needs and decided if they needed additional help to pack their shopping.

625. Many customer issues were considered unsuitable for Ms Ashton to deal with by herself. She was expected to refer them to a Service Host or Section Leader. Examples include:

- 625.1. product availability queries,
- 625.2. price queries,
- 625.3. decisions to void a transaction over £3.00,
- 625.4. customers requesting unusual amounts of change, and
- 625.5. queries which Ms Ashton would not be able to answer without leaving the checkout.

The only decision for Ms Ashton to make there was whether the customer was raising that sort of issue. If they were, she had no choice but to refer upwards.

626. Ms Ashton was not given the formal responsibility of being a “training buddy”. She was, however, asked to provide informal on-the-job training to new starters on around 5 occasions (just under once per year). The new starter watched Ms Ashton for about 15 minutes. Then Ms Ashton observed the new starter for about an hour. For the rest of the shift, they worked on adjacent checkouts so Ms Ashton was nearby in case the new starter had any queries. We know that checkout lanes were not chosen by the checkout operator, but were allocated by others, such as the Service Host.

627. More informally, Ms Ashton answered questions and gave advice to less experienced colleagues.

Produce

628. One of Mrs Wilby's responsibilities was breaking down pallets. She only had to do breaking down if the previous shift had left the job unfinished. The choice of task at the start of the shift was predetermined for Mrs Wilby by what the previous shift had or had not done.
629. Once breaking down was complete, Mrs Wilby moved on to her main task of replenishment. She and her colleague (or colleagues) divided up the sections between them. During the twilight shift, she and her colleague jointly decided who would be accountable for which section. They kept each other updated as to their progress and reallocated sections, if necessary, during the shift.
630. On a Sunday, Mrs Wilby was responsible for displaying flowers and house plants. She worked in the order she found most efficient to set up and dismantle the display.
631. Mrs Wilby did not decide what produce to replenish. The stock was brought in from the warehouse and it was Mrs Wilby's job to put that stock on display. She decided the order in which she replenished. Sometimes this would involve an exercise of judgement. Some of those judgements were simple. If she noticed a gap in the shelves, she would fill that gap. Other judgements were a little more complex. For example, she would prioritise replenishment of fast-moving stock over slow-moving stock, even if the slow-moving stock was more depleted. That decision involved keeping track of which items were selling quickly, as well as drawing on general knowledge (for example, that lettuce sells more quickly in summer).
632. Replenishment did not just mean putting stock on the shelves. Mrs Wilby also had to ensure that the fruit and vegetables were attractively presented.
633. Along with other replenishment roles, Mrs Wilby was expected to prioritise spillages over customers and customers over replenishment. These priorities could come into conflict with Mrs Wilby's time targets. These included the general replenishment target of "Full for 9, Fit for 5". They also included the expectation that Mrs Wilby complete date code checks by 10am.
634. If a customer asked for an item that was not in stock, Mrs Wilby would decide whether to recommend a suitable alternative, using her product knowledge.
635. Mrs Wilby decided whether or not to issue a Smiley voucher and regularly issued them.
636. Throughout her shift, Mrs Wilby made judgements about whether an item should be removed from sale, or whether it could be sold more cheaply under the RRR policy. She had authority to reduce items by up to 50%, which she could implement through her Telxon.
637. Mrs Wilby constantly assessed stock that she was replenishing in order to decide whether it was fit for display. She used her knowledge and had the Product Quality Guide to refer to if she needed it.
638. Mrs Wilby was asked to provide informal job shadowing to new starters on one or two occasions during the Relevant Period, each time for around a week. Typically, she would give a manager or section leader brief feedback in relation to the new starter's performance.

639. Mrs Wilby helped her colleagues as and when necessary. She replenished on other colleagues' produce aisles for a few hours, about once per week.
640. Mrs Wilby regularly answered questions or offered advice to colleagues who had not worked at Asda for as long as she had. For example, she showed them better ways to replenish, or display items. She did this at least several times per month. Less frequently (several times per year), Mrs Wilby showed junior Produce colleagues how to use equipment if they seemed unsure.

Edible Grocery

641. Ms Forrester had no choice about which aisles to replenish or where each type of stock should go. The biscuits, health and beauty aisles, were allocated to her. The stock to be replenished was determined by what had been delivered and broken down for her.
642. Once the shelves were full, Ms Forrester had to face up. "Facing up" was Asda-speak for ensuring that the food and other items were displayed neatly, attractively and correctly. There was very little room for creativity. Ms Forrester ensured that all items of produce faced the front, were flush with the shelf edge and in the correct longitudinal position so there was no mismatch with the shelf edge labels.
643. Within the parameters of the aisle, Ms Forrester could decide the order in which she replenished. She could also decide how to sequence replenishment with facing up. For example, she could stack everything and face it up at the end, or she could face up as she went. How she faced up was effectively decided for her.
644. She did additional tasks such as gap filling and substitute filling, which is to say, she plugged gaps in the shelves with more of the adjoining stock or a substitute product. These were done at the specific request of a manager.
645. When using equipment, such as a roll cage, Dalek, pallet or hand-pump truck, she first had to make a simple assessment of whether it was suitable and not defective.
646. When approached by a customer or dealing with a spillage, she had to apply the same cascade of priorities as Mrs Wilby. Some of her customer queries were a little more complicated than those which Mrs Wilby had to field. For example, she might have to ask some basic diagnostic questions in order to establish what kind of nappy a customer needed, or what kind of baby food was suitable.

Chilled

647. Ms Ohlsson worked largely autonomously. A Section Leader allocated her to a particular aisle, but otherwise gave her minimal instructions. She knew to break down deliveries at the start of her shift if the night shift had not completed this task.
648. Conflicting priorities arose in Ms Ohlsson's work, particularly when she was approached by a customer. As well as working through Asda's simple hierarchy of priorities (spills, customers, replenishment), she had to ensure that her diversion of attention to a customer did not compromise Challenge 20. She had to decide whether to pass on the query in order to ensure that products were returned to a chilled environment within the deadline.

649. Ms Ohlsson constantly assessed the quality of the chilled goods she was replenishing. Generally this involved checking date codes and being alert for signs of damage to the packaging.
650. Ms Ohlsson was sometimes asked to work alongside new colleagues for two or three days to answer questions such as the location of products, or to offer advice to colleagues who had not worked at Asda for as long as she had done. She showed the new starter where products were, how to interact with customers, and where equipment was located. There is nothing in Ms Ohlsson's job description to say how many times this happened.

Home & Leisure

651. Amongst the large range of products sold in Home and Leisure were computer games and video DVDs.
652. There are two Asda-expert iterations of Ms Darville's role. The second iteration covers the period from 2010 to 2014, when the store offered a Trade-in service on the Computer Games and Video Desk.

Home & Leisure (a) – (1) and (2)

653. The main purpose of Ms Darville's role was to ensure that her allocated aisles in the Home & Leisure department were presentable and fully stocked. She also assisted with other tasks as directed by a Section Leader or Manager, assisted with customer queries and provided customer service.
654. Replenishment was time-bound by the "Full for 9" and "Fit for 5" policies. Adherence to the latter policy meant deciding when to stop replenishing and start tidying to make the shop floor presentable by 5pm. Within that time constraint, Ms Darville decided the order in which she replenished stock.
655. Often, Ms Darville was told by a Section Leader or Manager what aisles she needed to replenish and what if any additional tasks to do. About once or twice a week, there was no leader available at the start of the shift, in which case Ms Darville and a colleague would divide the aisles between themselves.
656. Whilst replenishing, Ms Darville made day-to-day decisions within tightly defined rules, including:
- 656.1. Whether to "spot clean" a dirty-looking shelf;
 - 656.2. How to rearrange Top-Stocked products (pulling them forward or "facing across") on the top shelf after placing them on the lower shelves;
 - 656.3. How to rearrange products on the display shelves;
 - 656.4. Spotting gaps on the shelves and scanning the barcode on the shelf-edge label with her Telxon;
 - 656.5. How to "Face across" products to mask gaps in the display shelves; and
 - 656.6. How many trolleys she needed to "reverse pick" items from the warehouse to take out onto the shop floor, and how many items to load, defined by the number of units to be left in the warehouse.
657. At all times whilst replenishing, Ms Darville decided whether a product was fit for sale, using the Would I Buy It test.

658. Two to three times per week for about an hour at a time, Ms Darville worked behind the videos and games till. Some of the products on sale were age-restricted, which meant she had to make Challenge 25 decisions similar to those of the Checkout operator.
659. About two to three times per week a customer would buy a damaged item. If it was of low value, Ms Darville had discretion to “mark down” the price. Other items were marked down if they had previously been on display. Another reason for a markdown was if some packaging was missing. A simple decision tree determined the percentage markdown, but Ms Darville had some discretion to decide on the appropriate markdown if it was not covered by the decision tree. Ms Darville would use her initiative to decide whether items should be marked down.
660. Ms Darville was interrupted by customers whilst replenishing: 2-3 times per day with a query about product location and 1-2 times per day with an availability query. In addition, she answered about 5-6 telephone calls per shift from other stores about product availability, and was called to the Customer Service Desk about 6 times a day. Most days (and sometimes several times a day), she was asked about product information. If a customer approached Ms Darville with a product query, she had to be as helpful as she could, for example, by taking the customer to the location of the product, but also had to decide how to balance that requirement against the need to leave the equipment unattended for as little time as possible. If a product was out of stock, Ms Darville had to decide what alternatives to offer.
661. As with Checkout, Ms Darville exercised discretion, about once or twice per month, to provide a “Smiley” discount voucher. She was given examples of opportunities to issue Smiley vouchers.
662. In addition to her Telxon, Ms Darville used roll cages, kick stools and replenishment trolleys. She had to inspect this equipment before use to check that it was safe. If replenishment equipment was faulty or unavailable, she had to find another task to do.
663. Ms Darville had to be vigilant to the risk of theft. She had to decide whether she believed a customer was acting suspiciously or not, and if the customer’s behaviour was suspicious, she had to decide whether or not to report their behaviour to Security. She reported suspected theft about once per week.
664. About two or three times during the Relevant Period, Ms Darville was informally given the responsibility of providing on-the-job training to a new starter. This lasted up to a week. During that time, Ms Darville demonstrated the use of the Telxon and explained the process of replenishment. She provided brief feedback about how the new starter had performed.

Home & Leisure (3)/ (b)– Trade-ins

665. Once the Trade-in service opened to the public, Ms Darville would process a Trade-in every 3-4 months. This involved inspecting a game disk, making an assessment of the wear or damage, deciding whether to accept or reject the trade, and whether she should attempt to resurface the disk. She checked for signs that would indicate that the disk was counterfeit. There were many potential such signs, which were notified to her.

George

666. At the start of her shift, Mrs O'Donovan checked the Daily Planner. There she saw a list of the main tasks that her Section Leader had set for her. The list would specify the order in which the tasks should be completed. A separate Floor Walk Sheet, also prepared by her Section Leader, would also list tasks, but without prescribing the order of completion. In between these tasks, Mrs O'Donovan had some scope to use her initiative. For example, if there was nobody in the George warehouse and new stock had been delivered, Mrs O'Donovan would go to the warehouse and prepare the clothes for display on the shop floor, even if this was not on her daily planner. She could also deviate from the planner if something unforeseen happened.
667. Mrs O'Donovan was responsible for drafting a block plan, showing how to display new lines of girls' clothes over the coming weeks. She drafted the plan to meet a brief that had been supplied to her. This activity was not listed in the planner, so Mrs O'Donovan decided how best to fit it around her other tasks. Once Mrs O'Donovan had drafted the block plan, it was checked by a Manager or Section Leader.
668. Whilst Floor Walking and arranging clothes, Mrs O'Donovan used her judgement to view the department "through the eyes of the customer". Pre-set principles guided her to achieve the correct standards of presentation.
669. Mrs O'Donovan regularly assessed the quality of products and decided what to do about imperfect items. Her decision was a trident of options: waste, sell at full price or mark the price down. Each store had a target of 0.4% of sales to "spend" on wastage and damage markdowns each week.
670. Like other clothes shops, George displayed clothes on mannequins. Part of Mrs O'Donovan's job was to style, dress and accessorise the mannequins attractively. Mrs O'Donovan chose the clothes and accessories, taking account of the time of year (for example, Hallowe'en). The choice of each item would affect the choice of the other items: Mrs O'Donovan had to decide what clothes would go together, or might clash. Mannequins changed every 4-6 weeks.
671. About 5-10 times per year, the Aintree store was given a specific budget to allow for further markdowns of items that needed to be cleared. A Manager or Section Leader would tell Mrs O'Donovan of the waste budget for Girls' Kidswear. It was then up to Mrs O'Donovan to decide how that budget should be allocated. This involved judging how much each item should be marked down. She was expected to be as accurate as possible in ensuring that total markdowns matched the total budget. A Section Leader or Manager would check.
672. When working on the George Till, Mrs O'Donovan was responsible for processing returns. Some decision-making was involved. If a customer returned an item, Mrs O'Donovan could recommend a substitute purchase as an alternative to a refund. If she did, she had to decide what to recommend. On rare occasions, Mrs O'Donovan had to decide whether to refuse a fraudulent return.
673. Returns over £25.00 had to be logged. This was more time-consuming than a straightforward purchase. If the till was busy, she could put the task to one side, to be completed when time allowed.

674. Mrs O'Donovan offered informal support and fielded questions from less experienced members of the team. She was asked to provide informal job shadowing to new starters once or twice per year. The new starter worked alongside Mrs O'Donovan, who showed them how to operate equipment such as the Telxon and the tills. Mrs O'Donovan then observed the new starter in the performance of their tasks, providing guidance and instruction until they were sufficiently competent to work alone. Typically, Mrs O'Donovan provided brief feedback to the Section Leader or Manager.

Process

675. Mrs Trickett worked largely autonomously within a predetermined set of priorities. In rank order, she:

- 675.1. assisted with the completion of replenishment if the night shift had not managed to complete it;
- 675.2. undertook overstock investigations;
- 675.3. investigated the BAM exceptions;
- 675.4. investigated OSCA alerts, which highlighted products which had not been sold the previous day, despite the Perpetual Inventory showing them as being in stock;
- 675.5. completed additional tasks allocated to her by her Section Leader or Manager; and
- 675.6. got on with other tasks if time allowed.

676. The other tasks could be prioritised as Mrs Trickett saw fit. They included processing damaged ambient products, including repairing and marking down the price, gap scanning and general replenishment.

677. Mrs Trickett had to be adaptable. Sometimes there would be so many OSCA alerts that she would spend up to 4 hours on that task alone. She kept an eye on her progress and informed her Section Leader if she thought she would not reach her remaining tasks.

678. When investigating OSCA alerts, Mrs Trickett had to cross check the number of items on the shelf against the number on the printed OSCA report, and match those data to the numbers shown on her Telxon screen

679. Once every few weeks, Mrs Trickett noticed that the price change information on the BAM screen appeared anomalous. For example, if a grocery brand raised all its prices across all its product lines except one, the unchanged price of the single item might suggest an error. Mrs Trickett used her initiative to investigate and highlight the discrepancy.

680. When marking down damaged items, Mrs Trickett had to assess the damage, whether it had affected the quality of the product inside, and whether the damage was capable of being repaired. She judged product quality according to the risk of contamination and the general Would I Buy It standard. She had discretion to mark down the price, but sought authorisation from her Manager to authorise a large percentage price reduction.

681. Mrs Trickett made simpler decisions when Gap Scanning. A rule of thumb "three or less" indicated to her when a product was about to run out, and prompted her

to start a gap scan. She made similar decisions to Ms Forrester when replenishing.

682. Once or twice per year, Mrs Trickett provided job shadowing to new starters. She was shadowed usually for a shift or two, during which time she demonstrated the use of her equipment. Her job description does not mention any request to do this, or any feedback that Mrs Trickett provided about the new starter.
683. Mrs Trickett worked on several occasions at a different store that was short-staffed. We do not see how this added to the demands of her work.

Warehouse

684. Ms Hutcheson worked autonomously. The sequence of her work was influenced by the arrival of deliveries. Tipping, marshalling, racking away and picking all started with the arrival of the stock on a vehicle. Ms Hutcheson had no input into the scheduling of those deliveries, but she had to manage queues where a delayed delivery caused a queue of deliveries that had been scheduled for later in the day.
685. When unloading deliveries, Ms Hutcheson had to check the goods against the delivery documents. She had to make decisions about taking deliveries out of sequence.
686. Once or twice per year, Ms Hutcheson was asked to provide informal training to new colleagues. She demonstrated the correct methods of each task. She gave brief feedback to a manager or Section Leader. Her feedback was based on her observation of the new starter's performance.
687. The Hamilton store was designated by Asda as a "Store of Learning". There were often trainee managers and Section Leaders from other stores being trained across the various departments. This was part of Asda's leadership training programme. Trainees could be present in the warehouse for 10 to 15 times per year. Ms Hutcheson's job description lists examples of 12 different tasks for which Ms Hutcheson had someone shadowing her. We do not know how many of those tasks Ms Hutcheson was shadowed on by each new starter. We do not know how many of the 10 to 15 Trainees shadowed Ms Hutcheson, but we can make an educated guess that it was approximately two or three. (This does not involve introducing a new fact related to the question. It is an inference based on the fact that there were four or five people working in the Hamilton store warehouse, and there being no reason to think that any of them took on any more Store of Learning responsibility than the others.)

Bakery

688. Mrs Gardner was free to decide on the order in which she packed and replenished bakery goods. She gauged how to work most efficiently, depending on factors such as the day's production quantities, the number of available colleagues and the aims of "Full for 9, Fit for 5". She prioritised tasks to ensure that items were ready for home shopping before 7am. If she noticed that freshly-baked rolls were about to come out of the oven, and were not plentiful on the shelves, she would leave a less urgent task, such as defrosting, and concentrate on packaging and replenishing the rolls.

689. Apart from planning and organising, the decisions that arose in the bakery were of a similar level of complexity to replenishment roles. She used the “Would I Buy It?” test when deciding whether bakery items were suitable for display. She occasionally had to decide whether a photograph was inappropriate for use in the Photo-Cake machine.
690. There was a requirement for some basic team working within the bakery. Mrs Gardner cooperated with bakery colleagues to keep the bakery area clean and clutter-free. She updated Bakers about home shopping or customer orders.
691. Mrs Gardner, as we know, worked in the same store as Ms Hamilton. She contributed to its function as a Store of Learning. Trainees shadowed her in order to learn about the bakery process. We do not know how many times this happened, or how long it took.
692. Once or twice during the Relevant Period, Mrs Gardner was asked to provide informal job shadowing to a new starter. The new colleague worked alongside Mrs Gardner, who showed them how to carry out each stage of the bakery process. Mrs Gardner’s job description does not tell us for how long this shadowing arrangement lasted.

Customer service desk

693. Mrs Fearn was usually the only Customer Service Desk worker on her shift. She was left largely to her own devices, with support available to her from the Service Host and Section Leader.
694. Her work was mainly reactive to the issues that the customers brought to her. Some forward planning was required. She was not allowed to leave the desk unattended, but would have various reasons during her shift why she would need to leave the desk, usually for a couple of minutes at a time. She would estimate how long she was likely to be away from the desk and would ask a Kiosk colleague to keep an eye out for customers or would ask a Service Host to find cover.
695. The unpredictable nature of Mrs Fearn’s work required her to be well organised. She would always prioritise customers, but during a lull between customer queries, she would complete tasks left for her in the Handover Book. It was up to Mrs Fearn to decide how to fit those tasks in amongst her main customer-facing duty.
696. Some of Mrs Fearn’s decisions were the broadly the same as the ones Ms Ashton had to make on the checkout. These included decisions on the sale of restricted items.
697. Mrs Fearn frequently dealt with customer complaints throughout her shift. She asked questions to clarify anything she was unsure about and decided what action to take. This included offering an apology, with or without a goodwill offer of up to £15.00.
698. When dealing with complaints from customers about product quality, Mrs Fearn followed the CPQC guidance to decide whether a complaint was “serious”. This involved a sequence of straightforward decisions about whether any one of 11 examples applied (for example, whether a pet had been injured and vets’ fees had been incurred). It might also involve a more nuanced decision as to whether

it was a complaint of equivalent seriousness “which [she] considers could damage the Asda brand”.

699. If the complaint was not serious, in the CPQC sense, Mrs Fearn logged the complaint and offered a refund or replacement.
700. Mrs Fearn had the discretion to offer up to £30.00 of compensation for minor personal injuries or financial losses (such as dry cleaning costs).
701. Mrs Fearn also dealt with refunds and returns where there was no complaint about the product. She had discretion to extend the 28-day returns time limit by up to 7 days. Mrs Fearn would take account of the reason for delay given by the customer.
702. We have seen that one of Mrs Fearn’s responsibilities was the Scooter Club. Each day, Mrs Fearn decided whether each scooter was fit for use. This involved 7 checks, each giving her a simple decision to make. She had the freedom to decide whether a regular customer should be issued with a key to take home.
703. Some decisions were beyond Mrs Fearn’s remit. For example, she would ask a Service Manager to deal with:
- 703.1. goodwill offers exceeding £15.00 (this could be authorised over the phone)
 - 703.2. attending to a customer who demands to see a manager, or
 - 703.3. a serious complaint or incident involving injury or damage to property.
704. Mrs Fearn was not a formal Training Buddy. She was, however, asked to train three or four less experienced colleagues during the Relevant Period. Training lasted for between one and three hours per day, for a period of about two weeks. It covered ten discrete aspects of the Customer Service Desk role, each with its own pre-written coaching card. Mrs Fearn demonstrated the use of the CPQC pad to less experienced colleagues. This involved entering mock details into a real online form, because there was no training mode. She put the till into training mode when the desk was quiet, and showed the trainee how to process certain transactions such as refunds. After the trainee had completed each aspect of their training, Mrs Fearn completed a training confirmation form, which she and the trainee both signed. Mrs Fearn would not sign the form until the trainee was ready. She went over the content with them until the trainee was confident.
705. On a more *ad hoc* basis, Mrs Fearn offered advice to less experienced colleagues, including seasonal staff at Christmas.
706. During the Relevant Period, Mrs Fearn showed the Home & Leisure Manager how to use management functions on the till and gave her a general demonstration of the Customer Service Desk operation.

Counters

707. Mrs Webster typically worked alongside between four and seven colleagues on the counters. She was allocated to a counter for the day by the daily rota, prepared in advance by the Section Leader. Mrs Webster’s shift started about an

hour before the Section Leader arrived, so Mrs Webster and her colleagues agreed on the division of work amongst themselves.

708. Mrs Webster worked largely autonomously. She used her discretion to move to another counter if she noticed a customer waiting to be served. She was not told how many of each product to cook, but used her experience to decide the correct production quantities, taking account of seasonal variations and school holidays. When Mrs Webster gauged that there was a high demand for a particular pizza, she prioritised that pizza over others. When working on the Rotisserie counter, Mrs Webster was left to complete and record temperature checks on her own.
709. Over the Relevant Period, Mrs Webster informally trained ten new starters. They shadowed her and she delegated tasks to them. Typically, the shadowing would last a few days, up to a week. It formed part of their on-the-job training. Each year, during the Christmas period, the counters staff was swelled by seasonal workers. Mrs Webster delegated basic day-to-day tasks to them and oversaw their work generally. About once per month, she monitored less experienced colleagues for a few hours within a shift.

Service Host

710. Ms Billings was required to be flexible and work from task to task as necessary. She was responsive to checkout queries, for example, whether a Whoops! label had been switched. Her priorities were dictated by her assessment of the needs of customers at the checkout. Priorities could compete for her attention, for example, if she was approached by a customer whilst dealing with another customer issue at the checkout, or fetching a product for a different customer.
711. Ms Billings looked after a block of checkouts. She allocated Checkout Operators to checkouts based on their time of arrival at work. She used her discretion to open and close additional checkout lanes and to call Queue Busters. She planned, managed and coordinated colleague breaks to ensure that Asda's queue management target was achieved. The Q-Clarity prediction helped her to schedule breaks away from expected peak times. Within those constraints she generally timed breaks so that the earliest arrivals took their breaks first. She arranged coverage for toilet breaks if needed.
712. Ms Billings was responsible for checkout fault reporting and common errors in the self-scan units. She was often called over to the tills by colleagues and asked to demonstrate what to do, for example, to process a particular type of payment card. These requests usually arose when Ms Billings was dealing with a customer.
713. If a complaint was made or escalated to Ms Billings, she decided whether to deal with it herself or refer it on to the Customer Service Desk.
714. Ms Billings had to supervise 10 self-scan units and 4 hybrid checkouts. On one shift per week, she did that duty for anything between a few hours and the entire length of the shift. On her remaining shifts, she had that responsibility for about 15-30 minutes each day, to cover breaks for colleagues. When supervising the self-scan checkouts, Ms Billings monitored her surroundings and looked out for signs of suspicious behaviour, such as switching markdown labels, or scanning items that were cheaper by weight than the items they put into the bagging area.

715. Ms Billings also had a responsibility to make sure that the self-scan hosts and checkout operators were working as efficiently as possible. During the Relevant Period, Ms Billings was asked by her previous manager to complete Service Observation Sheets for all Checkout Operators and Self-Scan Hosts on an ongoing basis. The sheets reflected the Mystery Shopper criteria and listed 10 aspects of customer service for her to check. She observed one colleague at a time and filled in the sheet. Afterwards, she decided whether there were any major performance issues that should be reported to the manager or Section Leader. She escalated such issues once every few months.
716. If Ms Billings noticed that a colleague was struggling on the checkout, for example, by raising an unusually high number of queries, Ms Billings helped the colleague as softer intervention before raising performance issues with the Section Leader.
717. Once or twice per year, at the request of her manager, Ms Billings trained new starters on the use of the Self-scan Units using the Training Mode.

Section Leader

718. Miss Gibbins had a leadership role. She was responsible for monitoring the pace and quality of her own work and that of the Shop Floor Assistants on her shift. There would be between 45 and 72 colleagues on her shift, depending on seasonal variation. She organised tasks in order of urgency.
719. Miss Gibbins was responsible for editing the weekly rota for the colleagues she supervised. The first draft of the rota was computer-generated. Miss Gibbins would decide what changes to make and then implement it. A manager reviewed the rota once Miss Gibbins had decided on it. Editing the rota involved reviewing daily queue length reports. Miss Gibbins took into account “shift swap” requests and decided whether to grant them or not. She was responsible for ensuring that there was no overspend on wages and that the section was not understaffed. Miss Gibbins signed off holiday requests and requests to vary shift patterns (for example for childcare), taking account of the competing priorities of smooth running of the department and the particular needs of the individual requester.
720. If a colleague in her section was absent due to illness, Miss Gibbins reallocated staff to cover the work. She regularly conducted return-to-work interviews within the “Green” and “Amber” categories. She regularly made absence management calls to colleagues. She organised any adjustments or phased return that had been agreed.
721. At least three times per week, Miss Gibbins carried out the Service Customer Walk of the front end of the store. She dealt with any issues that arose and communicated any actions and completed the Customer Walk Sheet.
722. Miss Gibbins had to make decisions about performance. For example, she had to consider whether a colleague was meeting the required standards, including against empirical data such as checkout operator scan speeds, which she found on the Service Dashboard.
723. The Section Leader was the only role amongst our cohort to have responsibility for conduct issues, albeit minor ones. Misdemeanours within Miss Gibbins’ remit included colleagues arriving late for their shift or failing to maintain uniform and appearance standards. Miss Gibbins addressed the issues informally in the first

instance (for a first offence) and if, formal disciplinary action was not appropriate, she would have a documented counselling meeting with the colleague.

724. Miss Gibbins had to make decisions about cash imbalances and investigate the causes. She decided on atypical customer complaints and decided whether to escalate them to Headquarters at Asda House.
725. Part of Miss Gibbins' role was to manage queues and to oversee the management of queues by the Service Host. This involved making decisions about whether to open more tills or by operating a main checkout herself, or calling for a Queue Buster to assist.
726. Miss Gibbins was part of the Recruitment Squad. Jointly with others, she observed and interviewed candidates and decided to whom jobs should be offered.
727. As Section Leader, Miss Gibbins delivered job-specific training for new starters across a range of roles in the Service Department. These included Checkout, Service Host and Customer Service Desk. We have set out the training requirements for those roles under the heading of Knowledge. Miss Gibbins also provided the job-specific training for Porters (colleagues who moved trolleys around the car park). She was given resources including photographs and coaching cards. Some of the training was delivered face-to-face by her in a dedicated session. For on-the-job training, Miss Gibbins chose an experienced colleague to work alongside the new starter.
728. Miss Gibbins observed new starters and noted areas for improvement.
729. New starters met with a Section Leader for 10 minutes each week for the first 4 weeks of their employment. At each such meeting, Miss Gibbins completed a Review Form. Once the training validation documentation and Review Forms were completed, Miss Gibbins ensured they were signed by a manager. She then passed them to the People Clerk for filing as part of the new starter's individual training record.
730. Miss Gibbins' job description says that she delivered job-specific training "occasionally". According to the IEs' schematic (see paragraph 68), "occasionally" was measured over a period over a few weeks or months.
731. When a colleague was promoted to Section Leader, Miss Gibbins worked alongside the new Section Leader for one or two shifts and demonstrated the main Section Leader tasks.

Planning and organising features common to comparators

732. The activities of Warehouse Colleagues were determined and scheduled by a management decision. On any given day, they would be told what activity they had to do. They had no choice in the matter.
733. Most depot activities were subject to targets. With some exceptions, these targets were monitored at least daily.

Devenney

734. Mr Devenney's stock picking activities were almost all sequenced and directed by his Talkman.

735. There were nevertheless some decisions that Mr Devenney had to make for himself.
736. When carrying out his pre-operation LLOP inspection, the checklist gave him a sequence of 15 simple binary decisions to make. It generally took 5 minutes.
737. Other decisions arose during the course of a pick. For example:
- 737.1. Sometimes Mr Devenney would be directed to a pick slot, only to get there and find it was empty. The first time he arrived at a slot, he “zeroed” that pick. He would be redirected to it later. Two or three times per shift, Mr Devenney would arrive at the pick slot for a second time and find it was still empty. That gave him a decision to make. Either he zeroed the pick for a second time or asked a nearby colleague on Letdowns to replenish the slot. If he had 10 or more cases to pick from the empty slot, he had no choice in the matter – he had to wait.
 - 737.2. When picking for multiple stores, Mr Devenney could group products together in a container, for ease of unloading, but if he did so, he had to ensure that the stock was still stacked safely.
 - 737.3. Mr Devenney “closed” each pick by shrink-wrapping it, labelling it and leaving it at Goods Out. Sometimes he would close the pick early. A pick was closed early if there were still unpicked cases on the schedule for that pick, as instructed by his Talkman. Mr Devenney would only do this if he thought his pallet was becoming dangerously tall or heavy. This could have some effect on Mr Devenney’s ability to meet his target. This was because of the time it took to shrink-wrap one pallet and fetch a new one.
 - 737.4. On Stock Pick, Flow Pick and Cage Pick, Mr Devenney had the facility to request an Aisle Summary from his Talkman. He typically did this at the beginning of a pick. His decision to request the Aisle Summary was dictated by the total number of pick slots included in the pick. That number was provided to him by the Talkman before the pick started. A small number of pick slots generally meant a greater number of cases to pick at each slot. The Aisle Summary would then tell him if there were any picks of 10 cases or more, which he could use to build a stable base. He would then use this information to decide which pick slot to visit first.
 - 737.5. Mr Devenney also requested an Aisle Summary as his pallet was nearing head height. A large number of cases from a single pick slot would be enough to make the stack dangerously tall. Depending on how many cases were waiting for him in that aisle, he could pick from one of the later slots in order to give him a small enough number of cases to add safely to his pallet before he closed the pick.
 - 737.6. Sometimes, Mr Devenney was instructed to pick a large number of cases of a particular item, so many, in fact, that it would be more efficient to start with a full pallet directly from the higher racking shelves. If that was Mr Devenney’s opinion, he could decide to ask a Letdown colleague to provide him with one.
 - 737.7. Mr Devenney’s picking rate was slowed down if was given a series of “small picks” (a small number of cases to pick from each slot). If Mr

Devenney thought that his picking rate was suffering, he decided whether or not to speak to a supervisor to request some compensatory larger picks.

738. Mr Devenney worked on Pick By Line for one shift per week. Pick By Line was pre-set to the same degree as Stock Pick. The only difference was that, on Pick By Line, the order of his work was dictated, not by the Talkman, but by the queue of containers waiting to be distributed. Mr Devenney had some discretion to depart from that order, if he thought it would improve the stability of the containers he was stacking. For example, he might pick heavier items from a container further back in the queue, so each receptacle container had a more stable base.
739. Mr Devenney did Trammings shifts which varied in frequency over the Relevant Period, but which amounted to about a quarter of his working time. When Trammings, Mr Devenney would receive instructions orally over his radio. He was told to go to a precise location in the depot, collect a container of stock, and take it to another location. He had no choice about the order in which to do his work.
740. For one shift per month, or half a shift per month, Mr Devenney was engaged in Hygiene. On this activity he was free to decide on the order in which he moved through the depot. The work itself was not sequenced in any automated way, but there was little or no variation in the work and few if any decisions for Mr Devenney to make.
741. Generally, when carrying out Trammings, Hygiene and Chase Pick, Mr Devenney kept an eye on how his work was affecting other activities so he could ensure he was keeping up with them.

Opelt

742. Mr Opelt's only activities were Large Case Pick and Manual Store Pick. These activities were Talkman-directed in the same way as Mr Devenney followed his Talkman instructions at Didcot.
743. Mr Opelt answered questions when asked by a less experienced colleague. For example, he told a new starter where the canteen was. He explained to colleagues how to operate their RDT screen. He also showed how to stack cases efficiently, so they did not need to waste time restacking them later. He did this of his own volition, without having been asked to do so by a supervisor. Conversations such as these would last a few minutes at a time. According to his job description, such exchanges happened "occasionally". We interpret "occasionally" in line with the schematic, as we have done with Miss Gibbins.

Welch

744. We have already set out Mr Welch's profile of activities. Of those, Stock Pick and Flow Pick accounted for 90% of his shifts. He was directed from one pick slot to another, and from one flow-racking shelf to another, by his Talkman, just as Mr Opelt and Mr Devenney were.
745. Mr Welch's work on Pick By Line was approximately once per month.
746. Tasks were assigned to Mr Welch at approximately 15-minute intervals. Mr Welch could ask his supervisor to work in a different order, but required approval.

Makin

747. Mr Makin had been working in his role for 4 years by the start of the Relevant Period. At the start of a shift, he was occasionally asked to provide on-the-job instruction and guidance to a new starter on his activity. He demonstrated techniques and equipment and answered questions. He also observed the new starter in their work and informally provided feedback to the Supervisor.
748. Approximately once per year, Mr Makin “buddied” a colleague over a longer period. At least one of these pairings was on Goods Out. It lasted 1-2 weeks. Buddying on other activities was shorter and concluded naturally when the new starter was sufficiently confident to work independently.

Hore

749. Mr Hore had to make similar kinds of decisions to Mr Devenney whilst working on Stock Pick and Pick By Line. He also had a separate set of decisions to make when working on Goods In. He assessed the safety of inbound pallets, including whether their safety was compromised by build-up of frost and ice. He carried out basic quality checks, looking out for obvious damage and expiry dates. If he was concerned, he quarantined the stock and referred it to a Quality Assurance colleague for a decision about whether to reject it.
750. Mr Hore had no responsibility for training or mentoring.

Han

751. The bulk of Mr Han’s work was picking. From 2008 he did 1 or 2 shifts per week on Goods In, Handballing and Infeeding.
752. When Handballing, Mr Han worked in a team of two. They determined the order in which to unload trailers using a single criterion: they had to unload the trailer that had been waiting the longest. Between them, Mr Han and his teammate agreed on the number of cases to form the base of the pallet stack. They monitored the pace of their own work as they went. If they were falling behind, their Supervisor would speak to the team on the warehouse floor. This never in fact happened to Mr Han, but he saw colleagues being called out in this way.
753. When Infeeding, Mr Han decided whether pallets were in a fit state to be fed into the automated high shelving. He conducted a series of simple assessments: What colour was the pallet? Was it broken or split? Were there protruding nails? Was stock overhanging the side? Was it sufficiently shrink-wrapped? Did it have a label in the right place?
754. On multiple occasions per shift, the computer rejected a pallet of stock at the infeed point. If the pallet was rejected, Mr Han checked the error message on the computer. There were 29 possible errors. Most commonly, the error message provided Mr Han with the complete answer about what to do to rectify it. For example, if the pallet was overweight, Mr Han did not have a decision to make: he knew he had to remove cases by hand until the pallet reached the correct weight and then re-wrap the pallet.
755. On End of Chutes, Mr Han worked in a team of two or three people. They would coordinate to concentrate on the busiest chutes. They staggered their breaks by agreement.

756. There were some simple decisions to be made on Rear Tipping and Checking. For example, Mr Han used his knowledge of the different types of stock expiry dates (Best Before End, Use By etc) to input the correct Stock Code Date for an incoming pallet of goods. He checked for signs of damage to the packaging, or unpleasant smells coming from inside.
757. The depot management team monitored the accuracy of Mr Han's work closely. Large Case Pick, Manual Store Pick and Large Case Replenishment were the subject of individual hourly targets. On Small Case Decant, the target applied to the team as a whole.
758. About once per year, Mr Han was asked to "buddy up" with new starters who were struggling with their work. He provided informal guidance sporadically during a shift. Queries were usually about the Talkman and scanning gun. He helped colleagues with other tips and tricks on processes they may have forgotten following their training.

Ballard

759. The most heavily discussed activities in Mr Ballard's role were the Goods In activities of Tipping and Yard.
760. We have briefly mentioned Mr Ballard's Tramming and Handballing, as well as his other picking activities. When picking, he made essentially the same decisions (whether about planning and organising or problem-solving) as Mr Devenney made. This included distributing containers out of sequence on Pick By Line, and requesting Aisle Summaries on Stock Picking.
761. There was very little additional planning, organising or decision-making needed in Tramming. Nor was there much in Handballing, but there was an element of simple teamwork. Mr Ballard handballed pallets with a teammate. Sometimes, one of them would go up a ladder and the other would pass items to him. Some stock items (such as patio furniture) required a two-person lift.
762. Mr Ballard's Tipping and Yard activities required him to make a visual pre-operation inspection of the CBT. Like a LLOP check, this was a series of independent, simple decisions. He had more such decisions to make than Mr Devenney did when he was checking his LLOP, because the CBT checklist was longer. It included checks on fuel, tyres, lights, brake fluid and hydraulic lubricants. Inspection of the correct gauge would reveal the answer. Because of the extra decisions, a CBT check took about 5 minutes longer. (On Tipping, his job description says that his pre-operation check took a maximum of 5 minutes, but on Yard, his preparation could take up to 15 minutes).
763. Like Ms Forrester, Mr Ballard had to check whether his containers were safe to use. For example, he needed to establish that there was the correct number of wheels at the bottom of the roll cage or, when using a pallet, that it was not obviously damaged.
764. When working on Tipping, Mr Ballard unloaded the trailers in the order in which they had arrived, or as otherwise instructed. He had no choice about that. If there was no trailer to unload, Mr Ballard had some discretion to decide what work to do on the yard until there was another trailer ready to tip.

765. Mr Ballard had to make an assessment of each pallet that he tipped. Was it safely stacked? This decision involved looking out for obvious dangers such as overhanging or pallet damage.
766. When entering a trailer, Mr Ballard had to assess whether he thought it was safe to move around and how clean it was.
767. Mr Ballard generally tipped trailers as one of a team of two. If his teammate was CBT-trained, they divided up the CBT work between them across the shift. If the teammate was not a CBT driver, Mr Ballard drove the CBT the other person did other tasks. As discussed under Knowledge, some CBTs had a slip-sheet attachment. If a slip-sheet was in use, one of the duo would drive the slip-sheet CBT to tip the loose cases and the other would drive a Power Pallet Truck for the goods on pallets.
768. Every two weeks or so, Mr Ballard was asked by his Supervisor to “buddy” with new starters during the Relevant Period. He gave them tips on stacking pallets and roll cages efficiently and stably. He explained how they could optimise efficiency with the timing of their breaks. Such conversations took 5-10 minutes.
769. In Iteration (b), Mr Ballard also mentored other colleagues in his capacity as a Colleague Circle Representative. His job description does not tell us what this mentoring involved, or how often he did it.

McDonough

770. Mr McDonough worked in the Frozen Chamber at Skelmersdale. If he wanted a break, he cooperated with others to ensure that nobody was left in the chamber on their own. He responded to requests for replenishment in much the same way that Mr Dolan did. He reported issues to his supervisor if they arose.

Matthews

771. Mr Matthews worked at the Skelmersdale CDC.
772. One of his activities was Goods In – Tipping. This activity was done differently in Skelmersdale from the way Mr Ballard did it in Didcot. One difference was the time constraint under which Mr Matthews worked. Because the goods were chilled, he had to comply with Challenge 20. Mr Matthews had to prioritise his work to ensure that all the incoming goods were moved to the appropriate temperature chamber within 20 minutes.
773. Another difference was the way in which the activities were allocated. Workers in the Chilled Chamber were rostered for Goods In in teams of two or three. Between them, they had to do Tipping, Breaking Down, Receiving and Marshalling. They decided between themselves who would do which activity. This was agreed at the start of each shift. Their work was closely monitored.
774. Pick By Line in the Chilled Chamber was individually allocated and directed in a similar way to the other depots.
775. Mr Matthews was asked by his supervisor informally to act as a buddy to a less experienced colleague on Pick By Line. This happened approximately eight or nine times during the Relevant Period.

Dennis (2) (b) and (c)

776. Mr Dennis' activities in Iteration (c) included Putaways and Letdowns, using the HRT, similar to Mr Dolan and Mr Uchanski.
777. In Iterations (b) and (c) (which correspond to the IEs' Iteration (2)), Mr Dennis was responsible for Loading. This was the activity that involved the most planning, organising and decision-making.
778. Mr Dennis had no freedom to decide the order of trailers that he loaded.
779. Before Mr Dennis planned a load, he was given a load card. This document was partly pre-populated with information about the type of trailer and the picks that were required to be loaded onto it. The card did not tell Mr Dennis how to configure the load. It did not tell him how heavy each load was.
780. We have previously mentioned consolidation of containers. Mr Dennis had to decide how many consolidations were needed. This was a relatively simple function of the number of containers he had been given and the type of trailer. He knew the capacity. He would then have to choose two containers to consolidate. The choice would depend on the store destination for each container, his prediction of the combined height and weight of the merged load, the types of stock on the two containers, together with the restrictions on height, weight and product mixing.
781. Positioning of containers within the trailer would also depend the type of trailer, store destination and the height of the containers. He also had estimate the weight of each container and compare that estimate against the weight distribution limits over each axle and for each deck of the trailer.
782. Each dimension of these decisions was simple. The description of the type of stock on the case (beer or crisps) would generally be sufficient for Mr Dennis to know the approximate weight. The rules then told him what to do. Last in, first out for a split load. Heaviest items on the lower deck of a double-deck trailer. Taller and heavier containers in the middle, shorter and lighter containers at each end. What made the load planning more complicated was that the decisions were interdependent. Putting a short pallet at the end of a trailer was straightforward if it was light, but if it was heavy, it might have to go in the middle, or lighter pallets would have to be found to keep the average weight down. If it went in middle of a split load, but too near the cab, it might be difficult for the equivalent of Ms Hutcheson to unload when it arrived at the store.
783. Once the load was planned, Mr Dennis had simple decisions to make about what kind of straps to use and where to place them. These would depend on the type of container, type of trailer and combined weight.
784. He also had a succession of independent assessments to make for each container, for example, whether a pallet was safely stacked.
785. There were occasions when Mr Dennis would ask his Supervisor for help to rectify a problem. These included:
- 785.1. where a trailer had not properly been backed up to the loading bay, and
 - 785.2. where Mr Dennis considered that a pallet had been unsafely stacked.
786. On three or four occasions during the Relevant Period, Mr Dennis was asked by his Supervisor to buddy up with a colleague who was new to Goods Out and who

was struggling to load a trailer by the deadline. They were generally paired together for the duration of one trailer-load. That is roughly one-seventh of a shift. Mr Dennis observed the colleague and gave them advice. For example, Mr Dennis would explain why he had chosen a particular pallet to load first.

Beaumont

787. Mr Beaumont worked regular Goods Out shifts until August 2009, from which point he only worked on Goods Out about twice a year.
788. He sometimes worked with a team-mate. This happened approximately once per shift – usually when a colleague needed assistance to get the trailer loaded by its “Load By” time. They divided the work between them. One of them would do the consolidating and scanning and the other did the loading.

Dolan

789. We have seen that Mr Dolan drove a HRT and that the pre-operation checklist for a HRT was the same as for a CBT. Thus, he had to make a small number of additional decisions (for example about hydraulic fluid levels) that the LLOP drivers did not have to make.
790. He used his HRT for Flow Racking Replenishment. This included fetching pallets from high racking shelves. Mr Dolan had to assess the stability of each pallet. He could not take pallet stability for granted, because the pallet might have been partially emptied by a colleague and put back up again. This was a more difficult decision than inspecting a pallet at ground level, because of the restricted sight lines. The time allocated for checking each pallet was 30 seconds. (Mr Walls described it as “marginally” more complicated and we agree.)
791. Once the pallet was checked, Mr Dolan had to decide how much lifting force to apply to the pallet. This involved an assessment of the weight of the load and the feel of resistance against the joystick. Too much force would risk the pallet over-accelerating and hitting the racking shelf above.
792. As a First Aider, Mr Dolan had to assess each injured colleague and decide how he should be managed, applying his training. He was called to a casualty about 6 times per year.
793. Mr Dolan did not carry out any training or mentoring during the Relevant Period. On one day outside the Relevant Period, Mr Dolan spent half a shift working alongside an under-performing HRT driver, following which that driver’s performance significantly improved.

Uchanski

794. One of Mr Uchanski’s activities (in his (b) iteration) was Putaways. It involved all the decision-making of a HRT driver. Once every couple of months, Mr Uchanski “barred” a pallet that he deemed to be unsuitable.
795. Mr Uchanski was able to judge the stability of a pallet by inspecting it at ground level. This was a luxury unavailable to colleagues on Flow Racking Replenishment or Letdowns. Mr Uchanski did, however, need to make a decision that colleagues on those activities did not have to make. He had to assess the space into which the pallet was destined to be stored. This was relatively simple. The racking shelving was at a standard height. Mr Uchanski

had to compare it to the height of the pallet and check that there was a full pallet's width of space.

796. Mr Uchanski had an informal practice of providing new starters with informal guidance. He answered any queries they had during the shift. For example, he explained to colleagues how to operate their RDT screen or other electronic equipment.

Prescott

797. David Prescott worked at the Skelmersdale CDC. His activities included various Goods In activities, as well as solitary activities such as Pick By Line and Hygiene.
798. In Goods In, he worked in small teams of two or three other Warehouse Colleagues. At the start of the shift, he and his team mates would agree amongst themselves how they should divide that day's work. Activities could include Tipping, Receiving, Marshalling and Breaking Down. They took into account training limitations and efficiency. Mr Prescott did Tipping between 2 and 12 times per year.

Sayeed

799. One of Mr Sayeed's activities was Large Case Replenishment. At the start of each shift on that activity, the Supervisor told him which floor to go to. Usually, a colleague would be allocated to that floor with him. Between them they decided up the outfeed spurs. Mr Sayeed was free to decide on the order in which he replenished. He prioritised the busiest spurs to avoid a build-up of pallets. The next priority was to go to the outfeed spurs nearest to wherever Mr Sayeed happened to be, so as to reduce travelling time between spurs.
800. When Marshalling, Mr Sayeed's assignments were dictated to him, but if he completed all his assignments, he went to help colleagues whilst he waited for his next instruction.
801. Both of Mr Sayeed's iterations involved Loading. He had to use a CBT for one of them. After 2011, Mr Sayeed worked in a team of two with another loader. They agreed on the division of work at the start of each load.

Morris (a)

802. The reader will remember that, in Iteration (a), Mr Morris was a First Aider and an Instructor on two disciplines: Manual Handling and Mechanised Handling Equipment.
803. When called out to a First Aid incident, Mr Morris had to make similar decisions to Mr Beaumont.
804. Mr Morris delivered one or two full Manual Handling training sessions per year, plus more frequent refresher training. He taught groups of up to 12 trainees at a time. His responsibility was to ensure that trainees were competent in manual handling by the end of the course. This was a significant responsibility, because manual movement of stock was a core task in the depot.
805. Each full session lasted about 2 hours. Mr Morris had no input into the content of the training, as it was devised by third-party providers. The theory element of the

training was validated by a questionnaire, which Mr Morris had to administer and mark. The design of the questionnaire was such that it was relatively straightforward to work out whether the questions had been answered correctly. During the practical element, Mr Morris observed the trainees as they performed manual handling tasks. He decided whether the trainees were moving correctly and, if not, he intervened to give them further guidance.

806. Each year, Mr Morris also delivered one or two full Mechanised Handling Equipment sessions. These were more intensive, with a maximum of two trainees on each course. They involved about four hours of contact time. Mr Morris had to observe the practical skills test and score the trainee's use of the equipment. It was Mr Morris' responsibility to ensure that each trainee was able to operate a LLOP and/or Power Pallet Truck, with knowledge of the risks and procedures. Safe operation of this machinery was, again, crucial to the working of the depot.
807. More frequently, Mr Morris delivered refresher training on mechanised equipment.

Morris (b)

808. Outside of his Instructor responsibilities, Mr Morris was occasionally asked by his Supervisor to provide on-the-job instruction and guidance to new starters. His job description is worded identically to those of other Warehouse Colleagues about what this involved. On about two or three occasions during the Relevant Period, Mr Morris participated in "buddying" sessions. His job description is vague as to how long these sessions lasted.
809. In terms of decision-making, Mr Morris' role was otherwise similar to that of Mr Beaumont.

Haigh (a) and (b)

810. When Mr Haigh was on shift as a supervisor, he had additional decisions to make. For example, he decided which members of his team would work on which floor. He coordinated break times amongst colleagues. This was done by agreement wherever possible.
811. About every 30 minutes, Mr Haigh checked the Warehouse Management System for upcoming Large Case Replenishment assignments. This was to monitor the progress of his team as a whole.
812. According to Mr Haigh's job description, when supervising colleagues, Mr Haigh was "constantly engaged in on-the-job training and coaching". He had supervisory responsibility for one or two shifts per week on End of Chutes and Small Case Decant. From Early 2010, Mr Haigh acted as a team supervisor for Large Case Replenishment. This was for two or three shifts per week.
813. As a supervisor, Mr Haigh monitored colleagues' performance on both Large Case Replenishment and (on his floor) Large Case Pick. He checked their progress on the Warehouse Management System hourly. If a colleague appeared to be underperforming, Mr Haigh spoke to them in order to decide whether they had a good reason for falling behind.

814. These decisions were over and above the decision-making needed for the substantive role (which, in the case of Large Case Replenishment, was similar to that of Mr Uchanski and Mr Sayeed).
815. Mr Haigh did not take any form of disciplinary action. He did not have the authority to make decisions about annual leave. If a member of his team made a request for leave, Mr Haigh completed a form and submitted it for someone else to make the decision. Once Mr Haigh learned what the decision was, he relayed it back to his colleague.
816. Further decisions arose in the course of his duties in the Recruitment Team. Mr Haigh had limited input into the format or order of the sessions. He scored candidates against pre-determined criteria using the Assessment Centre Form. Some of these judgments were subjective, for example, whether he thought a candidate had communicated clearly when answering interview questions. He discussed and evaluated the overall performance of the candidate jointly with a manager.
817. As a member of the Recruitment Team, Mr Haigh was responsible for training potential new recruits when they attended assessment centre days. At each assessment centre, Mr Haigh gave the candidates an overview of Asda, its policies and benefit schemes, and the Warehouse Colleague role. He observed and coached candidates as they performed tasks during the assessment centre. During the team-building tasks, Mr Haigh facilitated and assessed the candidates. He facilitated and marked the headset voice test.
818. Mr Haigh was a Colleague Circle Representative. This responsibility was included as an attribute in all four of his iterations. In his Colleague Circle capacity, he went on a weekly "Walkabout Wednesday" in which he listened to colleagues' issues and concerns. If a suitable opportunity arose during these walkabouts, Mr Haigh offered his own personal advice and support, including advice on prioritisation and efficiency of work and techniques for tasks.

How related demands are measured in other schemes

Other equal value cases

819. Mr Holt has personally used Planning & Organising as a separate factor in previous equal value claims where he has been an IE.
820. In *Forward*, the experts agreed that one of the factors should be Responsibility for Planning and Organising Work. It measured "the post holder's responsibility for planning and organising their own work and that of others". There was no composite factor for Responsibility for People. The claimants and comparators in *Forward* all had significant planning and organising responsibilities. A painter and decorator was responsible for an annual decorating plan. A deputy librarian planned and organised the work of the library assistants, allocating tasks daily, weekly and monthly. A contracts manager worked autonomously and allocated tasks to off-site staff monthly. A booked admissions officer organised the activities of, and for, day surgery patients.
821. The factor was not used to differentiate between people whose work was sequenced by a computer and those who were given limited discretion to decide the order in which they worked.

822. EJ Malone's tribunal assessed the demands of Responsibility for Training, Mentoring or Teaching under a separate factor. At paragraph 313, the tribunal compared the respective Training and Mentoring demands of the deputy librarian, contracts manager and laundry manager. EJ Malone observed that this factor was "a particularly difficult one". The apparent cause of the difficulty was the vagueness of information in the job descriptions about the frequency of training new starters and the number of people for whom one of the comparators was responsible for training.
823. In *King*, the Malone tribunal again determined equal value by reference to these two factors. The jobs in question were PA to Head of Integrated Therapies and Building Technician. Equal value was determined by reference to 17 factors. These included Responsibility for Planning and Organising and Responsibility for Training and Mentoring. As in *Forward*, there was no integrated Responsibility for People factor. The parties did not challenge these two factors specifically, but there was a dispute about the number of responsibility factors. In the view of EJ Malone and the members, the responsibility factors were "appropriate for these two jobs". The tribunal identified a difference of one level between the two roles. The PA had acted as a mentor for "several months", whereas the Building Technician "was able to show contractors around the site and answer their queries".
824. In *Ross v. Portsmouth Hospitals NHS Trust* 2503337/2007, another EJ-Malone-chaired tribunal determined the equal value question by reference to a distinctly different factor plan. Responsibility for planning and organising a role-holder's own work, and that of others, was measured under a factor headed, "Responsibility for Work". A separate factor, headed, "Responsibility for Others", assessed responsibility for other people, both inside and outside the organisation. It included training and mentoring of colleagues, but also responsibility for their health and safety. There was no separate Training & Mentoring factor.

NHS

825. The NHS Job Evaluation Handbook contains a number of factors which capture related demands. These factors include:
- 825.1. Analytical and Judgmental Skills. Essentially this factor measures the skills required to analyse information in the job.
 - 825.2. Planning and Organisational Skills. The factor measures, "the planning and organisational skills required to fulfil the job responsibilities satisfactorily". The lowest level of demand here is "organises own day-to-day work tasks or activities". The highest level involves "formulating long-term, strategic plans...which may impact across the whole organisation".
 - 825.3. Responsibility for Human Resources. This combines the responsibilities for "management, supervision, coordination, teaching, training and development of employees...", including "work planning and allocation, checking and evaluating work...recruitment, discipline, appraisal and career development".

- 825.4. Freedom to Act. This factor measures accountability for the jobholder's own actions and those of others. The lowest level of demand is described as, "Generally works with supervision close by and within well-established procedures and/or practice and has standards and results to be achieved. Jobholders at the middle scoring point will be "managed, rather than supervised and results/outcomes are assessed at agreed intervals".

Local Government

826. The National Joint Council for Local Government Services ("NJC") periodically reaches a National Agreement on Pay and Conditions of Service. The version put in front of us is dated April 2022. That date is, of course, long after the Relevant Period ended, but, in terms of the help we can draw from it, the date is unimportant. The National Agreement contains a job evaluation scheme ("the NJC JES"). Of interest to us are the following factors:

- 826.1. Mental Skills – "analytical, problem solving and judgment skills", with the distinguishing features of demand being the variety and complexity of decisions made.
- 826.2. Initiative and Independence. This factor "takes into account the nature and level of supervision of the jobholder, the level and degree of direction and guidance provided by policies, precedents, procedures and regulations, and any requirements to organise or quality check own work". There are 8 levels. The lowest level "involves following instructions which define the tasks in detail. Minimal personal initiative is required. The job is subject to supervisory or customer checks or close supervision." None of the levels distinguish between the type of decisions that the jobholder is given freedom to make. Freedom to plan and organise is certainly encompassed, but so are decisions that fall into the jobholder's path, having been planned and organised on the jobholder's behalf.
- 826.3. Responsibility for Supervision/Direction/Coordination of Employees. The factor combines the responsibility for employees' supervision, training and development. This includes (at the lowest level), "demonstration of own duties, or advice and guidance to new employees", rising by three level steps up to "high direct responsibility for the supervision or...coordination or training... of other employees."

Greater London Provincial Council

827. The Greater London Provincial Council developed a Job Evaluation Scheme in the year 2000. Its factors include:

- 827.1. Supervision/Management of People. Demands range from "assisting in work familiarisation of peers and new recruits" at the lowest level, through to a mid-point involving "Supervision...of a group of employees undertaking tasks either in the same general area of work..."
- 827.2. Decisions. In broad terms, the factor measures the jobholder's discretion to make decisions for themselves and the impact of those decisions. The factor does not differentiate between decisions about planning and other kinds of decisions. The phrase "programme of work" in one of the

level definitions suggests that decisions about the order and prioritisation of work are encompassed in this factor.

828. Mr Holt has used this scheme to carry out job evaluations.

AON

829. We were shown passages from the AON Joblink Evaluators' Guide. This Guide was developed and applied by Ms Waller. Amongst the factors that AON recommend for job evaluation, there are:

- 829.1. Factor II – Problem Solving and Innovation. This factor is stated to capture “the difficulty of the problems to be solved, the degree to which judgement and analysis must be exercised in assessing problems and evaluating alternative solutions, and the extent to which assistance is available.” The guidance states that “Consideration should also be given to the frequency with which such problems arise.”
- 829.2. Factor IV – Organisational and Personal Impact. Within the Personal Impact element,
 - (a) The lowest level of demand for Personal Impact is where “impact is limited to the immediate delivery of tasks”, the jobholder “generally works under direct instruction/close supervision”, and “work is checked regularly”.
 - (b) A jobholder at the next level up is “responsible for planning own work, assessing own progress and adjusting efforts to meet goals”.
 - (c) The third level, still below the mid-point, is for a role that “contributes to the achievement of goals through personal effort and influence over others” and whose “impact is limited to the achievement of short to medium-term goals”.
- 829.3. Factor V – Accountability. This factor includes line management responsibilities. It is not used “when evaluating manual,...skilled trades or other similar roles”.

The IEs' scheme

Planning & Organising – the factor plan

830. The IEs developed the following set of levels to measure the demand of Planning & Organising:

The responsibility to manage and/or prioritise the jobholder's own work and that of others to achieve efficiency, quality and appropriate standards.	
Moderated (+ or -) by size of team managed/supervised AND/OR by the number of operations or processes for which the jobholder plans and organises AND/OR the degree to which forward planning is required	
LEVEL	LEVEL DESCRIPTION
A	The jobholder manages the work of others in a business unit and is responsible for the quality of that work. The jobholder will have responsibility for formal HR functions such as recruitment, workforce planning and service quality across an entire business unit. The jobholder will be responsible for the planning/organisation of the work of the business unit for a short/medium period.
B	The jobholder manages the work of others in a team and is responsible for the quality of that work. The jobholder may have responsibility for a number of HR functions such as, rota planning, absence management and service quality across a team. The jobholder will be responsible for the planning/organisation of the work of the team for a short period.
C	The jobholder is responsible for the daily organisation of their own work as set by and directed by others. While the jobholder is deemed to be responsible for the quality and standard of their own work in the first instance, they will be subject to occasional or periodic monitoring by others. They may be assisted by other staff from time to time whose work they may organise but they will have no direct management or supervisory role.
D	The jobholder has a limited responsibility for organising their own work on a daily basis within the framework of set routines. The jobholder will work to set standards and quality and will be regularly monitored by others. They have no involvement in organising the work of others.
E	The jobholder works in a role where their work and targets are pre-set. The quality and standard of work is maintained through frequent checks and monitoring by others.

Problem-solving (etc) – the factor plan

831. For problem solving and decision-making, the IEs' scheme read as follows:

Considers the scope and complexity of judgements and problems experienced by the jobholder and the impact and autonomy of their decision making.

Moderated (+ or –) for frequency of demand for problem solving/decision making.	
LEVEL	LEVEL DESCRIPTION
A	Problems are often escalated from subordinates and can be complex in that they require the analysis of several different strands of information. Written rationales may well be required and decisions will set precedents that may be incorporated into standard operating instructions.
B	Problems can be quite hard to understand due to their novelty or complicated nature. Decisions made may set minor precedents for subordinates or colleagues and will require consideration or analysis.
C	Problems require some investigation before judgements and decisions can be made and there will be a number of options to consider. The scope of decisions made, and advice offered, will be limited to non-critical areas and the impact will be short-term.
D	Problems and judgements are straightforward to understand. Any decisions made will be within a limited, well understood framework with more significant issues being referred to a supervisor or manager.
E	Any problems encountered in the role are short-term, very straightforward, and with readily available solutions coming from close supervision and/or established practice.

Development of the two factors

832. We can trace the genesis of the IEs' two factors back to Briefing Note 1 and the Table of Commonly-used Work Elements.

833. Amongst the work elements were:

- 833.1. "Responsibility for planning and organising own work and/or that of others", defined as "Covers the jobholder[']s Responsibility/role for Organising their own work as well as any responsibility for organising the work of others".

- 833.2. “Decision making – problem solving”, meaning, “Covers the type and complexity of decisions/judgements – what are they about”.
- 833.3. “Autonomy” – “The expectation that the jobholder will produce solutions to problems, the facility to take decisions, the impact of decisions”.
834. Amongst the 13 proposed factors in Briefing Note Two were “Organisation of Work” and “Decision Making/Problem solving.”
835. Under the heading, “Organisation of Work”, the plan proposed this “General Definition”:
- “This covers the way and degree to which the post holder organises their work or it is organised for them. It takes account of the level of autonomy in the job role and the degree to which the jobholder works to instructions. It also takes account of any facility on the part of the jobholder to plan or organise their own work.”

Planning & Organising

836. It can be seen from the draft General Definition that the IEs intended to capture the level of autonomy in the job role under this factor. This is consistent with the wording of the finalised factor plan, which states that the factor measures responsibility.
837. None of the roles could be assessed at Level A. They did not have responsibility across “an entire business unit”. A business unit was a store or depot.
838. The IEs’ Planning & Organising drew a clear line between those with supervisory responsibilities and those without. Miss Gibbins and Mr Haigh were the only two workers to reach Level B. Placement of the jobs into Levels C to E depended on the degree to which the jobholder organised their own work.

Subconscious decisions

839. In his oral evidence, Mr Holt was asked about various kinds of decisions about the order of work and which was the best factor for assessing them. In his answers, Mr Holt expressed the view that an indicator of planning and organising was that the decisions involved tended to be subconscious.

Advance planning

840. Mr Holt considered that advance planning was more likely to be a sign of a feature that should be assessed under Planning & Organising. “Conscious planning” and “thinking in advance” were more likely to fall under this factor.
841. It was not always easy to tell how the IEs had used this touchstone to assess a type of decision under one factor or another. For example,
- 841.1. When Mr Holt was asked about Ms Hills’ freedom to leave her pick to assist a colleague, he replied that it could be assessed under Planning & Organising, but actually “was more of a decision thing”, to be assessed under Problem-solving, “because there may be less planning on her part” and “she’s reacting to what’s happening in the store during the day”.
- 841.2. The IEs assessed Mrs Wilby’s role in Produce at Level D under both factors. Their rationale for Planning & Organising took into account Mrs Wilby deciding on the order of replenishment. Mr Holt agreed that this

was essentially a reactive decision, driven by how fast the stock was selling. (We ourselves might observe that there was some room for advance planning, here, as Mrs Wilby knew which fruit and vegetables generally sold faster than others, but that still left a key consideration which was reactive. Mrs Wilby was primarily responding to the gaps on the shelves.)

- 841.3. Mrs Wilby also made decisions about prioritisation of work when faced with a spillage or customer query. The IEs took this kind of sequencing decision into account under Problem Solving and Decision Making, but it was not clear how this was more reactive than a decision on the order of replenishment based on gaps in the shelves.

Planning & Organising modifier

842. There were three different ways in which the modifier could apply. It was used to reflect variations in the size of a team managed, the range of operations being organised, and the degree of forward planning required. In their Supplementary Report, the IEs laid out a convention in relation to the second modifier criterion. “Large”, in relation to the number of operations requiring organising, meant “more than three or four discrete processes/functions”.
843. It was not clear how the different modifier criteria interrelated. For example, a role-holder might organise a large number of different activities with little forward planning.

Problem Solving and Decision Making

The demand

844. The IEs’ plan sought to measure the complexity of decision-making required amongst the Asda jobs. It also sought to measure the impact and autonomy of those decisions. More complex decisions would require a greater degree of mental skill. The “impact” element looked to be measuring the weight of responsibility for decision-making.
845. These elements of demand were reflected to different extents in the IEs’ level definitions.

Complexity

846. Levels E to A set out a gradually rising scale of complexity of decisions, which they tried to capture by considering the sort of mental process that would be required to make the decision.
847. The IEs’ rationales used helpful concepts to distinguish between decisions of greater or lesser complexity. Decisions based on a “single predicate” (for example, Mr Dolan’s decision about whether to wait at a pick slot) were given as examples of decisions that were “straightforward to understand” in Level D.

Autonomy and Impact

848. Mr Walls explained that levels of autonomy were identified, essentially by the constraints on that freedom. As he put it,

“...very largely, the space in which the decision is to be made will be bordered by the rules that exist”,

and

“whether they’re written or by convention or by instruction from others at the lower levels”.

849. This second aspect of autonomy conveyed a dimension of immediacy of instruction. We took this to be a statement of opinion that it is at least somewhat more demanding to be left to follow the rules than it is to be given one instruction after another.

850. The impact of decisions registered in the higher levels. Impacts ranged from “short-term” at Level C, through “may set minor precedents” at B, to “will set precedents” at A.

851. None of the job descriptions stated that any of the role holders’ decisions could set a precedent for future cases. That shut the door to Level A. Even Level B proved problematic. The impact element of the definition led to a debate about whether the IEs’ assessment of Section Leader was properly based on the facts related to the question of equal value. Could we infer that Miss Gibbins’ annual leave decisions “set minor precedents” when her job description was silent on the point? Maybe we could. That, however, is missing the point. We agree with Asda that these sorts of debates clouded what really should have been a straightforward assessment. Miss Gibbins plainly had more demanding decisions to make than anyone who was not a leader.

The Problem Solving (etc) modifier

852. The IEs defined their modifier by reference to the frequency with which decisions were made.

853. The judgement reflected here was that the IEs considered it slightly more demanding to have to make decisions often than to have to make decisions infrequently. As Mr Walls put it, frequency provided “useful shading”.

854. In written questions, the IEs were asked,

“What frequency of the demand would result in a modifier being applied?”

855. The IEs replied,

“Unspecified but generally a role involved in significant troubleshooting or dealing with escalated issues or making judgements for more than 75% of working time would merit a ‘+’ while seeing this demand at less than 25% would see a ‘-’.”

856. As definitions, the 25% and 75% thresholds were clear. Less clear was how the IEs applied them. The definitions sometimes restricted the IEs’ ability to make the assessments they wanted to make.

857. Here are three examples:

857.1. Home & Leisure. The IEs identified three iterations of Ms Darville’s role in Home and Leisure. Iterations 1 and 2 were assessed at D=. The third iteration was assessed at D+. The feature that set Iteration 3

apart was Ms Darville's Trade-ins, which she did every 3-4 months. That could not sensibly be considered to make a difference to the overall frequency of making judgements, still less enough of a difference to reach the 75% threshold.

- 857.2. Produce and George. The IEs assessed Produce at Level D= and George at Level D+. Mrs Wilby had to make very frequent presentation and Would I Buy It? decisions; Mrs O'Donovan had to make occasional more complex decisions, such as waste budgeting and mannequins. Mr Walls could not think of any decisions that Mrs O'Donovan had to make any more frequently than Mrs Wilby's decisions. He explained that, in this case, the "plus" modifier had been awarded for the *variety* of different decisions that Mrs O'Donovan had to make. Later in his evidence, Mr Walls added that the IEs had inferred from this greater range that Mrs O'Donovan had to spend more of her time making decisions than a colleague in Produce. There did not appear to be a basis in her job descriptions for drawing that inference.
- 857.3. Dolan (1) and Dolan (2). Mr Dolan's role was divided into two iterations, the first with First Aid responsibilities and the second without. Both iterations were assessed at D+. The IEs' rationale for Iteration 1 mentioned the frequent checks of equipment as justifying the "plus" modifier. According to their rationale for Iteration 2, the "plus" modifier was awarded for First Aid. This signified that the IEs thought that First Aid entailed no significant additional decision-making demand. More relevantly for the purpose of the modifier, it also suggested (as with Home & Leisure) that the addition of some infrequent decisions was a sufficient basis for awarding a "plus".

Training & Mentoring – the factor plan

858. The IEs' scheme assessed the demand of Training and Mentoring in this way:

Considers the need for jobholders to train or mentor other employees.	
Moderated (+ or –) for the frequency of demand.	
LEVEL	LEVEL DESCRIPTION
A	The jobholder has a formal responsibility, which may involve working with others, for training/teaching. The jobholder is regularly involved with others in the planning of training or teaching - and will themselves produce training material and/or be involved in the delivery of training/teaching. They will be involved in advising other staff about training techniques, procedures and methods It is likely that this will form a substantial part of the jobholder's duties.
B	The jobholder has a recognised responsibility, working with others, to plan and arrange training or teaching for the section or be involved in training/ mentoring and advising others in respect of methods, techniques and procedures, as part of a formal process such as an NVQ.
C	The jobholder is involved in training or demonstrating in respect of new starters or trainees who will be assigned to work with the jobholder either for specific duties or the whole/part of a shift. Such involvement is likely to be on a one to one basis rather than with groups.
D	The jobholder's role is limited to the demonstration of simple work routines with no requirement for formal training, teaching or mentoring.
E	There is not usually any requirement for the jobholder to be involved in teaching, training or mentoring others.

What the IEs thought the demand was

859. The IEs' Training & Mentoring factor can be traced back to their Briefing Note Two. At that point, the factor was intended to measure:

“...not only formal training but also any responsibility the jobholder has to develop other staff who may or may not be subordinates. Mentoring covers the responsibility to explain and/or demonstrate techniques, procedures and methods to others...”

860. This shows that, at least at the design stage of their scheme, the IEs had in mind that the demand of training and mentoring stemmed from the jobholder's weight of responsibility. Up to the hearing, this was consistently their understanding. As

part of their contribution to the joint report, the IEs accepted the Leigh Day experts' position that this factor captured the role-holder's responsibility. Ms Spence told us in her oral evidence that the factor "measures the demand for training and mentoring, the responsibility for it and for doing it".

861. The waters were muddled as Ms Spence continued to answer questions. She told us that their factor also assessed the skill required to deliver training and mentoring. She described this as "the ability to show somebody what you are going to do". This, in her view, was different from other kinds of communication skill. She told us that "it is a different skill in terms of training...it is a specific form of communication and assisting other colleagues".
862. There are some difficulties with this part of Ms Spence's evidence. One problem is that it is inconsistent with what the IEs wrote in Briefing Note Two and the joint report. There, they focused on responsibility and not skill. But there is a more fundamental problem. The IEs' finalised scheme did not allow them properly to measure the level of skill that would be required for training and mentoring. If they were trying to assess the level of skill, we would have expected there to be some reference to it in the level definitions. For example, the IEs could have used general descriptors of the level of skill required. Or they could have referred to the complexity or simplicity of whatever it was that the role holders were trying to get their trainees or mentees to learn. The nearest we could find in the IEs' actual scheme was at Level D: "the demonstration of simple work routines". There was nothing in the remaining levels to describe rising levels of skill. Even if there had been, the IEs would then have had to explain how they avoided double counting with their Communication and Customer Service factor. As Ms Spence accepted in answer to Mr Cooper's questions, Mrs Fearn would have to use the same communication skills to explain policies and procedures to a customer as she would to a colleague.

The range of demand

863. When adding their comments to the joint report, the IEs stated,
- "The IEs do accept that the jobs in this sample have limited responsibility for Training and Mentoring but consider that their responsibilities have been fully assessed."
864. Within the scope of the cohort's "limited responsibility", the IEs found four levels of demand (plus a modifier), ranging from B= to E=. The highest level housed the two roles with leadership responsibilities (Mr Haigh and Section Leader), with the remaining roles being spread across three levels.

Formality and assignment as a distinguishing feature of demand

865. The IEs were also asked to clarify what was meant by "no requirement for formal mentoring". This was part of the definition at Level D. In answer, the IEs stated that the level was generally appropriate where a jobholder was asked by a supervisor or manager to demonstrate simple work routines, as opposed to the jobholder doing it of their own volition. They added that Level D might also be consistent with a jobholder providing "rudimentary general feedback if the mentored individual demonstrated severely inadequate performance".
866. In other words, the IEs' view was that Level D should be generally unattainable unless either:

- 866.1. There was a request from someone in a leadership position; or
- 866.2. The jobholder provided some feedback.
867. To get into Level C, a role holder had to have a new starter or trainee “assigned” to them “either for specific duties or the whole/part of a shift”.
868. The IEs did not place a role holder into Level C if their job description stated that the practice was “informal”, or that the role holder was “not a formal training buddy”.
869. By concentrating on the words “formal” and “informal” in the job descriptions, the IEs made their labour somewhat less Herculean than it otherwise would have been. We do not underestimate the seductiveness of that approach in a case where the job descriptions were so bulky. But in doing so, the IEs often allowed form to dominate substance. Their assessments did not reflect the weight of each jobholder’s responsibility to train and mentor others. For example:
- 869.1. The IEs assessed Mr Han at Level D. In their view, Mr Han’s trainees were not “assigned for the whole/part of a shift”, even though he was their “buddy” for the whole shift. This was because he only interacted sporadically.
- 869.2. Produce was also assessed at Level D. Although Mrs Wilby’s new starters shadowed her for up to a week at a time, and she provided feedback, the training was not “formal” and therefore could not achieve Level C.
- 869.3. Mr Dennis’ Iteration 2 (the equivalent of Dennis (b)) was assessed at D-. Level C was out of reach for him, in the IEs’ view, because he had “no requirement to provide training to others”. In fact, Mr Dennis was requested by a Supervisor to work alongside a new Loader for roughly one-seventh of a shift.
- 869.4. Checkout appeared to qualify for Level C. In her oral evidence, Ms Spence agreed that Ms Ashton had a new starter “assigned” to her when the new starter was placed on the checkout next to Ms Ashton and Ms Ashton was asked to observe and work alongside her. Ms Ashton nevertheless remained in Level D because her job description said that she was not a “formal training buddy”.
- 869.5. Customer Service Desk was assessed at Level C. The IEs did not hang this assessment on whether Mrs Fearn was a “formal training buddy” – she was not. They did, however, attach importance to the fact that the training that Mrs Fearn provided was part of the less-experienced colleague’s formal on-the-job training.

Frequency of demand and the Training & Mentoring modifier

870. Once a role had been assessed into a level, it could be modified, plus or minus, according to “frequency of demand”.
871. The IEs took the view frequency of training and mentoring was a highly relevant consideration. In Briefing Note Two, they observed:
- “Critically it is important to record how often a jobholder is involved in training, mentoring etc.”

872. Despite the importance of frequency in the IEs' minds, frequency of demand did not appear in the level definitions. There was a reference to frequency at Level E ("not usually any requirement"), but in practice this was ignored. None of the roles assessed at Levels D to B "usually" had any requirement to be involved in training or mentoring. The role holders got into the higher levels on the basis of activities done for a few days (or less) per year.
873. This omission led to the spread of assessments being disproportionately stretched. Roles scored points for activities done less than once a year. A role holder who was very rarely asked by a supervisor to act as a buddy or trainer would score nearly a level (or sometimes more than one level) higher than someone who had not had such a request. For example:
- 873.1. Customer Service Desk was assessed at C=. The only activity that could have qualified Mrs Fearn for Level C was the extensive training that she provided to less experienced colleagues. This happened, on average, less than once per year.
- 873.2. Mr Makin was assessed at Level D- for providing on-the-job guidance to new starters, together with informal reports on their performance. He did this approximately once per year.
- 873.3. Mrs Wilby, as we have seen, was assessed at D- for one or two longer periods of job shadowing over a six-year period.
- 873.4. Mr Opelt took it on himself to provide advice to less experienced colleagues and to show them how to work equipment such as the RDT screen. He did this at intervals of several weeks or months. He was assessed at Level E=, although the IEs upgraded his assessment to E+ during the course of the hearing.
- 873.5. Mr Dolan had provided some training and mentoring outside the Relevant Period, but did not do so during the Relevant Period itself. He was initially assessed at E-, which was subsequently amended to E=.
874. We considered whether there might be some compensatory advantages to the IEs' approach. As we have already observed, a modifier is generally more transparent if the criterion for the modifier is different from the criteria for the level definitions. There were some instances of admirable transparency: it was relatively clear, for example, why Mrs Wilby had been given a "minus". There were, however, some awards of modifiers that were hard to understand, even by reference to the single criterion of frequency. For example:
- 874.1. Mr Makin was given a "minus" modifier for an activity done 6 times in the Relevant Period; Ms Hills was scored at D= for doing 7 relevant activities in that period. It appeared that the dividing line was somewhere between 6 and 7 times in the relevant period. That would not necessarily be a criticism, because a line always has to be drawn somewhere. The difficulty in explaining Ms Hills' assessment was that Ms Spence regarded Ms Hills' participation in the trial as more demanding than the 6 occasions of buddying. There was nothing in the IEs' rationales or in the job descriptions to explain why it was considered to be more demanding. Even if there was something qualitatively different about her participation in the trial, that difference could not have had anything to do with

frequency. It should, on the IEs' definition, have been incapable of preventing the minus modifier being applied.

- 874.2. By "frequency", the IEs did not always mean how *often* the jobholder was engaged in a relevant activity. They also used "frequency" to measure the duration of an activity. They considered training and mentoring to be "infrequent" if it only lasted for a few minutes at a time. Applying this logic, Mr Ballard (in iteration (a)) was given a "minus" modifier, even though he was called upon every couple of weeks; far more frequently than roles assessed at D=.
- 874.3. Mr Haigh in iteration (1) was assessed at C-. The only activity that could have qualified him for Level C in this iteration was his supervisory responsibility. He acted as a supervisor for one or two shifts per week. When this was pointed out to Ms Spence, she agreed that Mr Haigh's assessment "should be in Level C without the minus modifier". That was fine as far as it went, but it still did not explain why he was not given a "plus" modifier. Mr Opelt was awarded a "plus", despite training and mentoring far less frequently than Mr Haigh. Counters was assessed at Level C+ on the basis of 10 occasions of work shadowing (for a few days to a week at a time) over a 6 year period. She monitored less experienced colleagues for a few hours at a time on a monthly basis, but Ms Spence accepted that this alone would not have taken Mrs Webster out of Level E.

The Leigh Day experts' assessments

The overall demands of decision-making

875. In their post-assessment analysis at Appendix 4.4, the Leigh Day experts examined the range of scoring points for under each factor in the IEs scheme. By then, the Leigh Day experts had examined all 20 of their test-assessment job descriptions in detail. They observed:

"...the factors with most available points on this basis are Planning and Organising, and Problem Solving and Decision Making, neither of which is a significant feature of most of the jobs under consideration."

The demand of planning and organising

876. The Leigh Day experts sometimes struggled to conceptualise what demand the Planning & Organising factor was supposed to be measuring. The problems were highlighted by the Leigh Day experts' attempts to avoid double-counting with Problem Solving and Decision Making.
877. There were two ways, essentially, in which the Leigh Day experts sought to distinguish between the demands captured in the two factors:
- 877.1. One factor was for responsibility, whereas the other factor was for skill; and

- 877.2. One factor was for planning and organising thought processes (both responsibility and skill) whereas the other factor was for problem-solving thought processes.

Responsibility versus skill

878. Their initial overview of the IEs' scheme was shaped by their prior experience of how job evaluation schemes measure demands relating to planning and organising. They were alive to the difference between skills and responsibility factors, and formed the view that the IEs' Planning & Organising factor fell into the latter category. They suggested that it might more aptly be named, "Responsibility for Organising the Work of Self and Others". But, as a responsibility factor,

"This then runs a risk of double counting with the Training/Mentoring factor and in practice the Responsibility for Health and Safety factor..."

879. Consistently with this view, they also warned themselves against the risk of double-counting with Problem Solving and Decision Making, but only if that latter factor also sought to measure the decision-maker's responsibility.

880. By the time they prepared the joint report, the Leigh Day experts had changed their minds. In support of the IEs' level definitions, they expressed the view that,

"It is important to remember that Planning & Organising is a skills factor in the IEs' factor plan. It is not a responsibility for decision making factor."

881. A similar U-turn appeared in the Leigh Day experts' test-assessment of Section Leader. Their rationale cited Miss Gibbins' rota editing and analysis of scan speeds as evidence supporting her assessment at B+ for Planning & Organising. The same tasks appeared in their rationale for B+ under the Problem Solving (etc) factor. That kind of double-counting would be potentially fair if the Leigh Day experts were trying to measure the responsibility under one factor and the mental skill under the other. In her oral evidence, Ms Branney told us that that was what they had been trying to do. But their rationale under Problem-Solving (etc) suggested that they had also demarcated the two factors in a different way:

"Note: decisions relating to planning and organising work are taken into account under [the Planning & Organising factor]."

Planning and organising thought processes

882. The dividing line between the two factors that was being laid out here was not to measure responsibility in one factor and skill in the other. Rather, they appeared to use a separate factor for measuring the composite demands of making planning and organising decisions. Other types of decisions could be assessed under Problem Solving and Decision Making.

883. This would have the advantage of enabling the Leigh Day experts to take account of the complexity of the decision-making under both factors, including the mental skill needed for each type of decision. It also presented a challenge. There had to be a way of drawing the line between the two types of thought process.

884. Here are four examples of the Leigh Day experts drawing that line:

- 884.1. The Leigh Day experts test-assessed Dennis (2), known to us all principally for Mr Dennis' Loading activity. We have seen that Mr Dennis had decisions to make according to criteria such as container height and weight, product type, store destination and the type of trailer being loaded. All simple decisions by themselves, but rendered more complicated by their interdependence. The end-product of Mr Dennis' load planning was a queue of containers that would then be loaded onto a trailer, one by one. The Leigh Day experts assessed Mr Dennis at Level D- for Planning & Organising and Level D= for Problem Solving (etc). They considered whether to give Mr Dennis a "plus" modifier on account of his trailer loading. They decided against it. According to their rationale, "this was organising and covered by [Planning & Organising factor]". Ms Branney told us that this demarcation was only for the purpose of the modifier. She also accepted, however, that it would not make sense to regard a feature of planning and organising to be relevant to the modifier but irrelevant to the main level definition.
- 884.2. Produce was test-assessed at D= under both factors. The rationale for Problem Solving (etc) highlighted some instances of Mrs Wilby having to make decisions. These included Mrs Wilby's decisions about the order of replenishment. They also included Mrs Wilby's assessments of how many dollies and roll cages she would need when breaking down. Decisions such as these were not considered to be planning and organising decisions. As such, they did not feature in the Leigh Day experts' rationale under that factor.
- 884.3. Essentially the same kind of decision-making featured in the Leigh Day experts' assessments of Edible Grocery. This time, however, they were excluded from Problem Solving (etc) and taken into account under the Planning & Organising factor instead.
- 884.4. Mr Ballard had some decisions to make on the order in which he carried cases from one container to another. Where he made those decisions on Pick By Line, they were treated by the Leigh Day experts as evidence of Problem Solving (etc). When the same decision followed an Aisle Summary on stock picking, it was taken into account under Planning & Organising.
885. To our minds, these examples illustrate how difficult it was in practice for the Leigh Day experts to know on which side of the line an organising-type thought process truly fell.

The Planning & Organising modifier

886. The Leigh Day experts tried to get the Planning & Organising modifier to work, but were not always successful.
887. When assessing Mr Dennis' role, the Leigh Day saw a "case to be made" for promoting him to Level D-. On a strict application of the IEs' scheme, this would have involved applying the definition for Level D and then the criteria for the modifier. Ms Branney candidly accepted that this had not been how they had actually been thinking. Rather, they came to a more holistic view that Mr Dennis' role might be a small step up in demand from what they had previously thought.

The Problem-Solving (etc) modifier

888. The Leigh Day experts “did not find this modifier terribly helpful”. They struggled to apply the IEs’ definition coherently.
889. For example, they noted that the IEs had given a “plus” modifier to Darville (3) to acknowledge her Trade-ins (see paragraph 857). By the time they finalised their report, they had received the IEs’ answers to the written questions. They knew that a plus modifier appeared to be reserved for decisions that a jobholder made for 75% of their role. They confirmed the D+ for Iteration 3. According to Ms Branney’s evidence, the Leigh Day experts believed that the addition of Trade-ins “was sufficient to increase the frequency overall”, thus tipping the frequency of decision-making into the plus modifier.
890. We find this thought process hard to follow. On any objective view of Ms Darville’s job description, she was making straightforward decisions several times per day. A Trade-in decision every 3-4 months made virtually no difference to the frequency of decision-making. It is more likely, in our view, that what the Leigh Day experts really thought was that Trade-ins was a more complicated problem-solving challenge than her day-to-day decisions.

The Leigh Day experts’ assessments of Training & Mentoring*The nature of the demand*

891. It has consistently been the view of the Leigh Day experts that the demand of training and mentoring is driven by the responsibility placed on the jobholder. This analysis contrasts with that of the IEs, who thought they were assessing a distinct type of skill.
892. Both Mr Cooper and our employment judge explored the nature of this responsibility with Ms Branney. What was it about the responsibility for training and mentoring that made it different from responsibility for any other kind of task?
893. The exercise took considerable time and effort, but it did eventually yield some snippets of opinion on which we could place some weight. According to Ms Branney, training and mentoring involved:
- 893.1. “contributing to the maintenance of standards or achievement of standards in Asda by assisting their colleagues to do the right thing, by showing them how to do things, answering their questions”;
- 893.2. “...taking responsibility for assisting a new starter or colleague to undertake that task correctly, and in some cases, feeding back to a manager or supervisor whether that new starter requires additional training or additional assistance, or is fully competent to carry on in the role”.
894. What we understood Ms Branney to be saying, at its most basic, was that trainers and mentors took a responsibility for the work done, not by themselves, but by other people.
895. Training and mentoring is not the only way in which a jobholder can take responsibility for the work of their colleagues. Ms Billings took responsibility for ensuring that the right people were at the right checkout at the right time. Miss Gibbins did so on a larger scale, by editing the rota. She and Mr Haigh took

responsibility for effective recruitment, monitored and addressed the performance of workers in their team. At a more basic level, Mr Prescott and his Goods In colleagues took some collective responsibility for the colleagues doing those activities across the shift. They had to cooperate towards the effective performance of the team as a whole. The Leigh Day experts did not try to measure these responsibilities. When asked about this, particularly in the context of supervision and performance management, Ms Branney observed,

“...we were not starting with a blank piece of paper designing this scheme.”

896. She clarified this to mean that the Leigh Day experts did the best that they could within the confines of what the IEs had given them.

Amendments to the IEs' scheme

897. The Leigh Day experts' view is that the IEs' scheme for this factor is workable with some amendments.

898. The essential adjustments proposed by the Leigh Day experts are:

- 898.1. To state expressly that the factor captures the *responsibility* for training and mentoring;
- 898.2. To retain the concept of “assignment” in Level C, but to make clear that a trainee or mentee can be assigned by a supervisor as well as by a manager;
- 898.3. To add the example of provision of feedback arising from training or mentoring as a possible indicator that the demand fell into Level C; and
- 898.4. To the Level D definition, add “Such involvement is not a requirement of the job and is likely to be brief on each occasion and on a one-to-one basis”; and
- 898.5. (during Ms Branney's oral evidence), to add to Level D, “whether or not at the request of a supervisor or manager”.

The Leigh Day experts' views about a separate factor

899. The Leigh Day experts were initially sceptical about a separate factor for Training and Mentoring at all. They expressed this reservation at paragraph 2.29 of their report:

“Although taken into account in conventional job evaluation schemes, this is more commonly under a factor measuring supervision and training of their employees, rather than as a factor in its own right. Accordingly, its inclusion here is rather odd and especially as most claimant and comparator jobs have limited responsibilities for training or mentoring others.

The Leigh Day experts' views about the range of demand

900. The Leigh Day experts also identified problems with the level definitions and, in particular, the risk of stretching small differences in demand. As they put it at paragraph 2.31, “...the level definitions of C, D and E make very fine distinctions.”

901. And at paragraph 2.32,

“ The effect of the much finer distinctions between levels in this factor, compared to other factors, is to give additional weight to limited responsibilities, compared say, to the significant responsibilities of most jobs for Responsibility for Assets.”

902. This concern resurfaced when the Leigh Day experts test-assessed the roles. When assessing Edible Grocery, for example, they commented that the level definitions were too close together.

903. By the time the Leigh Day experts had carried out all their test assessments, they were able to detect some differences in demand captured by the lower-level definitions. They still believed, however, that the differences were reflected disproportionately in the scoring. At paragraph 3.1.52, their report observed that there were “marginal distinctions between levels C and D, and D and E”, although they added that there was a “clearly discernible difference in demand between levels C and E”).

904. In the light of their assessments, the Leigh Day experts proposed some amendments to the level definitions. They also considered whether the number of levels was correct. This is what they concluded:

“[The] Main problem in this factor is the spread of limited responsibilities over 5 levels, especially levels E to C which cannot really be dealt with by amending definitions, suggested amendments confined to clarification of distinctions between levels as they stand.”

905. The Leigh Day experts re-stated this reservation when completing the joint report.

906. Ms Branney was asked about these observations during her oral evidence. She believed that the Leigh Day experts were constrained to follow the IEs’ design of five levels per scheme. In Ms Branney’s opinion, the Leigh Day experts had been able to avoid an unfair stretch by assessing most of the roles at Level C. The alternative, as she saw it, was not to assess the demand at all. Disproportionate scoring was, in her view, the lesser of two evils.

907. We commend the Leigh Day experts for their frankness. They consistently identified what they perceived as an unfair stretch in the IEs’ scheme, when it was largely in the claimants’ interests to hide the problem and leave the IEs’ scores as they were. Where we disagree with the Leigh Day experts is on their approach to remedying that defect. They knew that the effect of their amendments was merely to clarify the level definitions, and to lower the pass-mark for Level C. This relaxed the stretch between Levels D and C, but did nothing to remedy the stretch between those levels and Level E. If they believed that the definitions were pegs set too far apart for the elastic that connected them, they should have moved the pegs closer to each other, to allow the stretched elastic to return to its natural length. As it was, they maintained a two-level difference between C and E where they did not really believe it existed.

The step from Level D to Level C

908. The Leigh Day experts re-drew the dividing line between Levels C and D. Where training and mentoring was provided wholly of the jobholder’s own volition, it remained at Level D. Where it was at the request of a manager, or involved

feedback to a supervisor or manager, it counted as an “assignment” qualifying for Level C.

Frequency of demand and the Training & Mentoring modifier

909. The Leigh Day experts preserved a controversial design feature of the IEs’ scheme. Frequency of demand was kept within the modifier definition and out of the main level definitions. This meant that training and mentoring activities qualified for Level C, no matter how rarely they occurred, provided that they had the requisite degree of formality. For example, all the following roles were assessed at C “minus”:

- 909.1. Chilled - Ms Ohlsson reached Level C, in the Leigh Day experts’ view, because she “was asked to work alongside a new colleague” (their emphasis). The Leigh Day experts did not know how many times this had happened, so they assessed the frequency as “infrequent” and applied the minus modifier.
- 909.2. Personal Shopper - Once per year (plus one trial period in six years), Ms Hills was asked to train a new starter who shadowed her for about 4 hours.
- 909.3. Matthews – informal buddying eight or nine times during the Relevant Period.

910. Like the IEs, the Leigh Day experts found the modifier hard to apply on the basis of frequency alone. Mr Ballard was assessed at C-, along with the others. He was treated as having been requested to buddy new starters with “low frequency”, despite doing this activity with the highest frequency of all the non-leadership roles. The short duration of each buddying assignment was artificially treated as reducing the frequency.

The Asda experts’ assessments

Choice of factors

911. Of the three factors which we are presently considering, the Asda experts included only one in their scheme. The Asda experts shunned the idea of separate factors for Planning & Organising and Training & Mentoring. Reduced to its simplest form, the Asda experts’ argument was that these factors merely measured tasks, rather than demands.

The demand of responsibility for others

912. Mr Short tested Ms Waller on the Asda experts’ stance. Would she accept that responsibility for training and mentoring was a demand and not just a task? No, she would not. The exchange was nevertheless a fruitful one. Ms Waller accepted that JES sometimes measure “supervision of people” and that “responsibility for people ... is a resource which the organisation finds important and they will want to measure the impact of the roles on that and their responsibility for that.”

913. A JES can, of course, value an undemanding responsibility. An organisation may have its own pragmatic reasons for doing so (see paragraph 189). Sensibly,

Ms Waller did not suggest that there would be any such reason where the relevant responsibility was for people in the organisation.

914. One might have thought that a person with some responsibility for training and mentoring would have a greater impact on other people's roles than a jobholder who had no such responsibility. Ms Waller would not accept that. Training and mentoring responsibilities counted for nothing unless it was accompanied by some "other supervisory accountability". In her view, even if one of the Asda jobs had been Head of Training, there would be no need to measure the impact that their training responsibility had on the work of others.

The Asda experts' scheme for Problem Solving and Decision Making

915. The Asda experts used a composite factor to measure:

"the demands arising from the requirements to solve problems and make decisions."

916. As they explained,

"...decisions about the organisation or sequencing of work are simply one type of decision and are therefore covered under this factor. We do not treat those separately and they are included in references to decisions generally."

917. The "key drivers of demand", in the Asda jobs, were "the complexity of the decisions that need to be made and the degree of supervision/autonomy in respect of those decisions". The Asda experts considered a single Element sufficient to capture complexity and autonomy as, in their view, these two drivers of demand rose in step with each other.

918. Unlike the IEs' Planning & Organising factor, the Asda experts' Problem Solving and Decision Making factor did not try to measure the weight of responsibility on the jobholder for making decisions. This was a deliberate choice. Their explanation was:

"The consequences or impact of decisions taken are covered under the responsibility factors for reasons which we have explained in relation to those factors. They are not therefore covered under this factor."

919. Applying this rationale, the Asda experts measured the impact of Mr Dennis loading a trailer as part of his responsibility for assets and responsibility for health and safety. The impact of other kinds of decision appears to have fallen through the cracks. The Asda experts did not, for example, measure the impact of Mrs Fearn's decisions at the Customer Service Desk on customer goodwill, or the impact of Mr Haigh's decisions on the people whom he supervised, or on the work that those subordinate colleagues did.

920. Nor, for that matter, did the Asda experts properly assess the impact of Miss Gibbins' decisions. Mr Short asked Ms Waller about that. The example he put to her was about the consequences of Miss Gibbins miscalculating the rota plan for her section. Ms Waller replied,

"Yes, and that comes into her decision-making, mental effort, emotional demands of leading".

921. Except it didn't. Although Miss Gibbins was assessed at Level A for the emotional demands of leading, the only facts stated in the rationale related to Ms Waller's interactions. There was no mention of the weight of responsibility, or the potential consequences of her getting any of her leadership decisions wrong.

Under Mental Effort, the rota was mentioned as part of the rationale for Miss Gibbins' Level B for Concentration. The impact of the decision was not captured. Rota decisions were cited as part of an example of multi-tasking.

922. The level definitions were worded like this.

E	D	C	B	A
<p>Simple straightforward decisions, with a small number of clear cut alternatives.</p> <p>Solutions can be reached and applied immediately.</p> <p>Work is closely monitored, and any variation outside obvious alternatives must be referred upward.</p>	<p>Straightforward decisions, with options from a range of known, defined and readily apparent choices.</p> <p>Selects or matches best option from a set of defined solutions or practices.</p> <p>Referral to supervision is expected where issues are outside defined procedures or solutions.</p>	<p>Some decisions require some independent interpretation/judgement/initiative but mostly within an established and understood range of clear choices.</p> <p>Limited divergence of issues, which may vary but will be very similar in nature.</p> <p>Supervisory referral is not always expected or required for the majority of issues.</p>	<p>Choices can be made from a number of established options/ranges and involve frequent assessment/judgement, initiative, and interpretation.</p> <p>Will encounter a range of varied problems and issues, some of which are likely to be complex.</p> <p>Supervisory referral is not expected or required for the majority of issues.</p>	<p>More complex facts or situations, which require the analysis, interpretation, and comparison of a range of options.</p> <p>Work is performed independently, with limited oversight from management.</p> <p>Requires frequent assessment of issues and the use of considerable judgement.</p> <p>Some of these may be complex with no prescribed answers and a range of assessment, initiative, and judgement/choices.</p> <p>Greater scope for flexibility within a known framework.</p>

The demand of working autonomously

923. Autonomy, or freedom to act, was captured in the final paragraph of each level definition. That paragraph attempted to carve out the kind of decision that would be left to the jobholder to make autonomously at each level. At Levels D and E, this was done by defining the kind of decision that had to be referred upward. Broadly speaking, the decision that required approval was the converse of the autonomous decision. A "variation outside obvious alternatives", at Level E, would be a decision that could not "be reached and applied immediately". This converse approach reflected the "lock step" with which autonomy and complexity rose.

924. This approach meant that there was no automatic recognition of autonomous working within the lower levels. A jobholder who had no decisions to make for most of their shift would nevertheless get into a higher level if they had some complicated decisions to make at some point during their shift. A jobholder who

was left to get on with making simple decisions for most of their shift would be trapped at the baseline if none of their decisions were complex.

The step from E to D

925. A role that involved “straightforward decisions” could be in Levels D or E in the Asda experts’ scheme. If the straightforward decisions were also “simple”, they would be unlikely to escape Level E. An indicator of a simple decision was one to which the solution could be “reached and applied immediately”.

926. Under the Asda scheme, Ms Ashton’s Checkout role was assessed at Level E. It was the view of the Asda experts that the sorts of decisions she had to make were simple and straightforward, to which the solution could be “reached and applied immediately”. Ms Waller was asked about some of the immediately-apparent solutions that would direct Ms Ashton’s decision-making. In Ms Waller’s opinion, Ms Ashton could immediately reach a solution to decisions such as:

- 926.1. whether an adult customer was buying alcohol as a proxy for a child,
- 926.2. whether a person appeared to be under 25 years old,
- 926.3. whether cash was counterfeit.

927. Ms Waller described as “simple and straightforward” the decision about whether to issue a Smiley voucher, which Ms Ashton could decide to issue as a goodwill gesture for a poor service experience, to promote one brand over another, or to buy a damaged product.

928. The Asda experts also assessed Personal Shopper at Level E. They took into account the fact that her work was organised for her by the Palm Pilot. In their view, such decisions as she did have to make were simple and straightforward. Such decisions included the Would I Buy It test for deciding whether or not to pick an item for a customer’s tote. Ms Waller, in her oral evidence, told us that this was a binary decision: either a product was fit or it was not. That was a mistaken factual premise. The fact found at Stage 2 was that Ms Hills was required to pick the best items for her customers. Where there was a choice of two of the same item to pick, she was required to pick the one that was in better condition. Even if the decisions for Ms Hills were simply whether to accept or reject, some of those assessments were not as straightforward as Ms Waller thought. For example, there were a number of things to look for when deciding whether fresh meat was fit for sale.

929. Mr Welch was assessed at Level D. In the opinion of the Asda experts, his decisions were of limited complexity, but “the outcome [was] not always clear cut or immediately ascertainable”. The example given was “MHE safety ascertainments”. In one sense they were right. Mr Welch had to get to the end of his checklist before he could decide that his LLOP was ready to use. But in another sense, they were wrong. Each decision he had to make was handed to him in the form of a prompt on the checklist. The answer to each prompt was obvious from a brief observation of the LLOP.

Frequency

930. Ms Waller’s evidence to us was that the Asda experts did not think of frequency of decision-making as a “primary” consideration under this factor.

931. The Asda experts assessed Home & Leisure Iteration (b) (Trade-ins), which corresponds in all relevant respects to Home & Leisure (3). According to their rationale,

“When the jobholder was dealing with Trade-Ins, she was infrequently required to make some independent decisions or apply her initiative within a range of known and established options. For example, she had to assess disc quality in order to decide if she could accept the trade-in or not as well as deciding whether the disc needed resurfacing.”

932. Ms Waller was asked about this by both Mr Short and, later, by our employment judge. She explained that the word, “infrequently” was not what had determined the level assessment. Rather, it was the fact that Ms Darville’s decisions on Trade-ins were made within a “range of clear choices”. Our finding was that this was not the Asda experts’ thinking at the time of their assessment. The explanation they actually put in their rationales used the precise wording of the Level B definition: “established options”. The word “infrequently” was plainly used to make the point that Trade-ins were so infrequent that they failed to satisfy the requirement in Level B definition that such decisions be made “frequently”.

Discussion of Planning & Organising, Problem-solving & Decision-making, Training & Mentoring

Should there be a separate factor for Planning & Organising?

What is the demand?

933. Before we can decide whether there should be a separate factor for Planning & Organising, it is important to be clear about what demand this factor is supposed to measure.

934. The IEs and Leigh Day experts all struggled to define the demand precisely. Mr Holt believed that planning and organising would be more “subconscious” than problem-solving and decision-making, but we cannot see why this would justify a separate factor. At times, it appeared that Ms Branney thought it simply captured the accountability for decision-making, as opposed to the skill and effort it took to take the decision itself. At other times, she thought it encompassed the difficulty of the decision as well as the degree of responsibility for making it.

935. We agree with Mrs Hastings that it is not always necessary to pigeon-hole a factor into a rigid category. As we have observed, however, concepts such as “responsibility” and “skill” are well understood by job evaluators. They ought at least to know whether a factor measures responsibility or skill or both.

Responsibility

936. So far as the factor measures an element of responsibility, we have attempted to identify what it is about taking responsibility for planning and organising that makes it so demanding that it ought to be assessed under its own factor.

937. We applied our broad general principles (listed at paragraph 162). In our view, they indicate that a separate responsibility factor would be likely to be inappropriate. In particular:

- 937.1. Planning and organising one's own work is qualitatively different from planning and organising the work of others. Taking responsibility for how other people do their work is an aspect of a very important responsibility for human resources in an organisation. Self-organising lacks that wider importance in the world of work.
- 937.2. That is not to say that autonomous working has no intrinsic value. It saves the employer the resources of having to direct what the employee does, minute-by-minute. Ultimately, however, sequencing one's own work, and working unsupervised, is a means to a more important end. It enables the efficient delivery of the task which jobholders have been given to do. If we were to use a separate factor to measure responsibility simply for carrying out tasks efficiently, there would be a real risk of double counting with the other things for which that work takes responsibility, such as assets in a replenishment role.
- 937.3. If an employee is given responsibility for sequencing their own work with minimal supervision, that responsibility is not necessarily going to be very demanding, even if it is of value to the employer. The responsibility will become more weighty if the decisions that the employee makes autonomously have some consequence. Many of the decisions that were measured under Planning & Organising (for example, deciding the order in which to replenish an aisle) have virtually no consequence at all.
- 937.4. It is hard to assess more than a level difference in demand amongst people who are all responsible for doing their own work under supervision, and not responsible for the work of anyone else. This is particularly true when planning and organising is not a significant feature of most of the jobs being assessed. That was the initial view of the Leigh Day experts. We agree with it.
- 937.5. We paid particularly close attention to other schemes when coming to this view. These are not the kinds of roles with clear planning and organising responsibilities that were being assessed in *Forward*. With the exception of Miss Gibbins and Mr Haigh:
- (a) All the roles could arguably fall into the lowest level of the NHS Freedom to Act factor (paragraph 825.4) and could not conceivably reach the mid-point of the scale;
 - (b) All the roles could arguably fall into the lowest level of the NJC JES Initiative and Independence factor (paragraph 826.2);
 - (c) All the roles could arguably fall into the lowest level in AON Factor IV (829.2) and could not conceivably be higher than the second-lowest level.

Skill

938. At an abstract level, planning and organising can involve a different mental skill from problem-solving and decision-making. We can probably all think of someone who is highly intelligent but disorganised. By themselves, however,

variations in types of mental skill are not enough to justify a separate factor. The difference in those two types of mental skill has to be evident in the jobs we are actually comparing. Not only that, but it has to be a difference of broad equivalence with the differences between the other types of skill that have their own factors (problem-solving, communication skills and physical skills).

939. It is not particularly helpful to think of one set of mental skills as being conscious and the other being subconscious. A jobholder may bring varying degrees of conscious thought to the decision about how to solve a problem, or decide what to do next.
940. Nor can we tell planning apart from problem-solving by asking whether the jobholder thinks about it in advance. Ms Hills' decision to assist a colleague may have been made on the spur of the moment, but it was essentially a decision about what part of her work to prioritise. The same can be said of the decision about how much time to spend assisting a customer whilst replenishing.
941. Even if it were appropriate in principle to have a separate factor for a particular type of skill, there would still be problems trying to measure those skills using the factor that the IEs actually produced. This is because their factor did not try to assess the complexity of the planning and organising decisions that the Asda jobholders had to make.

Consequences of excluding Planning & Organising

942. For the claimants, Mr Short argues that the Planning & Organising factor is essential. Otherwise, there would be no way of measuring:
- 942.1. the responsibility that Miss Gibbins had for planning, organising and supervising the work of the Shop Floor Assistants in her team; or
 - 942.2. the "cost" to Asda that most of the Shop Floor Assistants save by working autonomously.
943. We agree that these are demands that ought to be captured somewhere. Where we disagree with Mr Short, and the IEs, is over the need to measure these demands under a Planning & Organising factor. There are other ways in which we can assess them. Leadership responsibility can be captured by a single Responsibility for People factor alongside the responsibility for training and mentoring. The modest demand of making straightforward decisions autonomously, rather than under constant instruction and supervision, can be taken into account under the Problem Solving (etc) factor. Here we agree with the Asda experts (although we disagree with the way in which they actually took autonomy into account at Levels D and E). The IEs were comfortable with assessing autonomy under this factor, too. They did not see the need to reserve Problem Solving (etc) purely for skill-type demands.

Our decision

944. For these reasons, we decided to exclude the IEs' Planning & Organising factor.

Problem-solving etc - choice of scheme

945. We prefer the Asda experts' scheme as a method of assessing the demands of Problem Solving and Decision Making.

946. This is because:

- 946.1. The IEs' scheme relied heavily on the modifier. Like both sets of party-instructed experts, we found the modifier definition hard to apply. It was also opaque, in the sense that at times it camouflaged the real reasons why the IEs and Leigh Day experts had applied it.
- 946.2. We also agree with the Asda experts that there were five levels of demand amongst the Asda jobs. The IEs' scheme effectively compressed the demand into three levels. The highest level (B) was inaccessible to all roles apart from Section Leader, and even then, the definition had to be strained with the assistance of a fact that stretched the tribunal's findings at Stage 2.
- 946.3. Whilst the Asda scheme contained some flaws (slightly undervaluing autonomous working) and produced some assessments with which we disagree, it is possible to remedy those defects by altering the assessments. In our view, those adjustments do not go against the grain of the Asda scheme as a whole.

Problem-solving etc relativities

947. We were able to place weight on Mr Walls' opinion about relative demands in response to questions posed to him by Mr Cooper. He had obviously thought carefully about the kinds of decisions that different activities required role holders to make. His views have the added advantage of independence.

948. Mr Walls' opinion, with which we agree, is:

- 948.1. The difference between Mr Opelt and Personal Shopper is not significant.
- 948.2. Dennis (a) is at an equivalent level of demand to Produce, because Mr Dennis' decisions (other than on Goods Out Loading) were of broadly equal complexity to Mrs Wilby's decisions.
- 948.3. Activities involving HRT driving were somewhat more demanding than Dennis (a), but not significantly so, there being only a little more judgement needed to assess the stability of a pallet at height than on the ground.
- 948.4. George is more demanding than Produce because of the more varied and complex decisions that Mrs O'Donovan had to make.
- 948.5. Loading involved more complex decision-making than activities involving driving a HRT or replenishing goods in a store. In our view, there was a clear difference in problem-solving demand between the work of Mr Dennis on Goods Out and the decision-making requirements of the store replenishment roles. Ms Waller described the problem of configuring a trailer load as a "3-D jigsaw in his mind". That is an apt description in our view. Mr Short characterised Mr Dennis' loading decisions as being a series of straightforward decisions. It is true that the choices appeared simple in isolation. But this ignores the knock-on effect of one decision on another. For example, if Mr Dennis decided to consolidate two pallets, this would make the combined pallet taller and heavier. In turn, this would make the pallet less suitable to be loaded at the front of the

trailer. But if the products to be consolidated were for delivery to the final store in a split load, they would have to be loaded near the front of the trailer, or they would get in the way of the pallets being unloaded at the first store.

948.6. Customer Service Desk was more demanding than George.

948.7. Section Leader was at the highest level of demand.

949. We also agree with Mr Walls that it is right to reflect the degree of constraint and supervision at the lower levels of demand. Being left to make almost constant straightforward decisions autonomously is – modestly - more demanding than being given a series of automated instructions, or a closely-supervised queue of customers or pallets.

950. We have considered the position of the First Aiders. Looking at their roles as a whole, we find that they had marginally more demanding decisions to take overall than if they had no First Aid responsibility.

Should there be a separate Training & Mentoring factor?

The demand

951. In our view, training and mentoring is one of the ways in which a role holder takes responsibility for their colleagues.

952. In many workplaces, training and mentoring will have a valuable part to play in ensuring a colleague's welfare. We mention this aspect of training and mentoring responsibility mainly in order to explain its limits. It is not relevant to most of the jobs we have to assess. The main responsibilities for colleagues' welfare amongst the Asda jobs, were in the leadership roles, with some more limited responsibility amongst the Colleague Circle Representatives.

953. In the Asda jobs, the training and mentoring responsibility was predominantly for the *work* that the less experienced colleague was learning to do. We agree with Ms Brannev that the responsibility was to help Asda ensure that individuals were fully competent in their roles.

954. Is it demanding to take responsibility for the work of others? To our minds, the answer is obvious. Of course it is. We were not quite sure whether Ms Waller accepted that point directly. To the extent that she disagreed with it, she is wrong.

955. For the responsibility to be demanding, there does not have to be any threat of a sanction on the jobholder if their less-experienced colleague makes a mistake. Mr Short came up with a helpful example. If Ms Billings incorrectly demonstrated a task to the Self-Scan Hosts, and they got it wrong, Ms Billings would be responsible for that mistake. It would not matter whether Ms Billings would be held accountable by a manager or not. It is sufficient that Asda placed a measurable degree of trust on Ms Billings to ensure that her colleagues on the Self-scan units did their work well.

How to measure the responsibility for others

956. The Leigh Day experts themselves thought it was “odd” to try to assess this responsibility under a separate Training & Mentoring factor. We agree. This is for three reasons, all articulated by the Leigh Day experts themselves:

956.1. The first reason is that it is more logical to assess the responsibility for training alongside the responsibility for supervision and organisation. The Leigh Day experts believed this from the outset. In both cases, what the trainer (or supervisor) is really entrusted with is the work that the trainee (or supervisee) is doing. It would not make sense to assess training responsibility without also assessing supervisory responsibility. The IEs attempted to measure that responsibility under their Planning & Organising factor, but we have decided against that factor for the reasons we have already given. If we were to adopt a separate Training & Mentoring factor, we would be left in a somewhat absurd position. The trainer’s responsibility would be fully assessed and the supervisor’s responsibility would be completely unassessed.

956.2. The second reason for rejecting Training & Mentoring as a separate factor is that most of the Asda jobs only had a limited training and mentoring responsibility. Again, the Leigh Day experts were fully aware of this fact, and the resulting unfair stretch it would cause. This view is consistent with that of EJ Malone in *King* - the appropriate number of responsibility factors will depend on the jobs being compared. Manual roles will generally have fewer responsibility factors than leadership roles.

956.3. The third reason is that a separate Training & Mentoring factor is out of step with job evaluation schemes. They measure the demands of training responsibility and supervisory responsibility together.

957. In her oral evidence, Ms Branney came close to admitting that the Leigh Day experts would not have chosen a separate Training & Mentoring factor at all, if they had designed their own scheme. They made the best of what they had.

958. We have not forgotten the wisdom of EJ Malone in coming to our decision. His tribunals have relied on Training & Mentoring as a separate factor in other equal value cases, notably *Forward* and *King*. Any employment tribunal would think twice before disagreeing with a judge of EJ Malone’s experience. Nevertheless, on this factor, we cannot follow the same approach as his tribunal did. This is because:

958.1. The Asda roles are different from the NHS roles that EJ Malone was comparing;

958.2. There does not seem to have been a direct challenge to the Training & Mentoring factor in his cases, whereas we have heard two days of disputed expert evidence on the point;

958.3. Where the Training & Mentoring factor was used in *Forward* and *King*, it was complemented by a Planning & Organising factor, which we have rejected; and

958.4. The same judge in *Ross* was content to merge the responsibility for Training & Mentoring with other people-related responsibilities.

959. Even if it were right in principle to adopt a separate Training & Mentoring factor, we would not be able to use the IEs' scheme, with or without the Leigh Day experts' amendments. This is because:

- 959.1. It includes the modifier. For the other factors, we have chosen not to use the modifier. It would be hard to fit a modifier-based scoring system into a scheme that did not use the modifier for other factors. In any case, it was not always easy to understand how the modifier had been applied.
- 959.2. As the Leigh Day experts also pointed out, small differences in demand were stretched across too many levels. This was primarily due to frequency of demand being confined to the modifier and left out of the main level definitions.

960. For these reasons, we have decided not to use the IEs' Training & Mentoring factor.

Responsibility for Others

961. This leaves us with an unassessed demand. It consists primarily of a responsibility for the work of others, with some additional responsibilities for colleague welfare.

962. Ms Waller reminded us that the demands of supervision have been assessed under the headings of Emotional Demands and Communication & Relationships. In our view, this is not adequate to assess the demand. As we examine more detail under those factors, all they measure is the skill required and the emotional toll that it takes. They do not capture the weight of responsibility.

963. In our view, the fairest way is to assess the demand for ourselves.

964. We have done the best we can to build a composite factor from the rubble of the Planning & Organising and Training & Mentoring factors.

Procedural fairness

965. A procedural point potentially arises here. It stems from the parties' final oral submissions. It first came up during the course of Mr Cooper's submissions on another factor (Customer Service), but might be said to have resurfaced indirectly when discussing responsibility for others. The topic in hand was how the tribunal might assess the demand of responsibility for customer goodwill in the event that it rejected the Leigh Day experts' Customer Service factor. Mr Short's submission was that we ought to assess the demand comprehensively for ourselves by devising our own factor plan and assessing roles into levels. Mr Cooper resisted that submission. At most, he said, the tribunal should construct a two-level scheme, with the upper level being reserved for the leadership roles. He added that, if the tribunal had in mind anything more than a two-level scheme (for Customer Goodwill), Asda should have the chance to make further submissions. Later, our employment judge specifically asked Mr Cooper about how Responsibility for Others should be assessed, in the event that we preferred that factor to Training & Mentoring. Mr Cooper told us that he relied on the same submissions as he had done in relation to Customer Goodwill. Those submissions might, potentially, have included a request for an opportunity to make further submissions about a multi-level scheme if we had in mind to construct one. Mr Short, in his oral submissions, resisted any attempt by Asda to

make further written submissions. He argued that Asda had already had a fair opportunity to make submissions on all assessments under the disputed factors. He added that parties could not generally expect a tribunal to indicate the decision it was proposing to make.

966. It is therefore possible – though not certain – that the parties may have been in dispute about the procedure to be followed in the event that the tribunal was considering assessing the demand of Responsibility for Others. There may be an outstanding disputed request to make written submissions.

967. If there is any dispute about this, we resolve it in favour of the claimants. This is because:

- 967.1. The parties have already had a fair opportunity to make representations. The idea of this factor has not come out of the blue. On 23 October 2024, Ms Waller was questioned in detail about the possibility of a composite supervisory and training factor. She replied, “We haven’t created that factor so I would need to have a think about it.” The claimants’ written submissions invited the tribunal to assess residual demands if the tribunal did not adopt one of the experts’ factor schemes. During the parties’ final submissions, our employment judge asked Mr Cooper about Responsibility for Others before the lunch break, so he had an opportunity to take instructions about it during the break and make his oral submissions afterwards.
- 967.2. The parties have been consistently been informed that the judgment would be sent to them in January. Asda have not written to the tribunal with any written submissions or any reminder of any outstanding request for permission to make them.
- 967.3. It is strongly in the interests of the overriding objective for us to give the parties a final decision within a reasonable time. Previous decisions of our employment judge have emphasised the need to avoid delay. It would not be practicable for the tribunal to make any further decisions after January of this year.

Responsibility for Others – our scheme

968. As with the other factors, we start with the basic framework of the Asda experts’ scheme, set out at our paragraph 122.

969. There is no need to divide the demand into Elements.

970. The factor captures the weight of a jobholder’s responsibility for the work of others, whether through planning, organising, supervising, recruiting, training or mentoring.

971. The baseline is for the roles in which:

- 971.1. There was little requirement for teamwork;
- 971.2. The responsibility to cooperate extended to inconsequential matters such as which aisle to replenish, which floor to work on Lifts, which delivery lane to De-Kit, or when to take a break;
- 971.3. There was no supervision, other than keeping an eye out for who might need assistance, and going to help them if they were falling behind;

- 971.4. Training and mentoring of others was limited to informally answering questions or offering tips, or work-shadowing (even at a manager's request) less than once per year.
972. We assessed these roles at Level E.
973. We found a measurable step up in weight of responsibility where a role holder:
- 973.1. Was responsible for increased cooperation in teamwork; or
- 973.2. Was paired with a less-experienced colleague for a shift or more, annually or more, and provided feedback to a manager or supervisor.
974. Such responsibilities were suitable in our view for Level D.
975. Where these features were present, but there were additional features such as Colleague Circle responsibility, or more in-depth training responsibility, we placed the roles into Level C.
976. At Level B, there was responsibility for day-to-day direction and assistance of a group of workers within an activity, a regular responsibility for training a cohort, or recruitment responsibility.
977. At the highest level was Section Leader. Miss Gibbins planned and organised a large team, together with responsibility for effective recruitment, organising training, addressing performance, and taking disciplinary responsibility for some aspects of their conduct.
978. Our scheme, in our view, corrects the stretch in the IEs' Training & Mentoring factor. Only one level difference is attributable to rare, or brief, responsibilities for work shadowing. We are satisfied that it is proportionate. We consider that level step to be the equivalent of modest differences in the requirement for cooperation and teamwork. It is also equivalent to the level steps we have put in place to recognise different amounts of physical lifting.

Scores

Problem-solving and Decision-making scores

979. Applying the relativities for Problem-solving & Decision-making, we assess the roles within the broad framework of the Asda scheme as follows:

Level	Store roles	Depot roles	Points
A	Section Leader		50
Marginal A	Customer Service Desk, Service Host (b)	Haigh (a) and (b), Morris (a), Beaumont (b)	50
B		Beaumont (a) and (c), Dennis (c) and (d), Makin (a) and (b), Morris (b), Sayeed (a) and (b)	40
Marginal B	George	Dolan (b)	40

C	Counters, Home & Leisure (b), Service Host (a), Warehouse	Ballard (a) and (b), Dolan (a), McDonough, Uchanski (b), Haigh (c)	30
Marginal C	Process		30
D	Bakery, Checkout, Chilled, Edible Grocery, Home & Leisure (a), Produce	Dennis (b), Haigh (d), Han (a) and (b), Hore, Prescott, Matthews, Uchanski (a)	20
Marginal D		Welch, Devenney, Dennis (a)	20
E	Personal Shopper	Opelt	10

Responsibility for Others scores

980. Applying the relativities for Responsibility for Others, we assess the roles within the broad framework of the Asda scheme as follows:

Level	Store roles	Depot roles	Points
A	Section Leader		50
B		Haigh (a) and (b), Morris (a)	40
Marginal B	Service Host (a) and (b)		40
C	Customer Service Desk	Ballard (b), Haigh (c) and (d)	30
D	Checkout, Chilled, Counters, Edible Grocery, George, Personal Shopper, Process, Warehouse	Ballard (a), Beaumont (a), (b) and (c), Dennis (c) and (d), Devenney, Han (a) and (b), Makin (a) and (b), Matthews, Prescott	20
Marginal D	Bakery, Home & Leisure (a) and (b), Produce	Morris (b), Sayeed (a) and (b)	20
E		Dennis (a) and (b), Dolan (a) and (b), Hore, McDonough, Opelt, Uchanski (a) and (b), Welch	10

Chapter Nine - Responsibility for Assets

Issues

981. There is a large measure of agreement in principle about this factor.
982. The party-instructed experts agree that the weight of responsibility for assets is driven by the scope of responsibility, and the volume and value of the asset.
983. Responsibility for an asset also engages other demands. Counting cash and examining it for counterfeit notes require concentration and mental effort. Careful handling of a pallet at height will require physical skill and concentration. Careful handling of a case of stock will require physical effort, followed by some decision-making about where to put it on a pallet. These demands are measured separately, and form no part of the assessment of responsibility.
984. There are different kinds of assets. These include physical assets such as stock and equipment, tangible financial assets such as cash, or intangible financial assets such as a budget. They also include valuable data. None of these assets takes primacy over any of the others.
985. There are other kinds of intangible asset, such as the value of Asda's transport operator's licence, and its customer goodwill. None of the experts tried to measure responsibility for these more intangible assets under the heading of this factor.
986. It is agreed that risk of loss or damage to an asset is one of the things that make the demand greater or smaller. As the oral evidence unfolded, subtle disagreements emerged about how such risks were relevant to the assessment of demand. The Leigh Day experts do not think that risk was a key distinguishing feature.
987. Whatever their dispute about that, they were all able to get behind one proposition: demands should be assessed on the assumption that a role holder does their job competently. This means we should ignore the risks to an asset that flow from the jobholder's dereliction of their responsibility. Various theoretical shortcomings in performance were explored with the experts during their evidence. Two LLOPs might collide. Mr Opelt might accidentally drop a case of stock. Mr Dennis might disregard the weight limits on a double-deck trailer. Ms Ashton might fail to detect a counterfeit note. We had to decide whether these nuances made a difference to the weight of responsibility.
988. The experts agreed that all role holders had a general duty of care over the things for which they had responsibility. In oral evidence, however, it became clear that the experts disagreed about what this meant. In particular, they disagreed about whether the general duty of care encompassed the requirement to be vigilant against theft. Mrs Hastings, Leigh Day expert, was clear that the requirement to look out for suspected shoplifting was not just part of the general duty of care.
989. All the experts agree that the cumulative value of assets for which a jobholder had responsibility had some relevance to the demand of taking responsibility for them. Nobody suggests that the threshold between levels of responsibility should be determined by a precise financial amount, such as £10,000. Demand may reach a different level if the financial value of the asset is "on a different

scale” or “an order of magnitude” from the level below. In broad terms, the party-instructed experts are comfortable with that formulation.

Relativities

990. There was some consensus among the experts about the relative demands of the jobs.
- 990.1. Personal Shopper, Chilled, Edible Grocery, and Produce all sat at the baseline. Their weight of responsibility for assets was broadly the same.
- 990.2. At the next level of demand were depot workers who picked stock one case at a time. These included Dennis (a), Haigh (d), Hore and Opelt and Uchanski (a). None of the experts sought to distinguish between these jobholders based on the kind of depot in which they worked.
991. The real dispute about relativities was how many more levels of demand there should be, and for whom. None, said the Leigh Day experts. They thought two levels (plus a modifier for Section Leader) should be sufficient to capture the full range of demands. The IEs added a third level into which they placed people with checkout or equivalent responsibilities. The Asda experts used four levels. Except for Section Leader, the highest level was reserved for depot workers who moved pallets or loaded trailers. An intermediate level housed the Warehouse Colleagues who moved stock by the pallet-load.

Facts related to Responsibility for Assets

Chilled

992. Ms Ohlsson’s role mainly consisted of replenishing food in the display fridges.
993. She used roll cages and was responsible for their safe operation. If she saw a defect, she reported it. She carefully manoeuvred a Hand-pump Truck with a value of £449. Other equipment included specialised milk roll cages, a Dalek and flat-bed trolley.
994. Ms Ohlsson carried a Telxon once or twice per week in order to process markdowns. She would have to sign the Telxon in and out on the occasions when she used it. Whilst using the Telxon, she was responsible for handling it safely and carefully. A Telxon cost £622.00.
995. As with other replenishment roles, one of Ms Ohlsson’s tasks was breaking down deliveries. This task was chiefly the responsibility of the night shift, but they regularly left the work incomplete. When Ms Ohlsson started her shift, she went to the back ups, sorted items and placed them into roll cages. Typically, she would fill three roll cages’ worth of stock.
996. Once that task was done, Ms Ohlsson moved on to her main activity of replenishing the fridges. She handled items either individually or in retail-ready packaging. Most of the food was of low individual value. Some items (for example, eggs) were fragile. Others, such as ready meals, had flimsy seals which, if broken, would lead to the product being wasted. She was responsible for carefully handling these items during replenishment.
997. Ms Ohlsson was personally responsible for complying with Challenge 20 (the time limit on keeping chilled food outside a chilled environment). If she left a roll

cage of chilled food in the aisle for more than 20 minutes, the stock had to be wasted.

998. For Ms Ohlsson, there was more to Challenge 20 than simply obeying the rules. Unexpected distractions (such as customer queries) could slow down Ms Ohlsson's replenishment. She had to keep track of how long her stock had been out of the chiller. This was done, first, by noting the time of day when each container of stock was removed from a chilled environment and returned to it. Ms Ohlsson had to keep those times in mind and check the time to see how much of her 20 minutes was left.
999. Ms Ohlsson carried out routine checks on the display fridges, for example, to check if the fridge was blowing out warm air. In-built sensors automatically alerted Asda management if the temperature rose above a pre-set level.
1000. Ms Ohlsson was responsible for reporting any suspicious activity, such as theft, which she did several times per year.
1001. Several things would have to happen before Asda could lose an item of chilled food or drink to theft from a member of the public. The thief would have to remove it from the shelf, pass the point of sale, pass through security and exit the store. In order to get past the point of sale more easily, they might conceal the item or put a cheaper bar-code on it. This activity might or might not happen in the chilled aisles. If Ms Ohlsson happened to be looking the right way at the right time, she might be able to alert security and prevent the theft.
1002. If Ms Ohlsson noticed any Shelf-Edge Labels missing, she would print one using the Telxon. Failure to display a Shelf-Edge Label ran the risk of Asda facing enforcement action from Trading Standards. To our minds, this was a feature of Ms Ohlsson's responsibility for regulatory compliance, rather than taking care of any of the assets that the experts thought to measure.

Produce

1003. Mrs Wilby handled stock throughout her shift. She ensured that it was kept in the best condition for sale by taking care when breaking down the delivery and carrying out replenishment tasks. She took particular care when handling fragile items such as soft fruit and flowers.
1004. She took care to keep buckets of flowers separate in order to ensure that flowers were correctly watered.
1005. A minority of foods in the produce department were temperature-controlled. Mrs Wilby was responsible for implementing Challenge 20 in relation to such goods. In practice, this meant monitoring the time that a dolly or roll cage of chilled produce was out on the shop floor and ensuring that goods that had not been replenished into a chilled display within 20 minutes were returned to the chilled room, and not removed again for another 30 minutes.
1006. Mrs Wilby dealt with markdowns on a daily basis until 2010 and around once a week thereafter. She would scan a short shelf-life product with her Telxon. The device would automatically set the new reduced price. Another form of price reduction was called "RRR". Mrs Wilby rescued good quality produce from damaged packaging or poorer-quality produce, so it could be sold at a reduced price instead of being wasted.

1007. Mrs Wilby was vigilant about the risk of theft. She was observant and alert to customers who might abuse the self-weigh scales by opening pre-packed fruit and vegetables and weigh them as loose produce, or by selecting a product that was cheaper by weight than the item they were actually weighing. She was alert to customers switching markdown labels onto produce that had not been marked down. If she noticed suspicious behaviour such as this, it was her responsibility to inform security or a Section Leader, not to challenge the customer directly.

Edible Grocery

1008. In terms of responsibility for stock, Ms Forrester's role was similar to that of Mrs Wilby. Generally, biscuits and health and beauty products were less fragile than fruit, vegetables and flowers. Some products, such as make-up, were attractive to thieves. Ms Forrester was responsible for putting tags on them.

Bakery

1009. Mrs Gardner was responsible for carefully using equipment such as the Telxon, with additional equipment such as the L-sealer and Photo-cake machine. She worked with some more expensive equipment such as ovens and freezers. If she noticed a build-up of ice in the freezer, she would report it, but her actions or inactions had little impact on the value of these assets.

1010. When using the Telxon, Mrs Gardner used her personal login details to gain access to the SMART system. It was suggested on behalf of the claimants that Mrs Gardner was responsible for the SMART system whilst logged in. She was not entrusted with the whole SMART system, or anything like it. Her responsibility was to perform one function on it correctly.

Home & Leisure

1011. Ms Darville's role was like Mrs Wilby's in the care she took over the Telxon and careful handling of stock.

1012. Many of the items Ms Darville replenished were of similar price to food and drink. In addition, the Home & Leisure department sold uniquely high value items such as televisions. Ms Darville replenished a television about 2-3 times per week. About once a week, she would fetch a large-screen (50") television, which she would lift with a colleague.

1013. When carrying out replenishment, Ms Darville secured high value products with "spider" security tags. She replenished products requiring security tags 2-3 times per week. This was an additional line of defence against theft.

1014. Very high value items, such as televisions, were secured to the display fixtures using a Kensington leash security system. This required Ms Darville to loop a padlock on a cable through the spider tag.

1015. Ms Darville had a swipe card, giving her access to the caged area containing high-value Home and Leisure stock. Asda's swipe-card system recorded each time her swipe card was used for that purpose.

1016. When Ms Darville sold a television, she took the customer's name and address for television licensing purposes. She took similar details if she accepted a Trade-in (see paragraph 665).

1017. Part of Ms Darville's role was breaking down a pallet by handling cases of goods and storing them elsewhere.
1018. About 2 or 3 times per week, Ms Darville covered on the video games till. She handled payment in a similar way to Ms Ashton on Checkout, and inspected the bottom of the trolley or basket as she would do. Photographs of suspicious customers were kept behind the desk. Ms Darville therefore had an additional responsibility to look out for identified suspects.

George

1019. Mrs O'Donovan had a Paxar Gun as well as a Telxon. She carried out basic maintenance on the Paxar by keeping the print head, platen roller and sensor clean.
1020. Mrs O'Donovan worked on the George till for up to an hour per shift. During that time, she processed cash transactions and had access to the cash drawer.
1021. Mrs O'Donovan was given a waste budget of £1,000. She was responsible for judging how that budget should be "spent" in price reductions.
1022. Merchandise and signage were issued periodically to Mrs O'Donovan to display. This was known as Point of Sale.

Personal Shopper

1023. Ms Hills handled individual items of stock constantly throughout her shift. She had to put them carefully into her pick trolley. The trolley itself cost £249. Her Palm Pilot was valued at £549.

Counters

1024. The Counters colleagues took turns to order ingredients for freshly-made food such as pizzas. When it was Mrs Webster's turn, she ordered the food two days in advance. She had delegated responsibility for placing these orders and was not required to gain any management approval. When stock arrived, Mrs Webster decided whether the order was in good enough condition.
1025. Mrs Webster was responsible for temperature-checking meat as she cooked it. The temperatures were recorded on the Roast To Go form. If there was no record showing when a chicken was cooked, it had to be wasted.
1026. Cooked chickens were sold by weight. Mrs Webster was responsible for weighing and pricing them.

Checkout

1027. In her role on the Checkout, Ms Ashton was engaged in repeated financial transactions. As she scanned each item, the price was added automatically to the amount payable by the customer. Card payments were system-generated onto the Chip and PIN card reader. She received cash payments and counted the cash to ensure it was accurate. The till informed her of the amount of change to return to the customer. Ms Ashton had to count the change correctly. She provided cashback which, again, was required to be correctly counted. Sometimes, Ms Ashton had to do mental arithmetic to calculate the change due if a customer had volunteered some additional coins at the last minute. (We provide some more detail of this calculation in Mental Demands.)

1028. Ms Ashton was required to be vigilant against counterfeit currency. She took alternative forms of payment, such as vouchers, which she had to check and count correctly.
1029. Cash accumulated in Ms Ashton's cash drawer during the shift, until it was collected by a colleague. She was trained not to exceed £600 of cash, but in practice this limit was not observed. (In other stores, such as the Queslett store in Birmingham, there was a strict £250 limit).
1030. Ms Ashton had to handle carefully and scan each product as it passed through the checkout. Her job description does not contain an express finding of the aggregate value of goods she handled on a shift. As a rough estimate, she handled the equivalent of about 1.5 cases each minute. (This is based on Ms Ashton's scan speed target, the average weight of an item in the Brighton store and the median weight of a case at the Didcot depot.)
1031. Ms Ashton's role was one of the lines of defence against theft. She followed guidance to check that customers were not trying to take goods through checkout without paying for them. The guidance was memorably called "Bob & Lisa" (Bottom of Basket and Look InSide Always).

Service Host

1032. Ms Billings had all the asset responsibilities of a Checkout Operator whilst actually working on the checkout. Whilst Queue Busting, Ms Billings worked on the hybrid checkout and had responsibility for that piece of equipment.
1033. Some tasks were entrusted to her specifically as a Service Host. She handled large sums of cash at a time. This was done when carrying out Pod Lifts. Cash was placed by the Checkout Operator into a sealed "pod" that could travel by air tube to the Cash Office. Depending on where the checkout was located, Ms Billings would either carry the pod to an air tube herself, or oversee the placement of the pod into the air tube by the Checkout Operator. Each Pod Lift was recorded by Ms Billings on a form.
1034. She also handled cash when replenishing checkouts and Self-Scan units with change. She pushed the Cash Trolley through the front of house from till to till. Whilst doing this she was accompanied by a Section Leader or manager and a security guard from the CCTV podium. This was done at least once per day.
1035. Ms Billings was vigilant against theft in the same way that Ms Ashton was, but also looked more proactively for signs of suspicious behaviour on the Self-scan Units, where customers had more opportunity to steal. She dealt with an attempted theft at the checkout about 3-4 times per week.
1036. Some security tags were deactivated automatically at the point of sale, without any need for them to be physically removed. The equipment used for this purpose was called the "Sensormatic Deactivator". One of Ms Billings' responsibilities was for carrying out a weekly test of the Sensormatic Deactivator at each self-scan unit. Ms Billings ran a soft tag through a dummy purchase and then carried it through the security gate at the exit. If the alarm went off, the Deactivator was not working.
1037. In Iteration (b), Ms Billings also had the responsibilities of the Customer Service Desk and Kiosk.

Customer Service Desk

1038. On a Monday morning, Mrs Fearn began her shift at 8am. The Chadderton store was not yet open. She went to the key cupboard and collected the keys to the Customer Service Desk. About once a month, she also collected the keys for the Kiosk shutter where the cigarettes and tobacco were. She opened up the desk. On the floor behind the desk were bags with the cash float for each till. They had been placed there by the Cash Office and left to Mrs Fearn's safe keeping.
1039. On other days, the Customer Service Desk had already opened by the time Mrs Fearn arrived.
1040. Apart from her responsibility for the cash and stock behind the desk, Mrs Fearn was entrusted with ensuring that financial transactions were carried out properly without loss to Asda or the customer. Some of these transactions (for example at the Kiosk) were price controlled in a similar way to the checkout, and there was limited opportunity for loss. Other transactions required greater care. Examples include PayPoint to pay bills, for which payment was always taken in cash. They also included processing of refunds and returns, and the issuing of compensatory gift cards for overcharging, all of which depended on Mrs Fearn correctly deciding whether the criteria were met. Mrs Fearn policed the staff discount cards to ensure that they were not abused. If she did not know a customer who presented a discount card, she asked for photographic identification and checked their signature.
1041. The desk required various low-value consumables in order to function, such as pads of forms and notepads. Mrs Fearn had delegated authority to order items such as these.
1042. At the end of each shift, the cash at the Customer Service Desk was reconciled with that day's transactions. Mrs Fearn knew that she could be interviewed and asked to explain any discrepancies, or unusual patterns of transactions. This happened every few months. She was interviewed on one occasion about a refund for which there did not appear to be a receipt. Her explanation was accepted.
1043. Mrs Fearn had responsibility for handling some customers' personal data, for example, when completing CPQC reports. She ensured that the data was input correctly and that any handwritten notes were sent for shredding.

Warehouse

1044. Ms Hutcheson moved large volumes of incoming stock during her shift.
1045. A conservative estimate of the value of a pallet or roll cage of stock was £750.00. (The range in the job description was £750 to £3,200. We do not know how much the value of stock had increased simply by virtue of having been safely delivered from a depot. We make no assumptions about that, but take the lower end of the range, to match Mr Cooper's conservative estimate of the value of pallet of stock in the depots at £720 each).
1046. When a delivery arrived, it was Ms Hutcheson's responsibility to open the rear door to allow the delivery vehicle access to the Warehouse.

1047. There was typically one ambient delivery per shift. It consisted of mixed items of pallets and rails. There would generally be about 36 containers in a mixed load; 26 if it consisted entirely of pallets. Depending on the load, Ms Hutcheson used the Scissor Lift or a FLT to assist with unloading. The driver helped by moving goods to the internal edge of the vehicle using a Power Pallet Truck or Hand-pump Truck. Ms Hutcheson assisted with the unloading of the goods from there.
1048. Once a week, Ms Hutcheson used a FLT to unload the consumables delivery containing 3-4 pallets. Sometimes it was not obvious which pallets were destined for her store and which were intended for onward travel. Where it was unclear, Ms Hutcheson checked the manifest.
1049. Ms Hutcheson had to check the deliveries as they came in. There were two types. "Non-checking ASN Deliveries" were backed by a stock loss agreement and did not need to be checked line-by-line. Examples included milk and bread. The rest had to be checked by Ms Hutcheson against every line of the delivery note. Ms Hutcheson counted the number of boxes or crates received and compared it to what the system was expecting.
1050. Ms Hutcheson was responsible for implementing Challenge 20 for chilled food and drink. When a chilled delivery arrived, Ms Hutcheson was responsible for checking that the trailer was at the correct temperature.
1051. On a daily basis, Ms Hutcheson undertook marshalling, which basically meant moving and organising ambient stock in the warehouse. Ms Hutcheson used a Power Pallet Truck to move pallets and roll cages of stock from one place to another at ground level. Marshalling accounted for about 1-2 hours' work per shift. Ms Hutcheson also racked away cases at low level for about 30 minutes.
1052. Whilst marshalling, Ms Hutcheson was responsible for putting all high-value goods (for example, jewellery, cigarettes and perfume) into a secure cage and personally responsible for locking them away as soon as they were entered onto the system. Needless to say, this was a precaution against the risk of theft.
1053. Ms Hutcheson unloaded Dee-Set deliveries between 30 and 60 minutes per day, 3-5 times per week. Each Dee-Set delivery would consist of about 2 or 3 roll cages worth of stock, which arrived in boxes. The delivery driver moved them to the edge of the wagon, where Ms Hutcheson manually placed them into a roll cage.
1054. Ms Hutcheson used her FLT to move pallets of goods onto and off high racking shelves. The top shelf of the high racking was 3 beams high. She checked the condition of the racking on a weekly basis for signs of damage.
1055. Some containers were required to be broken down into individual cases. Ms Hutcheson spent about 20-30 minutes per day breaking down ambient deliveries, 2 hours per week breaking down consumables and 1 hour for each Dee-Set delivery.
1056. We do not know how Ms Hutcheson's picking speed compared to the pace of work in the depots. Ms Waller told us that she was unaware of any fact that would suggest that Ms Hutcheson picked more slowly than they did. Although she did not have a personal target, she could not afford to fall behind, because

her required work rate was dictated by the scheduled flow of deliveries arriving at the Warehouse.

1057. About 2 hours per day were spent on tidying and Reverse Logistics. At these times, Ms Hutcheson was moving low value items such as packaging.

1058. Ms Hutcheson's job description does not divide up her working time in percentage terms, but we calculate the breakdown to be roughly as follows:

Tidying and moving low value items	20%
Low-level movement stock by the pallet/cage-load	25%
Moving pallets/cages of stock at height	10%
Manually handling cases or smaller containers of stock	25%
Booking in and other activities	20%

1059. The capital value of a Power Pallet Truck was about £8,500 (slightly less than a LLOP). As with replenishment colleagues, she carried a Telxon and was required to look after that. We do not know the capital value of the FLT, but we do know that its nearest equivalent in the depots was a CBT (value shown below).

1060. Ms Hutcheson was trained to work on checkouts. She assisted on the checkouts throughout the relevant period. In the IEs' Iteration 1 (prior to 2012), she undertook queue-busting occasionally. During the period covered in Iteration 2, Ms Hutcheson only did checkout work rarely, reducing to about once per year.

Section Leader

1061. Miss Gibbins had financial responsibility in the same way Ms Ashton, Ms Billings and Mrs Fearn had when covering in their roles.

1062. Additionally, Miss Gibbins had responsibility for operating within a wage budget for 90 colleagues. She did not set the budget, but she had to edit the rota to ensure that the section was sufficiently staffed without any overspend.

1063. One of the many systems that Miss Gibbins operated was called Merlin. This system used data mining to detect potentially suspicious financial transactions. It produced a top ten list of anomalies such as till shortages or excessive void transactions. Miss Gibbins was required to investigate each one of the top ten. Her job description lists 11 potential causes of such anomalies, some of which might be errors and others which might amount to dishonesty. Miss Gibbins' job was to try and find out which it was and decide what action to take. She had to ensure that she handled the information sensitively and confidentially.

1064. Of all the roles we are assessing, Miss Gibbins' was the only one that gave her access to the Cash Office. Every time she entered, she had to log her details.

Depots - general

1065. Warehouse Colleagues were informed of the potential consequences of careless handling of stock in the depot. They were informed that the average retail value of a case was £9.00. The value of a case could range up to £240.00.

1066. The average value of stock on a pallet was £720.00. This is Mr Cooper's conservative estimate to which we have already referred.

1067. We have not been told about how many cases of stock have been damaged in depots, whether by falling out of pickers' hands or by falling from equipment or shelves. Nor have we been given any estimate of the value of any such damage.

1068. Members of the public were not allowed into the depots. Access to the shelving areas was controlled by a swipe card.

Devenney

1069. Mr Devenney's job, for all relevant purposes, consisted of picking activities.

1070. He wore a Talkman and headset with a capital value of £1,350. At the start of a picking activity, he took possession of a LLOP which he would keep for his shift. The LLOP had an annual lease value of about £1,500 and a capital value of about £10,000. He had to inspect his LLOP before using it, and write his name onto the inspection checklist and inspection pass sticker.

1071. Whilst picking on Large Case Pick, he was responsible for safely stacking cases onto the pallet on the forks of his LLOP. If a pallet was stacked unsafely, there was a risk of stock falling off as Mr Devenney drove his LLOP round a corner. This happened about 3 times per year. There was a risk of collisions that could damage the LLOP or other stock.

1072. Mr Devenney was personally in charge of his cases of stock until he completed the pick. He had to enter each item of stock he picked onto the Talkman. A supervisor could track who had handled each item of stock and when.

1073. The average cumulative value of stock Mr Devenney picked on a shift was just under £15,000.

1074. Mr Devenney's time across the Relevant Period is not straightforward to apportion in percentage terms, but it roughly works out at:

Tidying and moving low value items	3%
Low-level movement stock by the pallet/cage-load	20-33%
Moving pallets/cages of stock at height	0%
Manually handling cases or smaller containers of stock	65-80%

Opelt

1075. Mr Opelt's work, it will be remembered, was exclusively picking, case by case. His equipment was the same as Mr Devenney's equipment. On Manual Store Pick, his target was to pick 158 cases per hour (averaged across the Relevant Period). The target for Large Case Pick was (on average) 120 cases per hour. This was about 3-4 times more stock than Ms Ashton handled over the same time period.

1076. His average value of stock handled on a shift was £8,500.

Han

1077. Mr Han used a Power Pallet Truck as well as a LLOP. The lease value of a Power Pallet Truck was £1,251 and its capital value was £8,563.

1078. Here is our analysis of Mr Han's working time:

	Iteration (a)	Iteration (b)
Tidying and moving low value items	0%	0%
Low-level movement stock by the pallet/cage-load	4%	23-50%
Moving pallets/cages of stock at height	0%	0%
Manually handling cases or smaller containers of stock	96%	50-77%

Prescott

1079. A similar calculation for Mr Prescott shows that he was moving pallet-loads of stock at low levels for between 50-80% of his time and picking cases for between 8 and 50% of his time.

1080. When working on Pick By Line, Mr Prescott handled delicate items such as flowers and cakes. These were the same sorts of items that Mrs Wilby ended up displaying in Hull. Like Mrs Wilby, he had to take care to ensure that they were not damaged.

Ballard

1081. When Mr Ballard did a Goods In (Tipping) shift, he unloaded approximately 520 pallets of stock on a shift with an approximate cumulative value of £374,400 of stock during a shift.

1082. Mr Ballard tipped curtain-side trailers, amongst others. Access to the side of a trailer was from the ground. This would involve raising the forks of his CBT over a metre from the ground. He had to raise the forks higher in order to tip a double-deck trailer.

1083. The annual lease value of a CBT was £4,838.52. Although we have not been given the capital value, it would be about £25,000 on the assumption that the lease/capital value ratio is consistent across different pieces of Mechanised Handling Equipment.

1084. We estimate his time to have been spent (roughly) as follows:

Tidying and moving low value items	3%
Low-level movement stock by the pallet/cage-load	5%
Moving pallets/cages of stock at height	10-20%
Manually handling cases or smaller containers of stock	80%

Morris

1085. One of Mr Morris' picking activities was Pick By Line. This involved placing cases onto or into containers. He was responsible for stacking the container safely, for example, by placing heavier items nearer the bottom and middle. Failure to do so could result in the tipping of the load when it was collected by another Warehouse Colleague.

Dolan

1086. Amongst other activities, Mr Dolan was engaged in Putaways. He moved pallets of stock up to be stored on the high racking. His target was 154 pallets per shift. The cumulative value of stock he moved during that time was approximately £110,000.

1087. The HRT that he used for Putaways had an annual lease value of approximately £5,000 and a capital value of approximately £28,000. It was fitted with a £2,000 scanner.

1088. Mr Dolan's First Aid responsibility made no difference to his weight of responsibility for assets.

1089. Mr Dolan dropped a pallet on five occasions in 13 years. He remembers two examples in detail:

1089.1. On one occasion in 2017, two overhanging cases of biscuits dropped from a pallet as he was extending the masts of his HRT. More may have dropped if he had not immediately brought the forks to a stop.

1089.2. On the other occasion, a pallet fell as he was rounding a corner with the forks at ground level. This was because the wrapping was torn.

1090. It is unlikely that any of those incidents involved dropping an entire pallet from height. We are sure that, had that happened, Mr Dolan would have remembered it and put it in his job description.

Uchanski (b)

1091. By the time of his (b) iteration, Mr Uchanski had started driving a HRT, like Mr Dolan.

1092. Mr Uchanski does not recall any pallets falling from height. He never dropped a pallet himself. He witnessed some cases falling off a pallet at ground level. He also received a warning in 2016 for driving his HRT into collision with a barrier.

Dennis (b)

1093. We next consider Mr Dennis' role from February to September 2009. Just as a reminder, this is the period assessed as Iteration (b) by the Asda experts.

1094. When Stock Picking, Mr Dennis was responsible for building up his pallet so that it was stable. Heavier items went at the bottom. Cases overlapped. There was a risk of cases falling off a pallet if Mr Dennis turned a corner sharply without having checked the stability of a pallet. In fact, this happened to Mr Dennis about once a week. His job description does not say whether any of them were damaged or not. We are sure that the job description would have said so if the items were more than rarely damaged.

1095. One of Mr Dennis' activities was Trimming. He did this less than once a week, averaged across the period.

1096. His Trimming work was all ground-based, using a LLOP or Power Pallet Truck.

1097. Because of the presence of other LLOP and HRT drivers, there was some risk that he might take reasonable care but still be involved in an accidental collision.

Dennis (c) and Sayeed

1098. It will be remembered that one of the important features of Mr Sayeed's and Mr Dennis' roles was Goods Out - Loading. The parties agree that the features of Mr Sayeed's and Mr Dennis' Goods Out activities were materially the same.

1099. The approximate value of goods on a fully-loaded trailer was £18,000. During a shift, Mr Dennis loaded approximately £120,000 worth of goods onto trailers. So did Mr Sayeed on his shift.

1100. Amongst the goods that Mr Dennis put onto trailers were shippers of eggs. The shippers were designed to make it more difficult for any cases to fall out. They did not rely on shrink wrapping as pallets did.

1101. Each loader had to record his loading configuration on a load card which was retained in case it had to be investigated following a road traffic accident. Mr Dennis wrote his name onto the loading card. He scanned containers of stock as he loaded them. He used a Power Pallet Truck or a Pedestrian Power Pallet Truck. (The latter piece of equipment having a lease value of £1,093.) He had to be careful to avoid damaging the trailer, especially if it was curtain sided.

1102. Once the trailer was fully loaded, Mr Dennis (or Mr Sayeed) placed a numbered cable tie on the inside of the trailer. It secured the trailer whilst in transit.

1103. Failure to plan the load correctly could theoretically result in damage to the trailer. It could also result in products being damaged due to movement of the containers during transit. These two consequences could also flow from a failure

to secure the load by strapping. We do not have evidence that any of these things actually happened.

1104. The only scenario presented by the job descriptions is one in which a double-deck trailer was loaded with the heaviest items on the top deck. Mr Short gave the vivid example of Mr Dennis putting all the crisps on the bottom deck and all the beer at the top. Mr Dennis knew that he must not do that. He had 20-25 minutes to plan the load. The total load time was extended from 60 to 90 minutes for a double-deck trailer. He could not put a trailer at risk of overturning unless he grossly disregarded his instructions.
1105. There was a weighbridge at the Didcot depot. If the weight limit of a trailer was exceeded, it would have to return.
1106. After the relevant period ended, some trailers were inspected at the roadside and found to be improperly loaded. This resulted in the relevant Warehouse Colleagues being retrained. We can conclude from this incident that a loader's actions or inactions could result in the additional cost of having to re-load a trailer at the roadside. In our view, this does not mean that Mr Dennis or Mr Sayeed had any more demanding responsibility for an asset. It was a responsibility for regulatory compliance, which none of the experts tried to measure.
1107. In Iteration (b), Mr Sayeed also drove a Beast with a lease value of £2,709.00, which we take to mean a capital value of about £13,000.

Responsibility for assets in other schemes

1108. Some schemes (such as the NJC JES) isolate responsibility for physical assets from responsibility for financial assets. The NHS Handbook combines the two. We looked to see how the NHS draw equivalences between demands of looking after physical and financial resources. At Level 2 is "safe use of expensive equipment", defined as costing £30,000 or more. Not being written for warehouse jobs, the level definitions do not refer to careful handling of stock, but they do envisage jobs that are responsible for keeping stock secure. Level 2 is appropriate where there is a "substantial amount/volume of drugs/materials". The next level of demand does not refer to security of stock. It encompasses, amongst other things, "responsibility for committing substantial financial expenditures from a budget held elsewhere".

The IEs' scheme for Responsibility for Assets

1109. The IEs, like the NHS, adopted a combined factor to assess responsibility for both physical and financial assets. Here it is.

Considers the responsibility for the jobholder to order, use, maintain or handle physical assets such as goods/stock, tools, equipment or premises AND/OR the monitoring, recording and security of financial or data assets.	
Moderated (+ or –) by the risk of damage/loss to those assets.	
LEVEL	LEVEL DESCRIPTION

A	The jobholder will have specific accountability for the maintenance and security of equipment and materials, stores, data or other resources. The jobholder will also be accountable for a budget allocated to the function. Alternatively, the jobholder has a specialist role in terms of the high level administration of financial and monetary transactions and/or data systems.
B	The jobholder has a delegated responsibility for the maintenance and security of high value goods/stock, equipment or resources (which constitutes more than 50% of the duties) and may have involvement with setting and using a budget. Alternatively, the jobholder is involved in cash or confidential data handling which will be the main purpose of the job, and/or processing transactions for which they are accountable.
C	The jobholder will have a specific but limited responsibility for the maintenance and security of equipment and other resources allocated to them or their work group for their use, used at their place of work. AND/OR They will have a role in ordering some supplies or replacement equipment in consultation or with the approval of others. Alternatively, the jobholder is involved in cash, electronic payments or critical data handling when undertaking some duties.
D	The jobholder has a limited responsibility for the maintenance and security of equipment and resources including electronic data. This will usually be concerned with a limited range of items allocated to them and used at their place of work. They may occasionally handle cash, electronic payments, process deliveries or the equivalent.
E	The jobholder has no responsibility for equipment, goods or resources other than that of the normal duty of care expected of any employee. They have no financial involvement or responsibilities.

Degrees of responsibility

1110. Leigh Day put questions to the IEs with a view to clarifying their scheme.

Question 5.5 was aimed at understanding the various degrees of responsibility in the level definitions. It read:

“At level B, what is the meaning of “delegated responsibility...”? How does this differ from (at level C) “specific but limited responsibility...”?

1111. To this question, the IEs replied,

“Under ‘delegated responsibility’ the degree of accountability is higher and the post holder would likely be linked by name, albeit temporarily, to the maintenance/security of the asset. ‘Specific but limited’ relates to a more general, possibly shared accountability.”

Responsibility for financial transactions

1112. One of Asda's criticisms of the IEs' scheme is that it allegedly over-values responsibility for financial transactions. Applying the IEs' level definitions, a jobholder with responsibility for financial transactions would be guaranteed a Level B. They reiterated this argument in the joint report. Engaging with that criticism, the IEs commented:

“Financial transactions are treated as an alternative to other forms of asset handling and involvement in them were scored as low as D, not B, as the respondents claim.”

1113. In fact, the IEs did not score any roles lower than B if the IEs considered that the role had any involvement in financial transactions. Superficially, there appeared to be one exception, which was Ms Hutcheson's Warehouse role. The IEs assessed Ms Hutcheson at Level C during a time when she did some Queue Busting work on the checkout. But the most obvious explanation for that was that the IEs made a mistake. Ms Hutcheson's other iteration was given Level B. The only real difference between the two iterations was that Ms Hutcheson worked on the checkout much more frequently in one of them. In other words, it was the Queue Busting that the IEs intended to reward with Level B. Had it not been for Queue Busting, Ms Hutcheson would have remained at C.

How the IEs took into account careful handling of goods

1114. Responsibility for “goods/stock” was expressly referred to in Level B, but not at the other levels.

1115. In their Question 5.6, Leigh Day asked,

“The words “maintenance and security” are used in the level definitions of A, B, C, and D. Should that be interpreted to encompass careful handling?”

1116. The IEs answered “No” to this question. In his oral evidence, Mr Holt told us that the answer should in fact have been “Yes”.

1117. In their comments on the experts' joint report, the IEs agreed with the Leigh Day experts' proposed amendments to their scheme to include “careful handling” within the level definitions. They did not, however, agree with the party-instructed experts' view that they had undervalued responsibility for handling physical assets. In the joint report, the IEs gave three examples of paragraphs in their supplementary report which had referred to stock handling. None of these paragraphs were assessing the factor of responsibility for assets. We looked in the IEs' detailed rationales for any mention of handling goods under this factor. We could not find any such references.

Responsibility for equipment and supplies

1118. Ms Forrester's role was assessed by the IEs at Level D=. The IEs' rationale stated that Ms Forrester was not in Level C because she had “No responsibility for maintenance of equipment or ordering supplies”. That rationale fully explained why Ms Forrester was not in Level C. What it did not explain, however, was how Ms Forrester could be assessed above Level E. The Level D definition required “limited responsibility for maintenance of equipment”. If she had no such responsibility, she could not satisfy that definition.

1119. The IEs assessed Mr Han's and Mr Devenney's roles at Level C=. The rationale for not assessing them at Level B was "No requirement for maintaining equipment for more than 50% of the work".
1120. In his oral evidence, Mr Holt told us that it was relevant how frequently a person used a piece of equipment. For example, according to Mr Holt, the weight of responsibility that Mr Han had for his LLOP was diminished by the fact that there were some days when he was not using a LLOP at all. By contrast, he told us, replenishment roles in store would involve the use of a dolly or roll cage every day. This consideration did not appear in any of the IEs' rationales. We think it is unlikely that it was actually taken into account by the IEs at the time of their assessments.
1121. Mr Holt also told us about another consideration that could affect the degree of accountability for an asset. This was the extent to which a jobholder would be contractually liable to pay Asda for the cost of any loss and damage. On further questioning, Mr Holt accepted that there was no evidence of any of the jobholders having such liability and that this was not part of the scheme that the IEs had applied.

Responsibility for assets - the Leigh Day experts' assessments

1122. The Leigh Day experts found significant flaws in the IEs' scheme. They were unimpressed with the IEs' attempts to define levels of responsibility, or the IEs' attempt to clarify them. Commenting on the IEs' answer to their question, the Leigh Day experts wrote:
- "This explanation appears to have little if any bearing on the actual work of the jobs under consideration. It appears to be terminology derived from IE job evaluation experience but it is of no relevance to these claims".
1123. Another concern voiced by the Leigh Day experts was that the IEs did not appear to have measured responsibility for handling goods carefully. In the view of the Leigh Day experts, that defect could be cured by making some amendments to the level definitions.
1124. In summary, the amendments were:
- 1124.1. To expand the phrase, "maintenance and security" to "careful handling/processing or use, maintenance and security";
 - 1124.2. To introduce "goods/stock" as a relevant asset in every level definition, and not just at Level B; and
 - 1124.3. To clarify "high value" in Level B as meaning "in terms of either individual goods or total value".

The Assets modifier

1125. The Leigh Day experts took into account the risk of loss or damage to an asset as something that affected how demanding a role was. They realised that, under the IEs' scheme, such risks were reflected only in the modifier.
1126. For some assessments, the Leigh Day experts got the modifier to work. For example, they decided not to award a "plus" modifier to the Checkout role on the ground that the risk of loss was effectively controlled by the automated till

procedures. They also proposed an amendment to the IEs' level definition to reflect the fragility of goods that a role holder was handling.

1127. When it came to some other assessments, the modifier definition proved more problematic. For example:

1127.1. Chilled – Ms Ohlsson's role was ultimately assessed at Level C=, but the Leigh Day experts saw how she might fall within the IEs' definition of Level D. Holistically, the Leigh Day experts saw her role as being somewhere in between. Their proposed solution was, "If D, 'plus' modifier applies re damage/loss of assets." There was no reason why the risk would be any different at Level C.

1127.2. Opelt - The Leigh Day experts' initial view was that Mr Opelt's role should be assessed at C+. In their rationale, they explained that the "plus" modifier "applies as there is a high risk of damage to stock". Having consistency-checked Mr Opelt's assessment against the other roles, they upgraded Mr Opelt's assessment to B=. Their revised assessment was "on account of the total value of the pallets/roll cages of goods processed by Warehouse Colleagues plus the value of equipment". They did not think that the risk of damage to stock had changed.

1128. Mrs Hastings was asked at length about the relevance of the risk of loss and damage more generally. Her explanation was that risk was taken into account as part of the volume and value of the goods. She told us that a higher potential cost of loss and damage was inherent in the higher volume and value of goods being handled. In particular, the Leigh Day experts believed that there was risk of loss inherent in the use of mechanised equipment to move stock. It followed from that answer that, other than volume and value, and the use of mechanical equipment, factors affecting the likelihood of loss and damage were not taken into account. For example, no specific account was taken by the IEs of any additional risk present when pallets of stock were being moved at height. Mrs Hastings told us that "that type of risk is really difficult to measure".

Volume and value

1129. The Leigh Day experts took into account differences between roles in value of equipment, and differences in volume and value of stock. They saw a clear difference between those values in the stores and in the depots. That difference was reflected in their assessments by placing store replenishment roles into Level C and depot roles into Level B. In the view of the Leigh Day experts, there were insufficient differences of value *within* the depots to justify any level steps. As Mrs Hastings put it,

"We saw the difference between C and B in our revised version of the scheme as being a reflection of a perceivable and measurable difference in scale of value and volume. In each group, the similarities in nature of responsibilities were so great that the differences were marginal."

1130. Thus, Mr Dennis (in IEs' Iteration (2)) could move 13 times the value of stock that Mr Opelt moved, and do so at height, using a piece of equipment that was about 3 times as expensive, but the two roles were compressed into the same level.

1131. Ms Darville's Home & Leisure role was assessed at Level B, along with the depot workers. According to the Leigh Day experts, Ms Darville qualified for that level because of the "high value of individual items processed and sold". That impression was "reinforced by information responsibilities". Here, the Leigh Day experts were referring, respectively, to Ms Darville's careful carrying and tagging of 2-3 televisions per week, and the occasional writing down of a customer's name and address. These differences aside, Ms Darville's role had more in common with the in-store replenishment roles than it did with anyone who worked in a depot. It is hard to see why Home & Leisure was a level step up from Chilled, but Mr Dennis (as a HRT driver) was not a level step up from Mr Opelt.

Budgetary responsibility

1132. Mrs Hastings was questioned at length about the relative weight of responsibility placed on Miss Gibbins and Mr Dennis. The underlying thrust was that loading was just as demanding as keeping to a staffing budget for 90 colleagues. Mr Cooper dissected the two responsibilities by value of the asset (the trailer or the budget) and the consequences of doing the job incorrectly (a catastrophic accident or an overspend). On this point, Mrs Hastings stood firm. The limit of Mr Dennis' responsibility was to load the trailer correctly. That was less demanding than ensuring that total staffing costs for a section stayed within budget.

The Asda experts' scheme for Responsibility for Assets

1133. The Asda experts' scheme, as well as containing level definitions, was supplemented by detailed explanatory notes and conventions. So far as is relevant, it read as follows:

The potential consequences of failing to take care are an important feature of these demands and are best assessed under this factor. They therefore form an important part of our level definitions for this factor and are not taken into account under other factors in order to avoid double counting.

The key drivers of demand in these jobs are handling / using / taking care of physical resources (stock and equipment) and dealing with financial transactions. They are therefore the elements that we have used.

In defining the levels, the most important distinguishing features in these particular jobs for both elements are the volume / value handled and the risk of loss / damage. There is not a significant amount of variation in the character of responsibility in these roles, which for the vast majority of jobholders is taking care whilst using / handling. We have concluded based on our job analysis that there are meaningful steps from Level E to B where the drivers of the demands are volume / value and risk. But in order to reach Level A we consider it is necessary for the jobholder to have some expanded scope of responsibility.

There is no definition for Level B in the Financial & Data element because we could not objectively identify such a level for this factor within the roles. Our broad framework is that Level B requires a frequent and high level of difficulty of demand as compared with Level C which requires moderate demands as a regular and expected part of the role, within the overall range of these jobs.

For the Physical Resources element, there are roles which spend most of a shift using and handling moderate volume/value physical resources. There is then a clear step with other roles using and handling much higher volume/value physical resources. That significant and measurable difference needs to be reflected and is consistent with our broad framework.

For the Financial & Data element, in order to maintain consistency between the elements of this factor we would therefore need to identify roles which spend most of their shift handling very high value transactions or highly sensitive data compared with those which do so for moderate value transactions / moderately sensitive data, but which do not have the expanded scope of responsibility necessary for Level A. We have clearly identified roles (e.g., Checkout or Customer Service Desk) which spend the majority of their shift handling moderate value transactions / moderately sensitive data but there are none which have an equivalent significant step up in the value of transactions / sensitivity of data handled that would enable us to identify a Level B for that element. The sort of role that might fit a Level B for this element might be a cash office role that handles the day's takings but does not have the wider scope of responsibility for Level A, but there is no such role in the group of jobs in question.

We therefore recognise that there a 'notional' Level B in order to maintain consistency and avoid unjustified implicit weighting, but we have not developed a full level definition.

We have reflected security responsibility in our level definitions but have not identified such responsibilities above Level D within these roles. There is a general responsibility in stores to be vigilant against theft. In our opinion that is no different than the general duty of care that applies to all employees. Some of the jobholders also have specific but limited additional security responsibilities (e.g., responsibility for the key to the fireworks cupboard, spider tagging TVs, sealing trailers etc.). In our opinion none of those is particularly demanding or carries significant risk. We have therefore concluded that these kinds of security responsibility do not rise above Level D for any of the roles in question.

1134. The level definitions for the Physical Resources element was:

E	D	C	B	A
<p>Meets one or more of the following:</p> <p>Frequent but minimal handling or processing products for which the JH is accountable. Aggregate volume will be commensurately low.</p> <p>Limited handling of low value Equipment.</p> <p>General vigilance against theft.</p> <p>And</p> <p>Minimal potential for</p>	<p>Meets one or more of the following:</p> <p>Handling or processing products for which the JH is accountable and is a prime feature of the role. Moderate aggregate volume of products.</p> <p>Frequent use of low value equipment or moderate value infrequently.</p>	<p>Meets one or more of the following:</p> <p>Handling or processing products of a high aggregate volume for which the JH is accountable.</p> <p>Frequent use of moderate value equipment, infrequent use of higher value equipment with responsibility for pre-op checks</p> <p>And</p>	<p>Meets one or more of the following:</p> <p>Sustained handling or processing products of very high aggregate volume for which the JH is accountable.</p> <p>Frequent use of high value equipment with responsibility for more extensive pre op checks</p> <p>And</p>	<p>Increased accountability for maintenance and /or stewardship of equipment / products beyond their direct handling or use.</p>

loss or damage.	Has specific responsibility for the security of certain assets. And Some potential for loss and damage but unlikely to be serious.	Potential for loss and damage which could be serious.	Potential for loss and damage that could be very serious.	
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1135. For Financial and Data Resources, the level definitions were:

<p>Meets one or more of the following:</p> <p>No or limited direct responsibility for processing of financial transactions.</p> <p>Enters and retrieves routine, controlled data.</p> <p>And</p> <p>Minimal potential for loss, inaccuracy or error.</p>	<p>Meets one or more of the following:</p> <p>Direct responsibility for straightforward processing of a range of financial transactions on a frequent basis but in moderate volume.</p> <p>Processes, reviews, and amends routine-controlled data.</p> <p>And</p> <p>Some potential for loss, inaccuracy, or error.</p>	<p>Meets one or more of the following:</p> <p>Direct responsibility for straightforward processing /security of variety of financial transactions on an ongoing basis in high volumes.</p>	<p><i>No role fits this level; therefore a more developed definition is not possible. The key elements would be sustained handling or processing very high value financial transactions and /or very complex or very sensitive data.</i></p>	<p>Verification and investigation of financial transaction reports.</p> <p>Managing large budgets, and ancillary financial operations.</p> <p>Frequently processes a range of very complex and very sensitive data, using different systems.</p>
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The Asda experts' assessments

1136. Broadly speaking, the Asda experts assessed store replenishment roles at Level D, store till-based roles and depot picking roles at Level C, and depot roles involving Tipping, Letdowns and Putaways at Level B. Level A was awarded to Section Leader and to the depot roles involving Goods Out. None of the roles were assessed in Level E.

The Physical Resources Element

1137. Level steps within the Physical Resources Element consisted of a series of gateways (equipment, goods and security) coupled with an additional criterion that also had to be satisfied. The additional criterion was the risk level. This was divided into the degree of "potential for loss and damage" and the seriousness of such damage.

Responsibility for equipment

1138. One of the Physical Resources gateways was responsibility for equipment. The value of that equipment rose as the level steps increased.

1139. A convention supplemented descriptions of value in the level definitions. According to that convention:

- 1139.1. “High value [Level B] would be more than £20,000.” Only HRTs and CBTs were worth that much.
- 1139.2. “Moderate value [Level C] would be between £5,000 and £20,000.” LLOPs, Beasts and Power Pallet Trucks all fell comfortably in this range.
- 1139.3. “Low value [Level D] would be up to £5,000.” This exceeded the most expensive equipment in the stores.
1140. The Asda experts’ scheme assessed a role at Level B if the role-holder frequently used high-value equipment with potential for loss and damage that could be very serious, provided that the jobholder had “responsibility for more extensive pre-op checks” than in the equipment checks envisaged Level C. On the face of the scheme, this gateway into Level B did not depend on the volume or value of goods handled.
1141. We found this gateway difficult to follow. Ms Waller told us that the responsibility for a pre-operation check on a piece of equipment was an indicator of how “accountable” the jobholder was for that equipment. But accountability would not depend on the extent of the pre-operation check. In practice, as we have seen, the pre-operation check on a HRT involved checking tyres, hydraulics and the lifting mechanism, but was otherwise identical to the pre-operation check on a LLOP. Ms Hutcheson’s pre-operation check on her FLT used the same checklist as Mr Dennis had to use on his HRT, but Ms Hutcheson’s role was assessed at Level C.

Responsibility for goods

1142. As with equipment, the demand of responsibility for goods was thought by the Asda experts to rise with the value of those goods. Value was determined by aggregate volume. As a convention:
- 1142.1. “Very high aggregate volume [Level B] would be handling mainly pallets and roll cages for a sustained period as a main part of the job”;
- 1142.2. “High aggregate volume [Level C] would be handling mainly cases (with some pallets or roll cages) for a sustained period as a main part of the job”;
- 1142.3. “Moderate aggregate volume [Level D] would be handling mainly single items (with some cases) for a sustained period as a main part of the job”;
- 1142.4. “Low aggregate volume [Level E] would be occasional handling of individual items (rarely cases).”
1143. The Asda experts took into account the responsibility for temperature-controlled goods. They did not always do so symmetrically. Mr Prescott’s rationale for Level B mentioned his responsibility to check the temperature of a Goods In trailer. Ms Hutcheson also had that responsibility, but it did not feature in her Level C rationale.
1144. When assessing the risk of damage to goods in the depots, the Asda experts did not take account of the protective effects of packaging. If Mr Prescott dropped a case of yoghurts on the floor, the cardboard box made it less likely that any of the pots inside would split open. If Ms Ohlsson dropped a yoghurt pot from a shelf, there was nothing to protect it. This was an omission by the Asda experts. We considered its significance. In our view, outer cardboard packaging

would be likely to mitigate the risk of damage at low levels. See our facts relating to Dennis (b). Packaging would offer little protection if a case fell from height. Even at lower levels, the added protection would be offset to some degree by the increased volume of goods that could be damaged.

Security

1145. “General vigilance against theft” was considered by the Asda experts to be a baseline level of demand at Level E. Such responsibility was considered broadly equivalent to “frequent but minimal handling or processing of products...” and “limited handling of low value equipment”.
1146. The Asda experts’ introductory explanation made clear that they regarded vigilance against theft as “no different from the general duty of care that applies to all employees”.
1147. That was a strange opinion for the Asda experts to hold. It appears to have been based on a notion that all employees have some general duty of care to look out for members of the public trying to steal their employer’s physical assets. Most employees do not have to think about that at all. Workers in the Asda depots did not have to do that either, because members of the public had no access. Vigilance against theft by members of the public is a responsibility peculiar to shop workers.
1148. In fact, all the store workers got into Level D or above through one of the other gateways. That was not, however, a complete answer to the claimants’ criticism. The store replenishment roles were still two levels below the HRT drivers and three levels below the Loaders. The Asda scheme did not appear to allow for vigilance against theft to be taken into account in narrowing the gap.
1149. Strictly speaking, there was a way in which vigilance against theft could register in the higher levels. Within the logical framework of the level definitions, vigilance against theft would only be in Level E if it also met the risk criterion. For Level E, that criterion was “minimal potential for loss and damage”. If there was more than minimal potential for loss and damage caused by a store worker failing to spot a thief behaving suspiciously, it would be open to an assessor to award a higher level. But that was clearly not what the Asda experts had in mind. Their Level D was for people like Ms Darville who had specific responsibility for spider tagging. Security responsibility did not feature in Levels C or above. If there were any remaining doubt, their accompanying narrative put it to rest.
1150. We do not wish to overstate the weight of responsibility for vigilance against theft. As we set out in some detail, other things had to go wrong before a shoplifter could actually steal something from Ms Ohlsson’s Chilled aisles. Her vigilance only had limited impact. The same, however, can be said of the impact of the actions of loaders on the safety of a trailer.

Working environment as a driver of demand

1151. Ms Waller told us that, in practice, the Asda experts also took into account the additional risk posed by the busy environment of the depots, with colleagues working at speed with their own machinery. This did not feature in any of the level definitions.

Interrelation between the Elements

1152. All depot roles had an obviously more demanding responsibility for physical assets than financial assets. Most service-based roles in stores were clearly more responsible for financial assets than physical ones. Replenishment roles vice versa. For all these people, the division of elements worked well.
1153. Ms Darville in Home & Leisure had to take care of stock but also had responsibility for financial transactions. She worked on the till. In her (b) iteration she also acted as a buyer for goods whose quality she had to assess. The Asda experts' use of Elements got in the way of a rounded assessment of her role. She was assessed at Level D for both Elements, without an appreciation of the combined responsibility.

Responsibility for assets - discussionThe demand of responsibility for assets

1154. In our view the distinguishing features of the demand are:
- 1154.1. The value of the assets for which the jobholder takes responsibility; and
 - 1154.2. The impact that the jobholder's actions and inactions could have on the security of that asset.

Impact and risk

1155. The risk of loss or damage to an asset will affect the impact that a jobholder can have on the asset's security. The magnitude of the risk can be assessed in a similar way to health and safety risks.
1156. The chance of loss or damage is partly determined by the asset itself:
- 1156.1. Some items are particularly attractive to thieves. Cash and security-tagged items are obvious examples.
 - 1156.2. There is a greater risk of stock being damaged if it is fragile, such as box (or shipper) of eggs, or temperature-sensitive, such as milk. There is a smaller chance of it being damaged if it is securely packaged. These determinants of risk do not appear to have been given significant weight by the experts in differentiating between jobs. We see no reason to interfere.
 - 1156.3. There is a greater risk of a piece of equipment being damaged if it is being moved at speed, or is hand-held, than if it is being manoeuvred on the ground at walking pace.
1157. Another cause of risk to an asset is the actions of the jobholder who is responsible for it. We must be careful here. For our purposes, all the Asda workers performed their jobs with reasonable care.
1158. Environment also affects risk:
- 1158.1. There is a greater chance of a physical asset being stolen if members of the public have access to it.
 - 1158.2. A valuable piece of equipment is more likely to be damaged in the presence of moving vehicles than if it is on its own. The driver need not

necessarily be to blame. It is notable that a CBT was damaged when a goods vehicle driver moved the trailer prematurely. The main cause of damage to mechanised equipment by driving over low-lying objects, which the driver would not necessarily have avoided by taking reasonable care.

1159. Risk – whatever its magnitude - is likely to place more weight on the worker's shoulders the more they are in a position to control that risk. Another way of looking at the same question is to imagine what else would have to go wrong before a jobholder's actions or inactions could result in loss or damage to the asset.

1160. In depots, we drew the following rough lines between categories of risk:

1160.1. We regarded low-level movements of pallets and roll-cages using LLOPs and Power Pallet Trucks as being of broadly equivalent risk to manual handling of cases. This included moving containers over a dock leveller. It also included moving cases along the floor of a depot and in and out of low racking shelves.

1160.2. We perceived an additional degree of risk with movement of pallets and roll-cages at height. There were additional movements that could affect the stability of a pallet. The further a case fell, the more likely it was to be damaged.

Ongoing impact

1161. The Asda experts rely on the concept of ongoing impact. It makes the difference between Level B and Level A in their scheme. Ms Waller confirmed it in her oral evidence. Mr Dennis' name was on the load card and traceable from the seal that he had put on the trailer.

1162. We found this concept to be a differentiator of demand, but only marginally so. The Asda experts did not apply it consistently. A pallet on a high-racking shelf was traceable to the HRT driver who had put it there. If the Putaways driver left it in an unstable condition, it could potentially cause damage (to itself or something else) when a Letdowns colleague next tried to move it. This element of responsibility was not assessed. If Ms Darville failed to fix a spider tag to a television correctly, it was at greater risk of being stolen. That ongoing impact was not assessed either.

1163. On this point, we find the evidence of Mrs Hastings to be the more persuasive. Mr Dennis and Mr Sayeed were not responsible for preventing a trailer overturning. They were responsible for loading it correctly. Once the containers were distributed within the weight limits and the straps were in place, Mr Dennis had done all he could. Gross neglect of the loading rules could result in a trailer overturning, but that did not make Mr Dennis' role any more demanding. We disregarded the possibility that any of the jobholders would disobey Asda's clear instructions. Ms Ashton could theoretically cause loss to Asda by stealing cash from the till. We have no reason to think that she ever did, but more fundamentally, that possibility did not increase the demands of her role.

1164. Even if Mr Dennis' actions could be said to have the potential consequence of making the trailer unsafe, that did not give Mr Dennis the responsibility for the safety of the trailer. The driver's actions had a much greater impact than that of

the loaders on the risk of the trailer being damaged. The weighbridge offered an additional line of defence.

1165. Like Mrs Hastings, we struggle to see the equivalence between responsibility for large expenditure commitments within a budget (on the one hand) and responsibility for correctly loading a trailer. Though it is by no means determinative, the NHS Handbook provides a useful sense check. Budgetary responsibilities like that of Miss Gibbins are considered by the NHS to be a level step above the responsibility for careful use of a £30,000 piece of equipment and the responsibility for security of stock and drugs.

Value

1166. We found the concept of aggregate value to be helpful, just as the party-instructed experts did. But how should aggregate value be measured?
1167. For the purpose of our decision, we took a broad approach to the value of a single case of stock across all depots and stores. This is not strictly accurate. The median value differed from the mean. The type of stock handled at different depots may have been more or less expensive. None of the experts sought to differentiate between roles using these distinctions. Only where a specific role took responsibility for particularly high-value items did we depart from this general rule of thumb.
1168. This leaves an important variable. Aggregate value will depend on the total volume of cases for which the jobholder has to take responsibility.
1169. Where a role involved repeated movement of stock over a sustained period, a sensible starting point for calculating total volume is how much stock a role holder handled at a time. Pallet-loads and roll-cages of cases were an order of magnitude higher than single cases.
1170. How much of a difference these pallet-loads etc made to aggregate value depended on the proportion of working time that a Warehouse Colleague spent moving these quantities about.
1171. This leads us to a further weakness in the Asda scheme. They did not try to calculate the proportion of working time. Most comparators spent most of their shifts constantly handling goods by the case, with less frequent shifts handling stock in larger quantities. The Asda experts took the view that *any* number of shifts handling stock by the pallet-load increased the overall demand by a level step, provided that the number of high-volume shifts was more than negligible. This error was compounded by measuring volume over the course of a shift, rather than a working week or month.
1172. In our discussion of general principles (paragraph 171) we stressed the importance of setting a fair reference period. Getting the reference period wrong can arbitrarily favour a group of workers on the ground of their pattern of activity, rather than the demand of their work.

Choice of scheme

1173. We found the Asda scheme to be more workable than the IEs' scheme.
1174. This is because:

- 1174.1. The level definitions embed a judgement with which we disagree. The opinion written into the IEs' scheme is that responsibility for financial transactions on a till is inevitably more demanding than responsibility for careful handling of stock, irrespective of the value of the transactions or the value of the stock. That cannot be right. It ignores volume, value and impact.
- 1174.2. The modifier was used to reflect all the differences in demand between all the comparators. It was inconsistently applied.
- 1174.3. The Leigh Day experts' amendments did not cure the defect. They compressed all the demands into two levels. We think there was a greater range of demand than that. We also think that there was a range of demands amongst the comparators, which the Leigh Day amended scheme did not capture.
- 1174.4. The flaws in the Asda scheme were capable of being rectified by changing some of the assessments.

Amendments to the Asda scheme

1175. We therefore retained the essential structure of the Asda scheme, with its twin elements. At the lower levels we left the assessments largely unchanged.

Physical Resources Element

1176. In our view, the kinds of roles suitable for assessment in Level B were those whose regular activities involved handling stock one case at a time, but who also spent at least 10% of their working time:

- 1176.1. Loading, or
- 1176.2. carrying pallet-loads or roll-cages of stock at varying heights using a FLT or CBT.

1177. Where roles involved mostly moving pallets or roll cages at low levels, we regarded them as marginally achieving Level B. This was because of the reduced risk of damage and the protective effects of packaging. It was also because the equipment they used was considerably less expensive.

1178. Loading was more firmly in Level B. This is not because the Loaders were responsible for the safe delivery of the whole trailer load. It is because:

- 1178.1. They mostly moved pallets or roll cages of stock at low levels;
- 1178.2. The work was in confined spaces with added risk of collision; and
- 1178.3. They had to take care to avoid damaging the trailer during the loading process; and
- 1178.4. They had additional responsibility for securing the goods with straps.

1179. Roles which were mainly picking were at Level C, even if they involved substantial working time moving pallets at low levels.

1180. Adjusting the assessments in this way allowed us to achieve the correct number of levels of demand, whilst maintaining the clear level step between Miss Gibbins' demands and those of everybody else. It also allowed us to narrow the

gap between replenishment roles and depot roles slightly to take account of their vigilance against theft.

1181. We did not find it necessary to re-write the level definitions. We removed Level A for Physical Resources.

Interrelation between Elements

1182. Home and Leisure (b) was marginally within Level C, owing to the combination of responsibility for physical assets and financial transactions.

1183. We considered whether to adjust the level for Checkout, too. Mr Short's argument is that Ms Ashton was responsible for both the goods she sold and the money she took. In order to assess the weight of responsibility on Ms Ashton for those two different types of assets, we should aggregate their value.

1184. We do not accept that submission. This is for two reasons:

1184.1. First, Ms Ashton's actions or inactions had relatively little impact on the great majority of the money that passed through her checkout. The shopping bill was calculated automatically. Electronic payments were collected by the checkout system. The financial asset over which she had the greatest responsibility was cash. Ms Ashton could never realistically lose more than a small proportion of the cash that was handed to her.

1184.2. Second, even if Ms Ashton's total money receipts were treated as doubling the value of the assets she processed, the total would not come near to the volume and value handled by the warehouse colleagues at Level B.

Other roles

1185. Before concluding our findings under this factor, we checked roles such as Process and George, to see if our adjustments disturbed their relative placement within the Asda scheme. In our view they do not. We agree with the Asda experts that they are equivalent to Service Host and Checkout. Our only point of disagreement is where those roles stand in relation to some of the depot roles.

Responsibility for Assets scores

1186. Here, then are our assessments of each role and iteration:

Level	Store roles	Depot roles	Points
A	Section Leader		50
B	Warehouse	Ballard (a) and (b), Beaumont (a), (b) and (c), Dennis (c) and (d), Dolan (a) and (b), Haigh (a) and (c), Makin (a) and (b), McDonough, Morris (a) and (b), Sayeed (a) and (b), Uchanski (b)	40

Marginal B		Prescott, Matthews	40
C	Checkout, Customer Service Desk, Service Host (a) and (b), George, Process	Dennis (a) and (b), Devenney, Haigh (b) and (d), Han (a) and (b), Hore, Opelt, Uchanski (a), Welch	30
Marginal C	Home & Leisure (a) and (b)		30
D	Bakery, Chilled, Edible Grocery, Personal Shopper, Produce		20

Chapter Ten - Responsibility for Health and Safety

Issues relating to Health and Safety

1187. All experts agree that the responsibility for health and safety is a distinct demand that should be captured by a separate factor.
1188. It is common ground that, under this factor, it is the weight of responsibility that counts. Tasks involving health and safety responsibility may also require knowledge, physical skill and concentration, but those demands should be assessed separately.
1189. If we are to measure responsibility for health and safety, we might well ask, "Responsibility for whose health and safety, exactly"? That question provokes areas of agreement among the experts, but also some disagreement. Everyone agrees that it is demanding to take responsibility for the health and safety of others, be they colleagues or members of the public. But what about the jobholder's responsibility for their own safety? The party-instructed experts share the view that is also a demanding responsibility that should be assessed. The IEs disagree. They say that this demand is better measured as part of a jobholder's working conditions. The party-instructed experts agree that there is a risk of double-counting. They are agreed at least on this: risk of injury to the jobholder due to the actions of others. That element of risk is an environmental demand.
1190. Responsibility for health includes responsibility for preventing illness due to infection or contamination. In a store or depot environment, the main way such illness is prevented is through hygiene. As with other factors, nobody suggests that responsibility for hygiene is inherently more or less demanding than responsibility to keep people safe from traumatic injury.
1191. So what does make the weight of responsibility more or less demanding? That is where the experts fall out more fundamentally. The Asda experts say that the driver of demand is risk. The magnitude of risk should be assessed by the opportunities for something to go wrong in the jobholder's work, the potential

severity of harm, and how much of the role involves those risks. The IEs and Leigh Day experts eschew the risk-based approach. They focus on “the positive responsibility on the jobholder for ensuring compliance with health and safety procedures”.

1192. If we follow the Asda line that the level of risk is indeed the distinguishing feature of the demand, that begs another question. Are risks to be assessed on the assumption that the role-holder performs their job competently? Or by imagining a scenario in which the role holder makes a mistake, or deliberately ignores instructions?
1193. Another issue between the experts is the relevance of the safety of members of the public. Nobody is suggesting that an injury to a member of the public is inherently worse than an injury to a colleague. Nor is any expert saying that the presence or absence of members of the public in a workplace is determinative of the level of demand. The IEs and Leigh Day experts nevertheless say that responsibility for the safety of members of the public is generally more demanding than responsibility for keeping a workplace safe.

Relativities

1194. There is a stark difference of opinion about the range of demands amongst the roles. The IEs and Leigh Day experts put everyone (except leaders) at the same level, with only a modifier to distinguish between them. Asda say that there are 5 levels of demand.

Facts related to Health & Safety

Store roles – common responsibilities

1195. All role holders had basic responsibilities for personal hygiene, for example, to wash their hands after using the toilet and to report to the Section Leader if they were unwell. They were responsible for following fire evacuation procedures as and when required, and for reporting accidents.
1196. All shop workers with any replenishment function had a responsibility to stack items safely into roll cages, to ensure they did not impair the visibility of the person controlling it. They were responsible for using other items such as kick stools safely.
1197. The risks to “colleagues and customers” of “slips and trips” was assessed as “possible (daily)” with the potential to cause an “over 7 day injury”. More detail about the risk assessments in stores can be found under the heading of Working Conditions.
1198. Stores were frequently visited by children and by adults with a range of ages and physical health. There were no dress or footwear codes for customers. They were not trained on how to behave safely in stores. The job descriptions make numerous references to Point of Sale signs, attractive mannequins and signs and eye-catching displays of products. All of these things tended to draw customers’ eyes away from where they were putting their feet. They moved the dial away from the customer being entirely responsible for their own safety, towards a relationship in which the customer trusted Asda to keep them safe. All of the colleagues in store took a share of that responsibility.

Checkout

1199. Ms Ashton was responsible for keeping the checkout area free from obstructions such as rubbish. Spillages occurred at least once a week. Food or drink spilled on the conveyor created a risk of cross-contamination. Floor spillages created a risk of slips and falls. Depending on the size of the spillage, she was responsible for cleaning it herself or calling a Service Host. If there was a major spillage, the Service Host would move her to a different checkout lane during the clean-up. Ms Ashton was responsible for prioritising spillages ahead of customer queries.
1200. Ms Ashton was responsible for helping customers to lift heavy items onto the belt.
1201. Once every 2-3 months, a customer asked Ms Ashton about allergens in food. If a customer asked whether a product contained an allergen, she was responsible for reading out the ingredients from the label and for telling the customer that there could be no guarantee that the product was allergen-free.
1202. Ms Ashton was responsible for operating Challenge 25, to ask for identification if an apparently under-age customer attempted to buy an age-restricted item. Such items included alcohol and knives.
1203. Her job description says that she faced personal criminal liability if she sold an age-restricted item to a person she knew to be under-age. Her responsibility of legal compliance is not being measured. The possibility of a criminal sanction is an objective indicator of the risk of harm to children from alcohol and the seriousness with which society treats responsibility for preventing that harm.
1204. Ms Ashton had to be aware of Challenge 20. It only became her responsibility if a customer abandoned a chilled item at the checkout. Sometimes, the customer would draw it to her attention; at other times they would leave it at the side of the checkout belt. If Ms Ashton noticed an abandoned chilled item, she had no choice about what to do. Challenge 20 dictated that she had to give the item to the Service Host to be wasted. This was because Ms Ashton could not be sure that the item had been out of the chillers for less than 20 minutes.
1205. There was an opportunity for something to go wrong if Ms Ashton failed to notice an abandoned chilled item. Other controls would also have to fail. The item would have to escape the attention of the Service Host. A customer would have to think, "That looks nice" and not think, "I wonder how long it has been there?" They would have to take it home and somebody would have to eat it.

Personal Shopper

1206. Ms Hills regularly picked frozen products at the end of the relevant period. Ms Hills picked chilled products only rarely – less than once per year. She wrote the pick time on the tote and took care to ensure that the chilled item was taken to the Home Shopping department within the relevant Challenge 20 timescale.
1207. Ms Hills was responsible for moving her multi-order pick trolley safely and not leaving it where it could cause an unsafe obstruction.

1208. The main responsibility for lifting totes off the trolley was with the Home Shopping Service Crew. If Ms Hills lifted a tote, she had to use correct manual handling techniques when lifting totes.
1209. On average, there was a major spillage in the Brighton store once on each of Ms Hills' shifts. Ms Hills would not usually deal with it.
1210. Ms Hills encountered minor spillages once or twice per week. If she noticed a spillage, she was required to prioritise cleaning it.

Edible Grocery

1211. Ms Forrester had a general responsibility to keep aisles free from obstructions.
1212. The most frequent incident posing a health and safety risk during Ms Forrester's shift was spillages. Minor spills tended to occur once every 2-3 shifts. Ms Forrester was responsible for placing a "Wet Floor" sign.
1213. Breakages happened about once a fortnight. No Asda Aces were available during Ms Forrester's night shifts, so she cleared up any breakage herself.
1214. Ms Forrester was responsible for checking date coding in the aisles she replenished. Date checks were undertaken every few days, either at the direction of a manager or Section Leader, or of her own volition. She did a full, pro-active, date code check in the Baby and Toddler Section once per month.
1215. Products on Ms Forrester's aisles generally had long shelf lives. It would be unusual for Ms Forrester to have to look for a precise date; the month or year would give her the information she needed. Date codes were generally stamped onto the same part of the product's packaging, meaning that Ms Forrester did not have to look all over it in order to find the date.
1216. From 2011, the claimant replenished Health and Beauty items including baby food. It would be unsafe to sell baby food that was out of date.
1217. Ms Forrester had to use and put away a knife safely. She had to take care to avoid an item toppling from the high shelves.
1218. Ms Forrester had to take care for her own safety when pushing containers around the aisles. A fully-laden roll cage could weigh 350-450kg. Manual handling injuries were a daily risk, assessed in severity as "Over 7 day injury". There was also an element of taking care for the safety of others. The risk of injury from a pedestrian collision with a roll-cage was assessed as "unlikely" and with the potential to cause "minor injury". The aisles were not busy when Ms Forrester was on shift, and on Sundays they were empty of customers.

Produce

1219. Mrs Wilby, when replenishing produce, had to take care to implement Challenge 20 in relation to certain "blue label" items of chilled food. She was trained in the importance of Challenge 20, and the risk of selling food containing harmful bacteria. She recorded the time when she took chilled items away from the chilled room. In practice, there was little need for her to do this, because her chilled food stock was able to be "merchandised" (by which we take the job description to mean put in the chilled displays) in substantially less than 20 minutes.

1220. Mrs Wilby was responsible for carrying out general date code checks when replenishing. She removed items that were out of date. Some out-of-date produce items (such as packed salads) could be harmful to health. The Process team was also responsible for checking and removing such items.
1221. Some of the foods in the produce department contained allergens. In general, they were easy to spot, because most produce items consisted of a single ingredient. If asked by a customer, she was responsible for following the same procedure as Ms Ashton did at the checkout.
1222. Mrs Wilby was responsible for safely operating roll cages, pump trucks and replenishment trolleys, and for removing such equipment from the aisles by 9am.
1223. There were more likely to be slip hazards in the Produce aisles than in other departments because of the nature of the foods and the way they were packaged. Mrs Wilby was responsible for ensuring that slip mats were placed in seven different areas to control the risk of slipping.
1224. On Mrs Wilby's shifts, there was added risk of her pushing a container into collision with a customer, but that risk was also assessed as unlikely.

Home & Leisure

1225. Ms Darville had health and safety responsibilities largely in common with other replenishment colleagues. There was less risk of spillage on her aisles because of the type of merchandise that was displayed there.
1226. On the other hand, Ms Darville had a health and safety responsibility that other replenishers did not have. Part of her job was to replenish the fireworks cupboard. She did not have a key to the cupboard. Her specific responsibility was:
- 1226.1. To ensure that the cupboard was kept locked,
 - 1226.2. To carry the fireworks safely through the store to the cupboard with a colleague,
 - 1226.3. To ensure that the total explosive mass of the fireworks inside the cupboard did not exceed 12.5kg, and
 - 1226.4. To keep a bucket of water by the cupboard.

George

1227. Ms O'Donovan spent 4 hours per day replenishing clothes. Her main containers were roll cages, totes and clothing rails. She was responsible for keeping her area clean and tidy. This included reducing obstructions by removing containers from the aisles. It also included removing trip hazards such as totes on the floor. Once or twice per month she had to clean up a spillage. She was responsible for keeping the clothing rails stable by hanging clothes evenly. When in the external warehouse, she had to wear high-visibility clothing, use designated walkways and doorways, and keep her distance from manoeuvring powered equipment. These precautions were not necessary in the George warehouse on the mezzanine floor.

Bakery

1228. Mrs Gardner's role was different from the other replenishment roles, in that she prepared fresh food for direct consumption. She had additional dress standards. She had to wear a hat and hair net and was restricted in the jewellery and make-up she could wear.
1229. Her cleaning responsibilities extended further than minor spillages and breakages on the shop floor. She had to keep food preparation areas clean and clutter-free. She had utensils to clean hygienically. Colour-coded disposable cloths were provided to her along with prescribed chemical cleaners and detergents.
1230. Mrs Gardner's first replenishment task was to defrost pre-baked frozen items. These were doughnuts and buns. She checked the quantity of frozen doughnuts etc from her production sheet, went to the bakery freezer for about two minutes, retrieved the items she needed in a box, and laid them out near the counter to thaw. While she was at it, she collected any items that were placed out by the bakers and put them in the freezer.
1231. Mrs Gardner had Challenge 20 responsibility for cream cakes. This was not generally onerous, because she was normally able to replenish the cream cakes within the 20-minute window. She recorded the time they came out of the chiller, just in case. She rotated chilled stock in the back ups by arranging it in date order.
1232. When wrapping freshly baked items such as rolls, Mrs Gardner took care not to touch heated wire of the L-Sealer. She used gloves to handle hot trays of rolls as she removed them from the oven. She operated the bread slicer, keeping her hands away from the blades when the back door was open. These precautions were for her own safety. Another way of saying the same thing is that they were ways of dealing with the hazards of her working conditions.
1233. Mrs Gardner also did things to protect others, for example, by labelling the fresh-baked items with expiry dates. The risk of food poisoning from out-of-date bread was relatively low.
1234. In other respects, Mrs Gardner's health and safety responsibilities were similar to those of the other replenishers. She had to deal with a spillage once every 2 weeks or so. She followed the standard procedure if asked about allergens.

Chilled

1235. Of all the replenishment roles, Ms Ohlsson had the most temperature-controlled stock to steward. Challenge 20 was essential for food safety, as well as product quality and longevity. Ms Ohlsson was responsible for ensuring that all food sold to customers was safe to eat. If chilled food was in an ambient environment for more than 20 minutes, there was an increased risk of growth of food poisoning bacteria.
1236. Incidents of food poisoning that could be traced back to food hygiene failures at Huyton could result in prosecutions against Asda. This is an indicator of the importance food hygiene, if it were needed. We are not assessing Ms Ohlsson's responsibility for keeping Asda out of trouble with the law.

1237. Ms Ohlsson was responsible for checking each individual item as she replenished it. She checked the date codes, to ensure that no items had passed their Display Until date.
1238. Ms Ohlsson was asked for allergen information about once per week. She followed the same procedure as the other food replenishment colleagues.
1239. One of Ms Ohlsson's replenishment containers was a 200kg roll-in milk trolley. She had to manoeuvre it carefully to avoid hitting a customer.

Process

1240. One of Mrs Trickett's main responsibilities was markdowns. She was required to check the date codes of products in store to ensure that out-of-date items were not displayed for sale.
1241. When dealing with food items, Mrs Trickett was responsible for taking care that a product was safe to consume. She checked the packaging to ensure that the seals had not been tampered.
1242. A manager or Section Leader would direct Mrs Trickett to remove recalled stock from the shelves. There might be a product recall for a variety of reasons, included a food item being mislabelled as to allergens.

Customer Service Desk

1243. Mrs Fearn dealt with a wide range of customer enquiries. Many (such as overcharging) did not engage any health and safety responsibility at all. Where customer queries involved health and safety issues, they tended to relate to products. Mrs Fearn had responsibility for deciding whether a reported fault should be escalated to CPQC. This responsibility affected the safety of a cohort of consumers, because of the potential for large batches of products to have the same fault.
1244. If a customer returned a chilled item, Mrs Fearn was responsible for processing it as waste. There was no monitoring responsibility here, because Asda's policy dictated that any item had to be wasted if it was unclear how long it had been outside a chilled environment.
1245. As we have seen, Mrs Fearn was responsible for showing customers how to use an Asda mobility scooter safely.
1246. Mrs Fearn dispensed fireworks (whether or not paid for at the checkout) and insisted that customers immediately remove them from store, or postponed collection until they had finished their shopping.

Counters

1247. Many of the facts relevant to Mrs Webster's health and safety responsibility are obvious from our earlier descriptions of her tasks.
1248. She prepared and served cooked food. Customers would naturally think that once it had been cooked it would not need to be cooked again. If a chicken cooked by her left the store with harmful bacteria inside, those bacteria would be ingested by the customer.
1249. Chicken was classified as a "high risk food" by Asda.

1250. There were multiple opportunities for cooked food to become contaminated under Mrs Webster's watch. Examples would include using a knife that had previously been used for cutting something else, or placing a food item on a contaminated surface. Contaminants could include harmful bacteria. They could also include allergens. A person who was severely allergic to fish might eat one of Mrs Webster's Margherita pizzas, trusting her not to have left any fish traces on the pizza.
1251. Mrs Webster was responsible for using different-coloured chopping boards and knives. She had responsibilities for keeping the food preparation areas clean. When cooking chicken in the rotisserie, she was responsible for temperature-testing the meat, as described above. She had enhanced personal hygiene and dress requirements.
1252. When filleting and boning fish, she had to take care not just for her own safety, but also to avoid the risk of leaving potentially dangerous bones inside the food.
1253. Mrs Webster had to take precautions to avoid burning herself when removing cooked chickens from the oven.

Warehouse

1254. Ms Hutcheson had the same general health and safety responsibilities as Ms Ashton when she worked on the checkout, and the replenishment colleagues when she was in the ambient grocery aisles. Unlike other replenishers, she drove a Power Pallet Truck on the shop floor, but restricted its use to nighttime to reduce the risk of collision with pedestrians.
1255. On top of that, Ms Hutcheson was responsible for health and safety in the warehouse area. This included taking reasonable care for the health and safety of colleagues, contractors or drivers who might enter. If necessary, she advised colleagues on the Two Bay rule (see below) and reminded them to wear a high-visibility vest. She ensured that proper signage was present on aisle and racking locators.
1256. There were two FLT's and two Power Pallet Trucks in the warehouse. The number of FLT's decreased to one. The equipment did not all operate at the same time.
1257. Ms Hutcheson was responsible for pre-operation checks in the same way that depot workers were.
1258. There were typically 4 colleagues in the warehouse on the morning shift. Some of those people were shop-floor colleagues fetching items for replenishment.
1259. Ms Hutcheson was responsible for safe operation of the compactor. She obtained the compactor keys from security and was responsible for locking it after use. If the compactor was blocked, Ms Hutcheson had to remove the blockage safely, remembering to isolate it from the mains first.
1260. Compactor skip changeovers were particularly hazardous, having resulted in a fatal accident at a different store. Ms Hutcheson supervised the area whilst the changeover was taking place. She placed a chain around the area and warned colleagues not to enter.
1261. Ms Hutcheson had a key to the hazardous waste area. She received firework deliveries and ensures that all fireworks were securely stored in a container in

the area outside the warehouse external doors. She was responsible for keeping the outside yard clear of obstructions, so drivers could safely manoeuvre their trailers to the warehouse.

1262. As we have seen, Ms Hutcheson was responsible for checking the racking shelving once per week. This was a proactive inspection that the depot workers did not have to do. Collapse of the racking shelving would be extremely dangerous.
1263. When tipping a trailer of chilled food or drink, Ms Hutcheson was responsible for checking and recording the temperature of the trailer, and for ensuring that the products were stored in the chilled area within 20 minutes.

Section Leader

1264. Miss Gibbins was responsible for ensuring good health and safety practice by colleagues in her section. If she noticed large equipment on the shop floor, for example top stocking steps and roll cages, she brought it to the attention of a colleague and asked her to remove it.
1265. Miss Gibbins had a responsibility for assessing risk as well as following procedures. She completed risk assessments for colleagues who were at greater risk of injury to their circumstances, such as disability or pregnancy.

Didcot ADC

1266. Most of the space at Didcot was taken up with aisles of racking shelving, laid out in a grid. Each aisle was 3.1 metres wide.
1267. The depot environment had large numbers of colleagues driving various forms of manual handling equipment. The speed of that equipment ranged from 6 to 15km per hour. Some of that equipment would be laden with pallets or roll cages.
1268. At any one time, there would be between 23 and 47 Warehouse Colleagues working within the aisles of racking shelving. There could be up to 9 colleagues working in a single aisle.
1269. Across the depot as a whole, there would be about 15 colleagues driving HRTs. Although the LLOP drivers were required to follow the one-way system, HRT drivers were exempt.
1270. The maximum speed of a LLOP at Didcot was 10.5 km per hour. The speed of a Power Pallet Truck was capped at 8.5 km per hour.
1271. Workers in all depots were taught the "Two Bay Rule". Where a piece of mechanised equipment was in use in an aisle, the operator had to stay two racking bays away from anyone else in the aisle, and they had to stay two racking bays away from the operator.
1272. Health and safety compliance was monitored through a system of "PAT tests". Depot workers were monitored by a manager, who then asked questions to ensure that they were following health and safety policies correctly. Not every Didcot worker was PAT tested during the Relevant Period.
1273. Between August 2008 and December 2013 there were 102 recorded accidents and incidents involving manual handling equipment. Examples include:

- 1273.1. a collision between a LLOP and a HRT, resulting in a depot worker being absent from work for 46 days;
- 1273.2. a neck injury sustained by an HRT driver in collision with another HRT;
- 1273.3. a pedestrian depot worker suffering a fractured foot caused by a reversing CBT.

Skelmersdale CDC

- 1274. The industrial environment at Skelmersdale CDC was similar to Didcot, but also temperature-controlled. The main throughput of stock was chilled and frozen food.
- 1275. Throughout the Relevant Period, the movement of stock through Skelmersdale was governed by Schedule 4 of the Food Hygiene (England) Regulations 2006. The Schedule created offences of failing to maintain hygiene standards for temperature-controlled food intended for human consumption. This is an indicator, if such were needed, of the importance of keeping cold food cold in depots as well as in stores.

Lutterworth IDC

- 1276. We could not find the maximum speeds of LLOPs and Power Pallet Trucks at the Lutterworth IDC. We took them to be the same as at Didcot.
- 1277. In 2013, there were 29 recorded accidents at Lutterworth involving the use of mechanised handling equipment. Four of these resulted in a worker being absent for over 7 days.
- 1278. One of the reported accidents occurred in February 2013. It involved a collision between two vehicles. One of the drivers was jolted forwards and was absent for 15 days due to her injury.
- 1279. Other injuries at Lutterworth were caused by defective equipment. In January 2013, a LLOP driver was injured by faulty cowhorns on his LLOP. Jammed rollers on a battery cart caused another worker to hit her knee against the side of a Power Pallet Truck.

Devenney

- 1280. As with all Warehouse Colleagues doing picking activities, Mr Devenney was responsible for conducting a 5-minute pre-operation check of his manual handling equipment to ensure it was safe to use. He used a LLOP for stock picking, a Pedestrian Power Pallet Truck on Pick By Line and a Powered (ride-on) Pallet Truck when Handballing. He had to follow driving rules as well as taking care. He was required to follow the one-way system which was clearly marked. He had to sound the horn when driving around corners or large obstructions.
- 1281. Mr Devenney also had responsibilities to assess the safety of pallets as he stacked them or moved them.
- 1282. Mr Devenney removed litter if he saw it on the floor and radio-ed a colleague if he saw a spillage. This typically happened once or twice per shift.
- 1283. In 2011, Mr Devenney drove a LLOP into collision with a colleague's LLOP. He failed to give way to her as she rounded a corner. As a result, she sprained her

hand and left her shift early. Mr Devenney was required to attend a counselling meeting for failing to observe the rules of the road.

Hore

1284. Some of Mr Hore's work was in the Frozen Chamber. If he was in the frozen chamber with one other colleague, he and the colleague were jointly responsible for leaving together, so as to ensure that neither of them was left in the freezer alone.
1285. Mr Hore used a LLOP, a Power Pallet Truck and a Beast. He was responsible for carrying out pre-operation checks, some of which would affect the machine's ability to be operated safely.
1286. Whilst he was on shift, about 25 colleagues would also be working on powered equipment, carrying up to 1,250 kg of stock at a time. The speed limit was 30 km per hour.
1287. Mr Hore was responsible for following rules for safe circulation of pedestrians and traffic. Rules included keeping to pedestrian walkways, and keeping two racking bays' distance away from a colleague who was using mechanised equipment. There were two accidents during the relevant period in which colleagues were injured following collision with a LLOP.
1288. Mr Hore remembers an occasion when a colleague was trapped underneath a fallen roll cage on a trailer.

Welch

1289. One of Mr Welch's activities in Skelmersdale was Pick By Line. He picked cases from a pallet or roll cage of stock that had been assembled by a colleague on Breaking Down. Before picking the first case, he spent a few seconds assessing whether the pallet or roll cage was stable. If it was unstable, he asked for it to be re-stacked.

Prescott

1290. We have seen that Mr Prescott worked on Goods In activities. One of those was Marshalling. When Marshalling, Mr Prescott moved dollies of totes from the designated receiving area to the Pick By Line grids. The totes were uncovered. Some of the food on the dollies was visible.
1291. Mr Prescott assessed each container for a few seconds and decided whether it was safe to move. He remained alert for signs of deterioration in food. He was not responsible for checking individual items, for example, by lifting up the totes and assessing the quality of the food underneath.

Sayeed (a)

1292. By now, readers will be familiar with Mr Sayeed's activity of Loading. Mr Sayeed and his team-mate worked in close proximity to the trailer and therefore to each other. They were each responsible for the other's safety, including at times when manoeuvring mechanised handling equipment in confined spaces.
1293. One of the trailers they loaded was called a semi-deck trailer. On a semi-deck, the top deck was removed and reassembled by raising and dropping a series of shelves. Mr Sayeed was responsible for securing the shelves in place with

latching tabs. If he did not do that, there was a risk that the upper deck could collapse in transit. The person tipping the load at the destination (such as Ms Hutcheson) might not realise. They could be injured by the unstable stock. There is no evidence that this happened. It could only happen if Mr Sayeed neglected to put the latching tabs in place.

1294. There was very limited responsibility for the safety of the wider public. In paragraph 1104, we have outlined our findings about the risk of an improperly-loaded trailer overturning. If a trailer overturned on a motorway, there could be multiple fatalities, but that was never going to happen unless Mr Sayeed was grossly disobedient.
1295. There is no evidence of any other risk of injury presented by weights being wrongly distributed or loads inadequately secured.
1296. During Iteration (a) (IEs' Iteration 2), Mr Sayeed worked some shifts in the Battery Bay. He underwent specific training including training on health and safety, including the administration of first aid. He was responsible for ensuring that he and others were not harmed by contact with battery acid. By the period covered in the IEs' Iteration 3, Mr Sayeed had stopped working in the Battery Bay.

Beaumont

1297. Mr Beaumont drove a HRT. It will be remembered that the pre-operation check of a HRT took about 5 minutes longer than a LLOP check.
1298. Putaways and Letdowns were recognised by Asda as posing added health and safety risks. This, needless to say, was because of the use of a HRT to move heavy loads at a height of several metres from the ground. As a result, performance against time targets was less closely supervised on these activities. Mr Beaumont's Putaways target averaged out to one pallet every 3 minutes. Performance management action was not taken if he failed to meet that target.
1299. In December 2009, Mr Beaumont attended a counselling meeting for leaving a trailer in an unsafe condition by not safely placing the trailer straps back inside the trailer once he had finished loading. This resulted in the straps getting caught in the loading bay canopy and pulling the canopy away from the wall when a colleague removed the trailer from the bay.
1300. The same month, Mr Beaumont was also counselled for failing to check that he had inserted a pallet of oil onto the racking shelving correctly when doing Putaways which caused several cases of oil to fall to the ground.
1301. In December 2010, Mr Beaumont sprained his wrist and jarred his shoulder when his Power Pallet Truck ran out of battery, causing the forks to lift up in the air and drop back to the floor.
1302. In February 2011, Mr Beaumont left damaged cases unattended after losing them on Putaways.

Uchanski (b)

1303. One of Mr Uchanski's HRT-driving activities was MSP Replenishment. There was no productivity target for that activity. This was to ensure that Mr Uchanski did not prioritise speed over safety.

1304. In May 2016, Mr Uchanski drove a HRT into collision with a barrier. He was warned for failing to drive with due care and attention.

Haigh (a) and (b)

1305. When Mr Haigh was on shift as a supervisor, he had an enhanced level of responsibility. He was accountable not just for his own actions but for the actions of others.

1306. Supervisory responsibilities included:

- 1306.1. regularly inspecting the working areas;
- 1306.2. ensuring that each team member conducted their pre-operation checks of mechanised handling equipment and wore the correct personal protective equipment;
- 1306.3. observing the practices of colleagues within his team;
- 1306.4. speaking to a team member if he thought they were not complying with health and safety requirements (Mr Haigh actually did this);
- 1306.5. monitoring their pace of work to ensure that they were not putting undue strain on their bodies; and
- 1306.6. responding to incidents creating additional hazards.

1307. Mr Haigh remembers an example of a dynamic response to an incident when supervising MSP Pick. A colleague dropped a pallet of oil. Mr Haigh “zoned off” the area, fetched the “wet floor” signs, and arranged for a colleague to deal with the spillage.

1308. When supervising Large Case Replenishment, Mr Haigh did the substantive activity at the same time. His supervisory responsibilities were therefore interlaced with those of the substantive replenishment activity.

Makin

1309. Mr Makin loaded refrigerated trailers in Skelmersdale.

1310. When clearing a refrigerated trailer ready for loading, Mr Makin had to comply with Challenge 20. He was responsible for ensuring that the trailer temperature met the required specifications and adjusting the temperature accordingly. In fact, it was unusual for trailer temperatures to fall outside prescribed ranges. He was required to record temperatures on the load card. His responsibility included remaining alert at all time for signs of deterioration in food quality including odours and signs of damage or decolouration. A failure to carry out these responsibilities could have significant consequences, such as poor-quality product reaching Asda’s customers by the pallet-load with a risk of food poisoning. Other control measures were in place to reduce the likelihood of this occurring. The load card was retained for checking. If Mr Makin had not written down the temperature, it would be clear that temperature check had been missed. It also was part of the in-store Warehouse staff responsibility (such as Ms Hutcheson) to check the temperature of the trailer. If there were any signs of food deterioration, the replenishment colleagues would have a chance to spot them.

1311. There was a Clean As You Go policy at the depot, which Mr Makin was required to follow. This reduced the risk of slips, trips and falls. Such risks were more than theoretical because of spillages of ice.
1312. On 13 September 2009, Mr Makin was driving a LLOP when the battery cut out, causing him to lose control of the vehicle. It collided with a roll cage, causing him to break his arm and injure his back.
1313. Just after the end of the Relevant Period, Mr Makin was on a De-Kit activity, for which he used a Beast. He clipped the door of a trailer with the roll cage he was carrying. He was thrown forward off the Beast, injuring his left shoulder and back.

Matthews

1314. We have seen (under Planning & Organising) that one of Mr Matthews' activities was Tipping and that it engaged Challenge 20 responsibilities. For about 25 minutes of a Tipping shift, Mr Matthews checked trailer temperatures and assessed the condition of the stock he was tipping. No more than half his shifts were Tipping during the Relevant Period. His other shifts did not require temperature checks.

McDonough

1315. Mr McDonough worked in the Frozen Chamber, as Mr Hore did. He spoke with colleagues multiple times daily to coordinate break schedules. As with Mr Hore, this was to ensure that there were always two people in the Frozen Chamber at any one time.
1316. In May 2010, Mr McDonough was counselled for crossing the central aisle with the forks extended.
1317. In February 2011, Mr McDonough was struck by a moving LLOP, thrown into the air and landed 3 metres away. He needed 10 days off work to recover.
1318. In 2012, Mr McDonough inadvertently nudged a pallet on the high racking, causing him to undergo a period of observation by a trainer.
1319. On 16 July 2014, just after the end of the Relevant Period, Mr McDonough failed to follow the correct procedure when operating the tilt button, resulting in him dropping a pallet from a height of 9 metres. The pallet dropped onto the racking shelves and nobody was injured. Following a disciplinary hearing, Mr McDonough was banned from driving a HRT for 9 months.

Morris (a)

1320. Mr Morris' responsibilities in Iteration (a) included the delivery of training on manual handling. He was entrusted to ensure that his cohorts of trainees understood the risk of injury and long-term physical wear and tear caused by repeated manual handling movements. It was his job to teach them best practice to minimise those risks. Mr Morris was also an instructor in the safe operation of LLOPs and Power Pallet Trucks. His job was to ensure that his trainees understood how to inspect and use these machines safely. The job description describes this task as "crucial to promoting a safe working environment".

1321. Full training courses in each discipline took place once or twice per year. Mr Morris also provided refresher training at more frequent intervals.

1322. For both training courses, Mr Morris administered the test as well as providing the initial instruction. His responsibility therefore extended to checking that trainees actually understood what they had been taught.

1323. Mr Morris appears to have learned the importance of health and safety the hard way:

1323.1. On 29 November 2005, Mr Morris was given counselling, having loaded a defective roll cage onto a trailer, putting the store colleague who unloaded it at risk of injury.

1323.2. In April 2008, Mr Morris was thrown from a defective LLOP, which stopped abruptly when turning a corner.

1323.3. Mr Morris was counselled during the Relevant Period for picking into a defective roll cage.

1323.4. In October 2010, a case of frozen goods fell on Mr Morris' hand as he was undertaking Stock Pick. He was absent from work for 20 days and had to wear a cast.

Opelt

1324. Mr Opelt had broadly the same responsibility for health and safety as Mr Devenney had. He encountered a spillage about once per shift. He caused spillages about once per month.

Responsibility for Health and Safety - the IEs' scheme

1325. The IEs's scheme assessed responsibility for health and safety as set out in this table:

Takes account of the jobholder's responsibility for ensuring their own health and safety and that of others. (We are not concerned here with risks to the jobholder - assessed in Work Environment)	
Moderated (+ or -) by proportion of regular duties impacted by active consideration of H&S issues.	
LEVEL	LEVEL DESCRIPTION
A	The jobholder has a specialist role where there is an enhanced requirement for safe practice in relation to their own work and the safety of others including members of the public.
B	The jobholder has a direct responsibility for safety and safe practices within a limited and defined area such as a small team or work group. They are responsible for knowing and applying regulations and procedures relating to safe working within the team or work group and in areas where members of the public are present.
C	The jobholder is responsible for ensuring safe working in their own practice and, as appropriate, when working with or alongside others and/or members of the public. They are responsible for knowing and observing regulations and procedures relevant to their own work.
D	The jobholder will be required to observe safety regulations or safe practice in so far as they apply to specific areas of their own work. It is expected that the majority of their work will not require the adherence to or knowledge of specific regulations.
E	The jobholder works almost exclusively in a low - hazard environment such as an office and/ or has no role other than a general duty of care in respect of health and safety.

How the IEs' took into account magnitude of risk

1326. The factor scheme did not mention the magnitude of risk to health and safety, except in Level E ("low-hazard environment"). This was deliberate. As they wrote in the joint report:

"The IEs do not consider the level of risk to be the determinant of level of responsibility. Consider the risk of fire in a store or in a

warehouse. This is a constant. This factor should reflect the differing levels of responsibility for **managing** that fire risk – from establishing overall policies and procedures to carrying out duties in a manner that complies with Health and Safety guidelines...”

1327. Mr Walls gave evidence on behalf of the IEs. Mr Short encouraged Mr Walls to develop his fire safety example. Low levels of demand would include a requirement to keep fire doors closed and refrain from smoking near flammable materials. There would be a higher level of demand on the supervisor who ensured compliance with those rules, and a higher level still for the person responsible for the entire fire safety policy. This example rests on the premise that there is one risk that is constant throughout a workplace. It is harder to apply when one workplace involves a higher risk of causing traumatic injury to a colleague and the other workplace involves a higher risk of poisoning a member of the public.

1328. Mr Cooper asked him about the extent to which risks were relevant when assessing responsibility for health and safety. In summary:

- 1328.1. Mr Walls accepted that a jobholder’s responsibility would be greater if it was easier for something to go wrong, and still greater if the adverse event could cause a more serious injury or illness. The example he agreed on (after some refinement) was the likelihood of a pizza being prepared on a contaminated surface, the likelihood of a customer becoming ill as a result, and the potential severity of that illness.
- 1328.2. Analysing risk in that way would involve layers of subjective judgments that would be difficult to make in practice. The magnitude of risk (in terms of likelihood of an adverse event and severity of consequences) was already catered for in the regulatory regimes that existed to manage those risks. As Mr Walls put it, “someone else has done the work for us”.
- 1328.3. He therefore accepted that the “depth and scope” of policies and procedures in place for managing a risk were a “proxy” for the extent of those risks. A jobholder’s “agency” for implementing such procedures, and the “breadth” of the policies and procedures in place, were therefore a suitable measure of the weight of responsibility a person had for keeping a person safe.

1329. The IEs did not always view risk in this way. In particular, they did not always think of formal roles within a procedure as a reliable proxy for the demand of keeping people safe. In their Briefing Note Two, Ms Spence and Mr Kennedy expressed this reservation:

“We should also be careful here to avoid official statements relating to an overall responsibility for Health and Safety as being the last word here. Examples of specific training are a useful indicator. But a negative response should not necessarily be left at that – there are countless examples of jobholders who have had no more than a general health and safety briefing common to all employees whose role nevertheless involves specific risks to others which have to be addressed by the jobholder.”

1330. The importance of responsibility for specific risks was consistent with the IEs’ Provisional Factor Plan and Revised Factor Plan. In both plans, the

Responsibility for Health and Safety factor aimed to assess the “impact” of health and safety responsibility as well as its “scope”.

The IEs’ level definitions

1331. By the time the IEs finalised their scheme, consideration of “impact” had disappeared from the Health and Safety factor. What counted was the scope of responsibility.
1332. Level steps rose according to knowledge of specific regulations, the size of the work group for whom the jobholder took responsibility, and the presence or absence of members of the public.
1333. This avoided the need for the IEs to step into the uncomfortable area of risk assessment. It also embedded a judgement that just about everybody had the same weight of responsibility, and if there were any differences, they could be captured by the modifier.

The IEs’ Health and Safety modifier

1334. The IEs were asked by the claimants to clarify their use of the modifier. The question and answer read as follows:

Question: “In regard to the wording of the modifier, what is meant by “active consideration of Health and Safety issues” in relation to “active” (as opposed to any other consideration)?”

Answer: “A jobholder exercising “Active consideration of Health and Safety issues” would be reviewing and potentially modifying their behaviour/techniques in the light of specific, identified and written Health and Safety protocols rather than simply observing normal common sense or following procedures which already had Health and Safety considerations built-in.”

1335. During Mr Walls’ oral evidence, Mr Cooper asked him a series of questions aimed at exploring what the IEs meant in the answer they had given. What specific written health and safety procedures, he asked, would not have health and safety considerations built in? In reply, Mr Walls gave the example of Mr Sayeed’s additional responsibility when working in the Battery Bay. Examples he gave of procedures that would not attract the modifier included Challenge 20 and the rules for driving a LLOP.
1336. We could not tell the difference. Mr Sayeed was responsible for checking for damaged batteries. Built into that procedure was the health and safety consideration that a damaged battery might cause acid burns. Ms Ohlsson was responsible for returning chilled food to the chiller inside 20 minutes. Built into that procedure was the health and safety consideration that harmful bacteria could multiply in certain foods outside a chilled environment. Mr Opelt had to observe the Two Bay Rule on his LLOP. Built into that procedure was the health and safety consideration that he might crash into someone if he drove too close.
1337. We also found the modifier criterion hard to reconcile with the IEs’ assessments. For example,
- 1337.1. Mr Sayeed was given a “plus” modifier for Iteration 3, which excluded the Battery Bay, but no modifier for the iteration (number 2) which included it.

The IEs swapped the assessments round once the discrepancy was pointed out.

- 1337.2. Section Leader was assessed at B+. Miss Gibbins undoubtedly did consider health and safety proactively (when, for example, carrying out pregnancy risk assessments). Most of her time, however involved taking responsibility for performance, budgets and avoiding loss. She spent 11 hours per week in an office. Mr Haigh (in his supervisory iterations) spent more of his time taking responsibility for the safe work of a group, but no modifier was awarded to him. Mr Walls explained the difference on the ground that “the number of different topics in [Miss Gibbins]’ world of work was more expansive than with Mr Haigh”. That was not a written criterion for the modifier.
- 1337.3. First Aiders were given a “plus” modifier for the First Aid iterations of their roles. (Their day jobs were assessed at C=.) They were put under the more intense health and safety spotlight when called out to treat an injury. That was only a small proportion of their regular duties.
- 1337.4. Mr Morris was an equipment instructor in the IEs’ Iteration 2 and a manual handling instructor in their Iteration 4. This was the part of his work that involved the most active consideration of health and safety issues. It involved taking responsibility for health and safety of a work group. It happened a few times per year. It was a small portion of his regular duties. Under the IEs’ scheme these iterations would have been a fairly obvious candidate for B-. They were assessed at C+.

Responsibility for health and safety – the Leigh Day experts’ assessments

The Leigh Day experts’ view of the demand

1338. The Leigh Day experts understood that the IEs’ scheme measured responsibility for compliance with health and safety regulations. They quickly recognised the limitations of that measure as an indicator of demand. When reviewing the IEs’ factor scheme, the Leigh Day experts commented,
- “In short, this factor measures a general requirement for employees to comply with health and safety regulations. In this sense, it could be said to be a ‘non-factor’ in that this requirement applies equally to all jobholders, so the factor is unlikely to differentiate between most jobs. There could equally have been a factor measuring responsibilities for complying with equality legislation”.
1339. The evidence is not clear about how much the Leigh Day experts knew about the detail of the Asda jobs at the time they made this observation. They did, however, have enough of an understanding of the jobs to be able to list the more common items of equipment that the jobholders used (for example, at paragraph 2.19 of the same chapter of their report).
1340. By the time the Leigh Day experts completed their report, they had adopted the IEs’ measure of demand, namely the extent of responsibility for compliance with specific health and safety procedures.
1341. The result was, as with the IEs’ assessments, that the Leigh Day experts put just about everyone into Level C.

1342. In the case of Ms Ashton and Mr Makin, Level C was thought appropriate because of the jobholders' responsibility for Challenge 20. The scheme did not allow them to differentiate between the weight of their different responsibilities under that policy, or the number of people who could be harmed if either of them made a mistake. As it happened, there were control measures in place to reduce the risk of anyone being harmed by either jobholder's Challenge 20 errors, but that is not how the Leigh Day experts reasoned. They saw a requirement to comply with the same named policy as necessarily connoting an equal level of demand.

The Leigh Day experts' Health and Safety modifier

1343. The Leigh Day experts were unclear what the IEs' modifier definition meant. They were not much the wiser after the IEs had answered their question. Having carried out their test assessments, they proposed an amendment which they thought to be more workable. It read,

“Moderated + or – by proportion of regular duties impacted by active consideration of Health and Safety/Hygiene issues. ‘Active consideration’ requires more than paying active attention to hygiene, health and safety regulations and requirements, for example, checking that others are following the regulations and requirements or carrying out specific checks.”

1344. Shortly before Ms Branney gave evidence, the Leigh Day experts had another look at Mr Matthews' assessment. They decided to amend it from C= to C+. Ms Branney told us why they had awarded the “plus” modifier. It was because of the amount of time Mr Matthews spent doing temperature checks. That was a “specific check” demonstrative of giving “active consideration” to hygiene issues.

1345. All depot workers did a pre-operation check of their mechanised equipment at the start of each shift. It lasted 5-10 minutes, depending on the type of equipment they were using. Averaged over a week, they were doing that check for as long, or nearly as long, as Mr Matthews spent temperature-checking trailers. If a pre-operation check of equipment was a “specific check” involving “active consideration of health and safety...issues”, then everyone in the depots would get a “plus” modifier under the Leigh Day experts' scheme. Yet none of them did.

1346. It was therefore important to understand what was different about a temperature check that meant it was “specific” and “active” in a way that a LLOP check was not. Mr Cooper asked Ms Branney about that. He made a number of attempts. One answer was based on the potential consequences of a temperature check being missed. Risk was not supposed to be a driver of demand under the Leigh Day experts' scheme. Another answer was that temperature checks were “pro-active”. In fact, they were not pro-active at all. It was part of the procedure that Challenge 20 instructed Mr Matthews to follow.

1347. This was a sign, to us, that the Leigh Day experts' attempts to redraw the modifier were not as successful as they had hoped.

The Asda experts' scheme for Health & Safety

1348. The Asda experts completely rewrote the factor scheme for health and safety responsibility. At Levels B to E, it was not just the words that changed, but the underlying algebra. The IEs had treated risk as the constant, and the scope of responsibility as the variable. The Asda experts' formula was the other way around. They explained it like this:

"...it is not possible to identify significant and measurable differences in the character of responsibility below the highest level of demand in these roles. Also, we could not identify such differences in terms of the range of regulations and processes related to health and safety...The key distinguishing feature for most of the roles is the level of risk and the extent to which it permeates the job. The key distinguishing feature for most of the roles is the level of risk and the extent to which it permeates the job. There are significant and measurable differences in relation to the demands arising from those differences which are identifiable at Levels E to B. But at the highest level of demand within these roles, again as with Responsibility for Assets, there are expanded responsibilities which in our view should be reflected at Level A."

1349. Their level definitions were as follows:

E	D	C	B	A
Health and Safety considerations have only limited relevance to the role. There is minimal potential for minor injury and or illness from the actions of the job holder.	Health and Safety considerations arise frequently but intermittently in the role. There is some potential for injury and or illness from the actions of the jobholder, but they are unlikely to be serious.	Health and Safety considerations permeate most aspects of the role. There is potential for injury and or illness from the actions of the jobholder, which could be serious.	Health and Safety considerations permeate most aspects of the role. There is potential for injury and or illness from the actions of the job holder, which could be very serious.	The jobholder has increased responsibility for adherence to Health and Safety regulations and practices by others. And / or The action of the job holder presents potential for injury which could be very serious, could be on a large scale, and extends beyond colleagues and the workplace.

Permeation

1350. One determinant of the level of responsibility was the extent to which "consideration" of risk "permeated" the role. This could mean how much of their time a role holder has to spend consciously thinking about risk. Or it could mean how much of the time they spend doing a risky activity. In answer to our employment judge's questions, Ms Waller told us that it meant both.

1351. We found the existence of risk to be a better indicator of demand than the need to think about risk consciously. A British motorist drives on the left hand side of the road. They do not think, "I must remember to drive on the left", still less, "otherwise I might crash into someone coming the other way".

First Aid

1352. The Asda experts assessed the First Aid iterations of the comparator roles at the same level as their iterations without First Aid responsibility. This was because of the risk-based approach rather than the IEs' focus on positive responsibility.

How the Asda experts assessed risk

1353. The second paragraph of each level definition attempted to assess the magnitude of the risk from the actions of the jobholder. In common with standard risk assessment tools, that paragraph divided the assessment into (i) the likelihood (or degree of "potential") for their actions to cause harm, and (ii) the possible seriousness of that harm.

1354. The Asda experts added a convention to explain how they assessed the likelihood of a person being harmed:

"Health and Safety Convention

In relation to the potential for illness / injury we take account of both the inherent risk of individual error by the jobholder and the extent to which it is mitigated by external systems, controls, and checks."

Baseline – limited relevance

1355. The Asda experts assessed Ms Ashton's role at Level E. Their rationale was that "health and safety considerations had only limited relevance to the jobholder's role".

1356. In oral evidence, Ms Waller recognised that if Ms Ashton failed to give the required allergy advice, and a customer had an allergic reaction, the resulting illness could be very severe. Likewise, she recognised that there could be a serious injury if an elderly customer slipped at the checkout. A person could become ill if they ate a piece of fruit that had been placed on a contaminated conveyor belt. There could be a serious injury if a child bought a knife and misused it. A person could become ill if they bought a warm chicken that another customer had left at the checkout for a long period. Ms Waller's view was that these things were unlikely to happen, and in each case, other things would have to go wrong before it could happen.

Consequences of failure to take care

1357. When assessing the likelihood of injury or illness, the Asda experts took into account the hypothetical possibility that the jobholder might not take care in their role. Their report stated,

"...the potential consequences of failing to take care are an important feature of these demands and are best assessed under this factor."

1358. In their minds, the weight of responsibility for taking care, and the consequences of failure to take care, were both sides of the same coin.

1359. When Ms Waller gave oral evidence about health and safety, Mr Short explored with her what sorts of imaginary carelessness it was appropriate to take into

account. Some of her answers were more helpful than others. For example Ms Waller quickly acknowledged that all jobholders should be assumed not to engage in deliberate wrongdoing. She contrasted wrongdoing with “pro-active omission” or “actively forgetting”. After some discussion of what these terms meant, Ms Waller accepted that it was hard to draw the line between deliberate wrongdoing and a lapse of concentration. She accepted that if a role holder was given a simple instruction that was easy to follow, there was a reduced risk that their actions could lead to injury. Responsibility for following simple rules would therefore be less weighty than a responsibility to take care where there was a risk of injury from “not seeing something” or “a knife slipping”.

1360. The “simple rules” mitigation of risk was visible in some of the Asda experts’ assessments. For example, they assessed Edible Grocery at Level E. According to their rationale,

“The potential for injury and illness arising from the actions of the jobholder was minimal, as any risks were easily mitigated by the jobholder following ... straightforward measures and policies...”

Similar rationales were given for assessing Mrs Wilby’s Produce role was assessed at Level E and Bakery at Level D. The “straightforward measures and policies” included Challenge 20, hand-washing and date-code checks.

1361. Ms Waller was asked about these rationales. Ms Waller agreed that it would be potentially very harmful for a baby to be fed out-of-date milk, but that would not happen provided Ms Forrester followed simple rules. (By contrast, the risks involved in driving a LLOP would be “less controllable by the role-holder”. Mere compliance with the Two Bay rule would not necessarily keep everyone safe.)
1362. This logic appeared to be missing from the assessments of the Loaders. They were assessed at Level A. Their rationales stated, “The jobholder’s responsibility when loading ... meant that there was potential for very serious injury which could be on a large scale beyond the depot as a result of trailer accidents, and unloading at the destination.” All Mr Dennis had to do to prevent an accident on the motorway was to put the heavy pallets on the bottom deck of a double-deck trailer and put the lighter ones on top. All he had to do to prevent injury from a collapsed semi-deck trailer was to put the latching tabs under the shelves of the upper deck.

Risk of illness

1363. The roles involved differing levels of responsibility to stop members of the public falling ill. The Asda experts reflected those differences in steps from Level E up to B. The level definitions referred to the increasing “potential for ...injury and/or illness”. At Level A, the risk of illness was not mentioned. This was an interesting omission. It is unlikely to have been a typographical error. Their report contained few if any such errors. The more likely explanation is that, by the time they finalised their level definitions, the Asda experts had already decided that Loading was a level step up from anyone whose responsibility was to reduce the risks of food poisoning or allergic reactions.

Severity of harm

1364. As the levels built up from E to B, so did the potential severity of any anticipated illness or injury. Severity ranged from “minor”, at Level E, through “could be serious” at Level C, to “could be very serious”, at Level B.
1365. One of the “very serious” injuries envisaged by the Asda experts was a traumatic injury caused by stock falling onto a colleague from a piece of mechanised handling equipment. Their rationales for placing comparators at Level B specifically mentioned the use of mechanised handling equipment to move high volumes of stock.
1366. Ms Hutcheson’s Warehouse role was assessed at Level C. The Asda experts’ rationale stated,
- “The jobholder’s use of vehicles when moving stock around the warehouse gave rise to the potential for injury to the jobholder or others which could be serious, although not very serious because she was operating alongside a limited number of other vehicles and people”.
1367. This rationale was hard to match to the level definitions. Ms Hutcheson moved pallets of stock at height. If any cases fell onto a colleague in the warehouse, the injury would be just as serious as if it happened in a depot. What the Asda experts appeared to be saying was that, if Ms Hutcheson dropped a case from height, it was less *likely* that anyone would be underneath it. In the Asda scheme, the difference between Levels C and B did not depend on the likelihood of injury, only its severity. Even if the level definitions could be read so as to reflect the chances of an adverse event, they would not capture the weight of Ms Hutcheson’s responsibility. She was responsible for ensuring that people in the warehouse complied with the Two Bay rule. Depot workers only had to observe it themselves. Ms Waller also justified Ms Hutcheson’s Level C on the ground that she did not spend all her time operating mechanical equipment. Nor did many of the comparators. Some activities, such as Pick By Line, Breaking Down and Handballing, were almost entirely pedestrian.
1368. The Asda experts also thought Level C to be the best fit for Counters. Ms Waller accepted that her actions had the potential to cause very serious illness, either through food poisoning or an allergic reaction. The rationale in their report did not mention the potential seriousness of the illness. According to Ms Waller, Mrs Webster did not get into Level B because the risk of food poisoning was mitigated by the hygiene procedures that Mrs Webster was given to follow. This, again, was an assessment of likelihood rather than severity. It was overlooked when it came to assessing the Loaders.

The line between Health and Safety Responsibility and Working Conditions

1369. The Asda experts recognised that a risk-based formula for assessing Health and Safety Responsibility might “overlap” with the measurement of hazards in the Working Conditions factor. The danger of double-counting was acute where the risks being measured were risks to the jobholder’s own safety. It will be seen from paragraph 2253 below that the levels of demand for Working Conditions rose according to the “frequency, duration and degree of risk” to the jobholder. The Asda experts sought to reassure us that no double-counting had in fact taken place. This is how their report drew the dividing line:

“This factor...is different from the hazards elements of the Working Conditions factor...which is concerned with the demand of being exposed to a hazardous environment, whereas this factor is concerned with the demands on the jobholder to take care in their own actions.”

1370. The rubric of their Working Conditions factor referred back to the same demarcation.
1371. When it came to the Asda experts' assessments of the individual jobs, that line appeared to blur. Both iterations of Mr Uchanski's role were assessed at Level B for Health and Safety and also at Level B for Working Conditions. The rationale for the Hazards Element of Working Conditions stated, “The jobholder had sustained exposure to various hazards with risks of injury, including...MHE collisions. For Health and Safety, his rationale stated, “The jobholder's use of his MHE at speed...with the busy depot environment in which he worked, gave rise to the potential for very serious injury to himself...”. These extracts from both rationales could be equally well expressed as, “Mr Uchanski had to take care for his own safety when driving his LLOP in a depot environment, otherwise he might be badly hurt in a collision.” That is not to say that the two factors perfectly overlapped. In the Health and Safety factor, Mr Uchanski also had a responsibility not to drive his LLOP into anyone else. He was responsible for not causing containers of stock to fall onto a colleague. In the Working Conditions factor, Mr Uchanski was at risk of being hit by someone else's LLOP, even when he was a pedestrian. The example does show, however, that there was more of an overlap between the two factors than the Asda experts' demarcation suggested. Both factors would assess, as a demand, the risk to Mr Uchanski from driving into collision with a stationary object. This was conceded by Ms Waller when giving evidence about Working Conditions. To be fair, Mr Uchanski was not named in that example. As it happened, though, the only collision that Mr Uchanski was involved in was one in which he had driven a HRT into a barrier.

Responsibility for health and safety - discussion

The demand of health and safety responsibility

1372. As with other factors, our starting point is to try and understand the demand that the factor is supposed to be comparing. What is it about the roles that makes responsibility for health and safety more or less demanding? In our view, those features are:
- 1372.1. the scope of the jobholder's responsibility, whether they are only accountable for their own actions or also for the actions of others;
 - 1372.2. the likelihood of an adverse event occurring as a result of the actions or inactions of the jobholder, or people for whom they are responsible;
 - 1372.3. the number of people who could be harmed if an adverse event occurs;
 - 1372.4. the severity of any illness or injury that may result if that adverse event occurs; and
 - 1372.5. where a role-holder has a specific responsibility that carries greater risk, the proportion of the role that involves that specific responsibility.

1373. In our view it is logical to take risk into account. The responsibility is to keep people safe. Keeping people safe is more demanding in situations of danger.

1374. The IEs' and Leigh Day experts' focus on "positive responsibility" does not tell us what it is about that responsibility that makes it more or less demanding. Nor does any of the experts' reliance on "active consideration". It should not make a difference how much the role-holder has to think consciously about health and safety. The requirement to concentrate and make decisions is all being assessed under other factors.

Control measures

1375. When assessing the likelihood of an adverse event occurring as a result of the actions or inactions of a person, it is right to take into account of controls in place to stop it happening.

1376. Such controls may operate independently of the jobholder. For example:

1376.1. If a Warehouse Colleague overloaded a trailer, it would be detected as the vehicle drove over the weighbridge and there would be no risk of an accident on the road. If the Warehouse Colleague failed to fit straps to a trailer, that would not be detected, but there is nothing in the job description to say that there was a risk of a person being injured by an unsecured load.

1376.2. If Mrs Forrester failed to notice that a package of baby food was out of date, a baby might be given food that was a few days out of date, but only if the Process colleagues had failed to spot the presence of that item on the shelves. For the baby to be given food that was more than a few days out of date, a colleague would also have to have failed to carry out the systematic monthly check..

1377. It is also right, however, to take account of controls placed on the jobholder by way of simple rules.

1378. All the experts agree that health and safety risks cannot be eliminated altogether, even if they follow all the rules. Where the residual risk is higher, the greater the responsibility on the role holder to take care. A vehicle may stop suddenly and without warning, as happened to Mr Makin's LLOP and Mr Beaumont's Power Pallet Truck. The driver – and the driver of other vehicles that may come into contact with it – has the responsibility of anticipating that such a thing might happen.

1379. When weighing the demand presented by the risk, it is important to avoid double counting with the demands of environmental hazards. These are assessed under a separate factor. The distinction is usually easy to draw. A pedestrian in a depot aisle is at risk of being hit by a LLOP if he does not take care. That is an environmental hazard. The LLOP driver must avoid colliding with the pedestrian. The risk of collision is properly to be taken into account under responsibility for health and safety. But the distinction is not always obvious, as can be seen the Asda experts' assessment of Mr Uchanski. Another example can be seen from Mr Makin's other accident. He drove into collision with a roll cage and injured himself. His responsibility not to drive in the roll cage is hard to separate from the hazard that the roll cage presented by being in the way of his LLOP.

1380. It is difficult to make any precise assessment of the probability that any jobholder's actions or inactions will result in any illness or injury, still less the possibility that such illness or injury will be severe. None of the experts were trained in risk assessment.
1381. The IEs' proposed solution is to regard the obligation to follow specific health and safety rules as being decisive of the level of demand. This is because the rules would not be there if the jobholders' actions or inactions did not have important health and safety consequences. As with other factors, this proxy has the advantage of being observable without the need for judgement. And as with other factors, it has difficulties of application. For this factor, the difficulty is that just about every job will have some health and safety rules and there will always be some risk of injury if they are not followed. It does not reflect differences in demand that are driven by the likelihood of actions or inactions resulting in injury.

Actions of others as a distinguishing feature of demand

1382. When attempting to measure the impact of a jobholder's actions on the safety of colleagues, it is relevant to consider:
- 1382.1. The extent to which the colleagues have been trained in health and safety; and
 - 1382.2. The likelihood that those colleagues will put themselves in danger by disregarding their training.
1383. Members of the public cannot be assumed to have been trained in health and safety. Their behaviour is less predictable. Where a jobholder works in proximity to members of the public, the unpredictability of those people's behaviour is likely (other things being equal) to place a greater weight of responsibility on the jobholder to keep them safe.
1384. This does not, however, mean that a jobholder is entitled to assume that a colleague will always follow their training. The risk that they may not do so is something that adds to their weight of responsibility. An HRT driver on Letdowns had to be aware of the risk that a colleague (such as Mr Beaumont) might have left a pallet unsafely on the high racking shelves. A Goods Out colleague could not take for granted that all the roll cages were safe to put onto a trailer. A picker (such as Mr Morris) might have filled it without checking the wheels.

Relativities

1385. We have borne these principles in mind when looking at the relative demands of the roles.
1386. We disagree with Asda's contention that there were five levels of demand. If Checkout and Edible Grocery are at the baseline, they cannot be said to be four levels of demand below a Supervisor, let alone a Loader. The Asda assessments do not sufficiently reflect the controls in place that operate independently of the jobholders' responsibility. They make selective allowances for the mitigation of risk by way of simple rules, but they do not do so fairly.
1387. We also disagree with the IEs and the Leigh Day experts that there was only one modified level of demand for the non-leadership roles. That position fails to recognise the increased risk of serious injury in the depots in the event of a minor lapse of concentration, or even where the jobholder is blameless.

1388. In our view, there were four levels of demand, with the highest level being for role holders who were accountable for the actions of others. Depot workers were two level steps above the baseline.

1389. The Asda scheme managed to capture broad equivalences of demand as between claimants and as between comparators. They saw a level step up to Loaders that was not there.

Choice of scheme

1390. We preferred the framework of the Asda scheme to the IEs' scheme.

1391. This is because:

- 1391.1. There was, in our opinion, more than one level of demand amongst the jobs. With the exception of the leadership roles, the IEs' scheme could not capture those differences. This was because the level definitions did not reflect the impact that the claimants' or comparators' roles had on protecting people from harm. If there was a health and safety policy in place that told a jobholder to do something, they were automatically in Level C, and could not get higher unless they had responsibility for a work group or the public.
- 1391.2. The modifier definition was confusing. It was difficult to know when somebody was actively considering health and safety, as opposed to actively following a procedure with health and safety considerations built in. One of the symptoms was that the modifier was inconsistently applied in the assessments.
- 1391.3. The Leigh Day experts' amendments tried to cure the modifier, but did not succeed. We were left guessing at what a "specific check" was.
- 1391.4. The Asda experts' scheme more clearly and directly focused attention on the magnitude of risk and the impact of a role holder's work on that risk.
- 1391.5. The Asda scheme suffered from defects and asymmetry of application, but these were capable of being remedied by altering the assessments.

Amendments to the Asda scheme

1392. We do not see any need to make radical changes to the Asda scheme itself.

We regard the level definitions as flexible enough to allow us to re-assess the roles. Placement of the roles into their new levels does not go against the grain of the level definitions. For example:

- 1392.1. In Checkout, Ms Ashton's actions or omissions intermittently carried risks of harming customers, for example, if there was contamination of the conveyor belt or a spillage on the floor, or a child tried to buy a knife. There was some potential for them to cause injury which might be serious.
- 1392.2. Mrs Webster satisfied the definition of Level B because of the risk of very serious illness caused by contamination or bacteria in freshly-cooked food.
- 1392.3. Ms Hutcheson satisfied Level B because of the potential for very serious injury caused by stock falling from height.

1393. For completeness, we would delete the second paragraph of the Level A definition, as we do not think it applies to any of the roles.

Responsibility for Health and Safety scores

1394. Here, then, are the scores we awarded to the different roles for Responsibility for Health and Safety:

Level	Store roles	Depot roles	Points
A	Section Leader	Haigh (a) and (b), Morris (a)	50
B	Counters, Warehouse	All other comparator roles and iterations	40
C	Bakery, Chilled, Customer Service Desk, Home & Leisure (a) and (b)		30
D	Checkout, Edible Grocery, George, Personal Shopper, Process, Produce, Service Host (a) and (b)		20

Chapter Eleven - Communication, Customer Service, Emotional Demands and Mental Demands

1395. We have taken the next four proposed factors together, for reasons which will become apparent.

Issues

Communication Skills – issues of principle

1396. Everyone agrees that communication and interpersonal skills are a distinct demand that should be assessed. As between the parties, it is common ground that it should be assessed as a separate factor.

1397. The party-instructed experts have chosen different headings for the factor. “Communication and Relationships” is Asda’s preferred title, whereas the Leigh Day experts called it “Communication Skills”. The two sets of experts have also used different forms of words to describe the demand that is being assessed. For Leigh Day, their factor “covers communication skills” including “interpersonal communication skills”, “non-verbal communication skills” and “requirements for empathy with the recipient of the communication”. The way the Asda experts describe it is “the demand of exercising the skill of effectively communicating and interacting with people”. In their joint report, the party-instructed experts have agreed that this is the same demand.

1398. There does not appear to be any real dispute about the distinguishing features of the demand, either. Both sets of party-instructed experts agree that the focus should be on how developed the skill needs to be and how wide the range of contacts are. There is nothing inherently more demanding about talking to one type of person (for example, a customer) over another (such as a new recruit). The kinds of people with whom the jobholders interacted are relevant, but do not themselves determine the level of demand.

1399. Asda have described the “key distinguishing features” as:

“

- Interpersonal Skill – the range of contacts and the extent to which tact/persuasion/issue resolution are required; and
- Complexity of communication – the range of issues covered and the extent to which communications require more complex explanation.”

1400. The Leigh Day experts agree, with the qualification that the interpersonal skills should include non-verbal skills. We do not understand Asda to take a contrary position.

1401. The IEs have a different perspective. They used a factor to measure the demand of “Communication and Customer Service”. It seeks to measure the “responsibility to create and maintain relationships, communicate with customers, external agencies, internal clients and maintain corporate reputation”. In the joint report (under the Leigh Day experts’ proposed Factor 5C), the IEs also state that their composite factor measures the demands of having to use communication skills.

1402. If customer service responsibility were to be excised from the communication skills factor, the IEs would agree that the demand consists of the requirement for communication skills, but exhort the tribunal to consider “who the contacts are and the purposes of interactions”.

Communication Skills - relativities

1403. There is some common ground amongst the party-instructed experts about where the roles sit in relation to each other:

- 1403.1. Mr Opelt, Mr Hore and Mr Dennis’ (a) Iteration prop up the bottom of the table. (Mr Devenney in his probationary period iteration had been a level below them, but the claimants no longer ask us to assess Mr Devenney’s probationary period separately). Asda accept that Mr Welch is also in this baseline group, but the Leigh Day experts did not try to assess his role.
- 1403.2. Most of the claimant roles are at the same level, which is more than one whole level above the baseline comparators.
- 1403.3. Unlike the Asda experts, the Leigh Day experts would separate Warehouse and Personal Shopper from the rest of the claimant cohort, but only by the width of a modifier.
- 1403.4. Section Leader is at the highest level of demand, with or without Mr Haigh in his supervisor iterations.

- 1403.5. Customer Service Desk and Service Host sit between the main claimant cohort and Section Leader.
- 1403.6. Mr Ballard's (b) Iteration is higher than (a), reflecting an agreement that participation in a Colleague Circle increases the level of communication skill required for the role.
1404. The main disputes about relativities are:
- 1404.1. Whether Mr Haigh's supervisory iterations were at the same level of demand as Section Leader;
- 1404.2. Whether there were differing levels of communication skill required amongst the comparators, depending on the extent to which their activities required teamwork; and
- 1404.3. Whether comparator iterations with the First Aid attribute should be assessed higher than those without.

Responsibility for customer service

1405. We now turn to a fundamental divergence of expert opinion. Should the demand of communication skills should be split from responsibility for customer service, with a separate factor for each?
1406. Yes, say the Leigh Day experts. Their position is that Responsibility for Customer Service is a distinct demand that should be reflected in a separate factor. The IEs and Asda experts both disagree.
1407. Part of the disagreement stems from what the experts mean by "customer service". The IEs see customer service as consisting of interactions with customers. As Ms Spence put it in an answer to Mr Short:
- "We believe that customer service shouldn't be a factor in its own right. The whole of customer service is a communications skill."
1408. This is another way of putting the point the IEs made in their written answer to the question, "What were the IEs' reasons for including Communication and Customer Service in the same factor?" Their answer to that question was,
- "Customer Service, in the context of store-based roles, was considered to be a sub-set of Communications in that the service provided depended as much, if not more, upon the manner of interaction with the customer as the practical service or assistance itself".
1409. In the view of the IEs, the demand of interacting with customers is perfectly captured by assessing the skill that a jobholder needs in order to convey complex information and handle that interaction tactfully, politely and clearly. Creating a separate factor to measure the responsibility for those demanding interactions would, in their opinion, be to double-count the same demand.
1410. Asda have engaged with the IEs' thinking about customer service. When customer service is limited to interactions with customers, Asda view this as an "activity" and not a demand. They have also thought about a wider notion of customer service, in the sense of giving customers a good experience. That, they say, is "the purpose of an activity", and not a demand either.

1411. Asda go a step further than the IEs. Their factor measures communication skills and nothing else. Their experts take the view that customer service should have no special status within that factor. They therefore propose a factor with the heading, "Communication and Relationships".
1412. There is one thing on which all the experts are agreed. We are not here looking at the impact on the jobholder's resilience, or the effort of self-control, caused by having to deal with difficult customers. It is common ground that these impacts should be assessed separately. That is as far as the truce goes. The experts then immediately part company as to which factor is the best medium for making that assessment: the party-instructed experts say it should be a separate Emotional Demands factor; the IEs consider that the assessment can be made under the factor of Mental Demands.

Emotional Demands – issues of principle

1413. It is common ground between all the experts (including the IEs) that emotional demand of having to cope with a difficult situation is a different type of demand from the skills needed to deal with that situation.
1414. All experts agree that, if emotional demand is to be assessed at all, it must look only at the demands that are "intrinsic" to feature of the job. In other words, we should ignore how the role holders actually felt.
1415. Many emotions are positive. Job satisfaction is not just an idea. A depot worker may experience the quiet satisfaction of achieving his target for the day. He may be excited that his performance figures might lead to a pay review or new training opportunity. A store worker may feel the reward of reuniting a lost child with a parent, or helping an anxious shopper find items on a list. These compensations do not register in emotional demands at all. None of the experts ask us to reflect them. We concentrate on the negative.
1416. A powerful trigger of emotion is an interaction with another person. All the experts agree that managing these emotions may give rise to a demand. The party experts disagree with the IEs on the question of whether those emotional demands should be measured under a separate factor.
1417. When measuring the emotional demands of dealing with people, we disregard the demands of dealing with inappropriate behaviour from peers or supervisors. More precisely, we assume that Asda sets standards of acceptable behaviour and polices those standards. The experts are agreed that this is the right approach.
1418. The main fault line between the parties concerns the pressure of having to work to performance targets. On one side are the Leigh Day experts, who say that this is not a demand at all. Facing them across the chasm are the Asda experts. Their position is that the pressure of targets takes such a toll on a worker's emotional reserves that it is the equivalent of frequent exposure to challenging behaviour from members of the public.

Emotional Demands - relativities

1419. Once that dispute is resolved, there ought to be harmony. The parties broadly agree about where the claimant roles sit in relation to each other. Section Leader is at the top. About three levels of demand separate the other claimants. (Leigh Day say it is two levels plus a modifier.) Edible Grocery and Warehouse are at the

lowest demand amongst the claimants. Bakery, Produce, Chilled and Home & Leisure are higher, with Service Host sitting between their level and Section Leader.

Mental Demands – issues of principle

1420. All work takes effort. No doubt that is why “effort” is one of the examples singled out in section 65.

1421. It is common practice in job evaluation to separate mental effort from physical effort. This facilitates comparison between what used to be called “blue collar” and “white collar” jobs. It is uncontroversial that we should take the same approach here.

1422. The experts agree that mental demands will rise, at least in part, with the degree of concentration required in a jobholder’s work.

1423. The remaining disputes of principle are about what *e*/se makes mental effort more demanding. In particular,

1423.1. The IEs are of the view that an increased requirement for accuracy will lead to an increased mental demand. This is not necessarily the case, in the view of the Asda experts. Amongst these jobs, the Asda experts do not see a sufficiently “close relationship between escalating requirements of accuracy and increased demand for concentration”.

1423.2. Frequency of interruptions may affect the effort required to maintain concentration, but the experts have differing views about how much effect interruptions have. In the opinion of the Asda experts, the relevance of interruptions “will depend on the nature of the task that it is interrupted”.

1423.3. Deadlines and targets will have some impact on the level of mental effort that a worker must put into a task. The party-instructed experts do not see deadlines and targets as demands in themselves. Rather, they see them as features that may cause a jobholder to have to work more quickly and therefore concentrate harder.

1423.4. The Asda experts say that duration of concentration is important, as well as intensity. Duration does not feature in the IEs’ scheme or the Leigh Day experts’ amendments to it.

Memory

1424. Part of the Asda scheme is built around the effort required in using “working memory”.

1425. The Leigh Day experts and IEs do not find memory to be a helpful concept when assessing mental demands. Mr Walls challenges the underlying premise, which he characterised as,

“By the differential application of effort, can one recall more things than not?”

1426. None of the experts consider that the requirement to use memory is entirely irrelevant to the assessment of Mental Demands. For example, when Mrs Fearn had to remember a customer’s name for long enough to enter it onto a refunds

form, there was a distinct demand on her that was separate from the knowledge she needed to acquire to do her role.

1427. This dispute of principle is in any case something of a phoney war. The proponents of the Memory Element are the Asda experts and it is the claimants who oppose it. Yet the Memory Element appears to benefit 6 of the claimants (Bakery, Chilled, Customer Service Desk, Produce, Service Host and Section Leader) and only one comparator (Haigh). All the other jobholders fared at least as well, or better, under the Concentration Element as they did under the Memory Element.

Mental Demands - relativities

1428. There is a gulf of opinion about the range of demands amongst the Asda jobs. The Leigh Day experts' view is that everyone (apart from Section Leader) is at the same level of demand. The Asda experts claim to discern five different levels.

Facts

1429. As with other factors, we have reminded ourselves of some of the factual findings relevant to the assessment of demand.

Facts common to in-store roles

1430. Every new recruit to an Asda store was taught the importance of customer service. As we have seen, customer service was a bespoke training module during the Best Welcome Induction. Trainees learned that the average lifetime spend of a single customer was £105,000.

1431. Managers and Section Leaders carried out "Happy to Help" observations on a daily basis. The observations had a Pass or Fail element. The observer checked that the store worker greeted the customer in a warm and friendly manner, and engaged in additional conversation where appropriate. A failed observation would lead to coaching and re-training. A third failed observation led to informal counselling. Subsequent failures were subject to disciplinary investigation.

1432. Asda also used Mystery Shoppers. They visited monthly. Collective performance was included in monthly reports which were displayed for colleagues to see. Individual workers were named if they scored 100%. Errors (such as failure to wear a name badge) were pointed out in individual feedback.

1433. A shopping survey measured the in-store experience of customers. The survey was conducted twice per month. Results were collated into individual store reports.

1434. Formal performance management procedures were available to managers in the event that they were needed.

1435. Holders of replenishment roles worked to the aim of "Full by 9, Fit for 5". Employment Judge Ryan described this phrase as a "mantra". This was not a personal target, in the sense of a jobholder facing personal consequences for underperformance. It did, however, place some collective pressure on all the replenishment workers.

Personal Shopper

1436. Ms Hills worked from 5am to 9am. As we have seen, her main role was to pick items for customers and to make substitution decisions. She had to concentrate harder whilst making a substitution decision than she did when picking the precise item she had been instructed to pick.
1437. She was approached by a customer between 3 and 6 times per shift. As we have seen, Ms Hills was required to stop what she was doing and give the customer her undivided attention.
1438. She encountered with customers who were on unhappy on a weekly basis. This was frequently due to the picking trolley being in their way or because an item was out of stock. She encountered a rude customer around twice a year. Up to 6 times per shift, Ms Hills spoke to a customer who presented a challenge of a different kind. The customer would be talkative and would be enjoying the conversation to the extent that Ms Hills would have to find a tactful way to bring the conversation to an end, so as not to delay her picking.
1439. Ms Hills aimed to complete the picking assignment and put the ordered shopping in time for the Service Crew to consolidate the orders and assemble them for delivery. If she was behind with a pick, colleagues sometimes came to help her. She generally completed all her picks by the end of her shift. She could choose to stay on at the end of her shift to finish off any incomplete picks, but was not obliged to do so. Someone else would finish it for her.
1440. Ms Hills' picking was closely monitored. She was informed of her pick rate, accuracy and downtime every one or two weeks. Personal Shoppers were ranked in order of performance. The rankings were displayed on a list visible to colleagues. Achievement of targets was praised. If a Personal Shopper was very, very slow they were spoken to. Pick rates were not a particular focus for management. Nobody at her store was disciplined.

Checkout

1441. Ms Ashton interacted with customers on the checkout constantly throughout her shift. All the while, she had to maintain an amiable display, whatever her private mood or thoughts may have been.
1442. She was required to have conversations of potential conflict, including disputes over a price or discount, eligibility to buy an age-restricted product, a refused method of payment. Some customers were already disgruntled by the time they first reached the checkout, for example, where an item was out of stock or they had to wait in a queue.
1443. Ms Ashton would encounter an unhappy customer at least once per shift. She would listen carefully, try to understand the customer's problem and deal with it herself if she could. If she was unable to deal with a customer's issue, she would escalate it to a Service Host or the Customer Service Desk. She had to put up with low-level rudeness about 3-4 times per month.
1444. Ms Ashton had to serve an intoxicated customer about once per month. Once a year she refused a sale of alcohol to a drunk customer. She reported suspicious activity or theft 3-4 times per year.

1445. When making decisions (see Problem Solving and Decision-making), Ms Ashton had to concentrate more intensely than when simply scanning.
1446. When a customer paid in cash, Ms Ashton had to count the cash and/or the change to ensure that it added up to the amount displayed on the till. On some occasions, customer had an afterthought to offer a precise amount of change, after Ms Ashton had already entered the tendered amount. If this happened, Ms Ashton could politely decline or use mental arithmetic to recalculate the correct change.
1447. Ms Ashton's scanning speed was monitored against a target of 19 items per minute. She could be rewarded for meeting that target. Periodically during a shift, she checked her scanning speed.
1448. The scan speed performance of each Checkout operator was listed and displayed on the Service Board in the corridor and in the back office. Checkout colleagues were identified by login number, but not by their name.
1449. The manager at the Accrington store had a collective scanning speed target. If the collective target was not met, the manager would have spoken to individual Checkout operators who were underperforming. The conversation could include feedback or coaching. This did not in fact happen. The manager did not concentrate on individuals because the collective target was exceeded. There is no evidence that Ms Ashton feared any personal consequences.

Produce

1450. Mrs Wilby had direct face-to-face contact with customers every day. She was responsible for providing excellent customer service. Mrs Wilby was expected to make herself appear available and approachable at all times when she was on the shop floor. She had to be aware of customers who were near her, regularly looking up and smiling as customers approached and reading and responding to a customer's body language (for example, noticing a customer who had been at the shelf edge for a longer than normal period of time, or was looking at a product's label).
1451. Between 5 and 10 times per day, Mrs Wilby was asked by a customer to help them to find a product. Product availability was a question she was asked about 5 times per day. She was asked questions about product information about 3 times per week. She was asked about use of manual scales daily. Occasionally, she was asked by a customer to find multiple items on a list.
1452. These interactions were of an essentially practical nature, without any emotional charge.
1453. Sometimes a customer would talk to Mrs Wilby about a negative experience. She was expected to listen carefully, ask questions, act calmly and show concern, apologise for the problem, and reassure the customer. She was required not to blame the customer, argue back or challenge their version of events. The Customer Service Desk was available if Mrs Wilby was unable to resolve the problem herself.
1454. Mrs Wilby encountered unhappy customers and low-level rudeness, for example a customer muttering under their breath, or turning their back on her. Hostility, negativity or unpleasant interactions with customers occurred once or twice per month. About 2-3 times per year a negative interaction with a customer could lead to her being subjected to verbal abuse or aggression. She interacted

with drunk customers about once a month. She would not know in advance whether a customer would exhibit these behaviours.

1455. At the start of each day, the Date Code Team checked the date codes in the produce aisles. About twice per month, a manager asked her to help carry out spot checks. She took sample pieces of fruit and vegetables and checked the date codes proactively.
1456. As Mrs Wilby replenished, she checked the date codes on the packaging. She rotated stock to ensure that the oldest items were at the back of the display. She had to waste products that were past their date.
1457. Mrs Wilby had to concentrate when making the Would I Buy It decisions we have described.
1458. She had to be aware of any customers around her. On busy days, she had to manoeuvre her dolly around crowded aisles, concentrating on avoiding shoppers.
1459. One of Mrs Wilby's tasks on the twilight shift was to implement final markdowns at 8pm. From 9pm she removed marked down items that were on their last day. This had to be done by the end of the shopping day.

Warehouse

1460. Ms Hutcheson was the Hamilton store's point of contact with a goods vehicle driver when they arrived to make a delivery. For about 10% of her working time, she worked on the shop floor.
1461. Ms Hutcheson encountered low-level rudeness at least once per month. This included customers muttering under their breath, or turning their back on her when she was talking to them. Less frequently, she came across resistance, negative or unpleasant interactions from customers.
1462. About once a week, a delivery was delayed by 15-30 minutes. Longer delays happened about twice a month. Delayed deliveries could cause congestion later in the day. There could also be a clash of delivery arrival times if it took her longer than expected to check the incoming goods from the first delivery. When deliveries coincided, Ms Hutcheson went to the queue and informed the waiting drivers when they could expect their deliveries to be dealt with. She apologised for the delay and used interpersonal skills such as empathy and reassurance to diffuse any situations and to manage expectations.
1463. Ms Hutcheson had to concentrate when checking receipted goods against the inventory. She had to communicate discrepancies politely to the depots from which the delivery had come.
1464. She was expected to help the warehouse meet the target turnaround time. For a single delivery trailer, the target time was 1 hour. The Warehouse Manager prepared a weekly printout of performance against target. He or she informed the team if the average target had not been met. At Ms Hutcheson's appraisal, the Warehouse Manager discussed her individual contribution to the team's average tipping target. Any chilled deliveries that had arrived overnight were required to be booked in by 9am.

Chilled

1465. Ms Ohlsson's work was subject to the same sorts of interruptions as the workers in other replenishment roles.
1466. Every other month, Ms Ohlsson was called upon to deal with unscheduled overspill deliveries. When that happened, Ms Ohlsson had to stop what she was doing and deal with the overspill. She had to remember to return any chilled stock to the chillers in the back ups.
1467. Ms Ohlsson experienced low-level rudeness and minor complaints (such as a shrug of the shoulders, rolled eyes or a curt remark) from customers once or twice per day. Such behaviour was triggered, for example, by a customer learning that a product was out of stock. Ms Ohlsson had to put up with intoxicated customers about twice per month. About twice per year she encountered a customer who shouted, used bad language or made a physical threat.

Home & Leisure (1)

1468. Ms Darville had a wide variety of tasks to do throughout her working day. They included:
- 1468.1. cleaning shelves
 - 1468.2. scanning stock from the top storage shelf and bringing it down to the display shelves
 - 1468.3. reverse picking (scanning stock in the back ups and putting it on display on the shop floor)
 - 1468.4. gap Scanning (see paragraph 681)
 - 1468.5. some stock rotation of date-coded items, such as printer cartridges
 - 1468.6. replenishing and spider-tagging sound and visual units such as televisions.
1469. None of these roles required particular intensity of concentration, but moving from one task to another required a shift in attention.
1470. Ms Darville was interrupted by customers many times per shift in the course of her work (see paragraph 660). About once per week, she had interactions that were more challenging, where a customer was unhappy, rude, had limited communication abilities, or where Ms Darville had to refuse a sale.

Home & Leisure (2)

1471. The IEs' second iteration of Ms Darville's role included being part of the Recruitment Squad. During recruitment exercises, Ms Darville was required to observe the candidates in the group session which lasted for half a day. She observed candidates completing group activities and tasks. She took notes and provided feedback to Human Resources. The feedback was used for shortlisting purposes. On two occasions she sat in on job interviews and took notes.

Edible Grocery

1472. Ms Forrester worked on night shifts, three per week. On one of her 3 weekly shifts prior to 2011, the store was closed, so she would not encounter any

customers. On the other two shifts, she would be approached by a customer once or twice per shift. Generally, there were fewer customers on the night shift than on the day shift.

1473. As we have seen, Ms Forrester was sometimes interrupted by spillages, but less than once per shift.
1474. Between 2008 and 2011, Ms Forrester regularly answered queries on the Biscuits and Confectionery aisles. These were generally about product location and availability.
1475. From 2011, a few times per week, Ms Forrester would be approached by a customer seeking information about products on the baby aisle, such as nappies and baby foods. Some queries were about whether a product contained allergens. These were slightly more involved conversations and could last over two minutes.
1476. Whilst important to Asda, these conversations did not have any particular emotional impact, other than requiring Ms Forrester to be polite whatever she might privately have been feeling.
1477. When approached by the customer, Ms Forrester had to give the customer her full attention to try to understand the customer query. Once she had dealt with the customer, she would return to her replenishment. She would not usually be in the middle of any decision-making process, so it was relatively easy for her to return to what she was doing. If she was in the middle of a task that required greater concentration (such as overstock counting), Ms Forrester used a Post-it note to keep track of the last item she had counted, so she knew where to pick up her count after she had dealt with the customer. Overstock counting happened once every two to three months.
1478. Sometimes a customer approached Ms Forrester with a complaint and was obviously unhappy. Ms Forrester listened carefully to their complaints and decided whether or not to pass it upwards.
1479. Ms Forrester encountered a rude or intoxicated customer about once per month. The frequency would be higher, we find, had Ms Forrester worked full-time.
1480. Sometimes, Ms Forrester would help customers in a way that did not require any particular communication skills. For example, if a customer had difficulty reaching an item on a high shelf, Ms Forrester would help to fetch it for them.
1481. Ms Forrester aimed to organise, replenish and face up by the end of her shift at 6am. When larger deliveries were received, managers would reallocate resources to those aisles if necessary to assist colleagues in completing their work. If Ms Forrester failed to complete her replenishment by 6am, that would create extra work for her colleagues on the morning shift. It would not carry personal consequences from her, unless it was apparent to a manager that she was not pulling her weight.
1482. When she replenished, she needed to concentrate and be accurate. She needed to pay attention to shelf-edge labels as they were a legal requirement. She had to check that the product type and pack sizes that she was replenishing corresponded to the information on the label. Usually there would already be stock on the shelves, so she would not need to check the label in order to know

where to put the stock. If she noticed that the facings of the existing displayed products did not match the label, she alerted a Process colleague (the equivalent of Mrs Trickett). The shelf-edge labels had a consistent formatting, so Ms Forrester knew exactly where to look on each label to get the information she needed.

1483. Displays of products would move, or spacings would change. This happened, for example, when new lines were introduced, or old ones were withdrawn. These changes were put in place by a separate team. Ms Forrester needed to look out for such changes as she replenished.

1484. Ms Forrester had to concentrate when doing the full date-code check (see Responsibility for Health and Safety).

George

1485. Mrs O'Donovan replenished using low levels of concentration, following her brief and laying out the display of clothes.

1486. Mrs O'Donovan had to concentrate whilst operating the till and processing markdowns. She spent up to an hour per shift dealing with returns, where she had to concentrate on what the customer was saying and making a visual inspection of the garment.

1487. If a customer returned an item over £25.00, Mrs O'Donovan completed the returns logging sheet with 7 fields of information.

1488. She had other moderately intense periods of concentration during her less frequent activities such as the block plan, allocating the waste budget and dressing mannequins.

Process

1489. We have described the sorts of decisions which Mrs Trickett had to make. Many of them required concentration and focus. See, for example, OSCA alerts and BAM exceptions. She had to type bar codes if her Telxon was unable to scan them.

1490. Mrs Trickett had between 6 and 12 customer interactions per day. She was interrupted mid-task on every shift. Whilst undertaking a Process task, Mrs Trickett was sometimes approached by a colleague asking her to look up a price. When this happened, Mrs Trickett would have to navigate to the correct screen, scan the item, read out the price, navigate back to her original screen and remember what she was in the middle of doing. If she was interrupted in the middle of a count, Mrs Trickett would try to remember the last item she counted, or restart the count once she had dealt with the interruption.

Bakery

1491. Mrs Gardner followed the Bakery Production Plan, which informed her what products to replenish. She counted how many products were available on the shop floor, then worked out the number of items that needed to be thawed. This was a simple calculation. Mrs Gardner subtracted the number of items on the shelves from the number of items on the production plan.

1492. Mrs Gardner had to concentrate when doing date code checks and markdowns, and when collecting bakery goods for home shopping orders. She had to input codes into the printer in order to print the correct label.
1493. Mrs Gardner had to concentrate for about 5-10 minutes whilst preparing the photo-cake machine.
1494. About 5-10 times per shift, a customer would ask her to slice a loaf of bread. Mrs Gardner would stop what else she was doing and attend to the customer. Ms Gardiner was sometimes interrupted, but rarely in the middle of a task (such as a product count) requiring sustained concentration.
1495. About two or three times per week, a customer would place an order directly with Mrs Gardner at the bakery. This was done either in person or over the telephone. Mrs Gardner had to give the customer her undivided attention.
1496. If Mrs Gardner was interrupted by a customer in the middle of replenishing chilled items such as cream cakes, she had to keep track of how long she had left before having to return them to a chilled environment.
1497. As with the other store workers, Mrs Gardner had to balance the need to concentrate on those tasks against her general requirement to be vigilant against suspicious customer behaviour.
1498. Mrs Gardner encountered low-level rudeness about once per week.

Counters

1499. Counters was one of the few roles that involved making a product for sale. When making pizzas or cooking chickens, Mrs Webster was responsible for the quality of the finished product, as well as its safety.
1500. Mrs Webster had to concentrate on hygiene precautions throughout her shift. She had to remember the correct apron, knives, cloths, boards to use, as well as handwashing. On top of that, she had to concentrate on delicate tasks, such as preparing fish, and had to remember to carry out temperature checks at relevant intervals. She had to pay attention to the expiry dates on her ingredients.
1501. As Mrs Webster prepared pizzas for baking, Mrs Webster had to concentrate to recall the correct combinations of ingredients for each one.
1502. Mrs Webster was not out on the shop floor. She was not frequently approached with queries about product location or availability. Customers would make direct requests to her for rotisserie chicken. She engaged them in conversation, but had to ensure that this did not distract her from her role. If a customer had a query about a different department, she was expected to refer the customer to someone else.

Service Host

1503. Ms Billings' role was constantly customer-facing. If a customer made a complaint and another Shop-Floor Assistant was unable to deal with it, she would typically be the next person to whom the complaint was escalated.
1504. Ms Billings encountered low-level rudeness about once per week. Up to 5 times per year, Ms Billings experienced a negative interaction with a customer which could lead to her being subjected to verbal abuse and aggression.

1505. At the times when Ms Billings covered the checkout, she had to deal directly with customers presenting suspicious currency when paying by cash.
1506. Ms Billings had to concentrate when looking out for signs of theft, which we have described under Planning & Organising and Responsibility for Assets.
1507. About once per month, Ms Billings covered the Customer Service Desk and Kiosk for about 30 minutes at a time.

Customer Service Desk

1508. Mrs Fearn's position at the Customer Service Desk was constantly on display and, most of the time, directly interacting with customers.
1509. There was a greater expectation on her than on other Shop Floor Assistants to deal with the complaints herself rather than referring them elsewhere. She was one of the people to whom a colleague would bring a customer complaint if they could not deal with it themselves.
1510. Mrs Fearn had to give customers her undivided attention. She had to listen carefully to what the customers were saying. That information was useless unless Mrs Fearn could hold it in her memory for long enough to be able to act on it. Mrs Fearn had to enter details on the system to record complaints. This had to be done accurately. She wrote down the customer's details and a summary of their complaint in the Handover and Customer Comments Book.
1511. Additional concentration was needed when redeeming vouchers. Mrs Fearn had to ensure that the products were eligible and that the receipt matched the voucher being used. Her decision making was time-pressured when there was a queue of people waiting to be seen.
1512. If Mrs Fearn issued a refund over £25.00, she completed the Refunds Log, which required her to complete seven different fields of information. There was a similar-length form for the Overcharged and Out of Use Sales Log. Some information was chosen from a pull-down screen. Other forms included VAT and Try Me, Love Me.
1513. She had to concentrate when carrying out maintenance checks on the scooters in order to identify faults or concerns. She had to complete the Scooter Club Pad in front of the customer so that the customer could sign it.
1514. Of all the roles, Mrs Fearn had the most frequent exposure to negative behaviour. Several times a day she encountered unhappiness or frustration. Low level rudeness (muttering and back-turning) was a daily occurrence. She was on the receiving end of more hostile behaviour about twice per week.

Section Leader

1515. We have set out some of the decisions that Miss Gibbins had to make. Some, by their very nature, could be unpopular. Miss Gibbins had to own those decisions and explain them to the members of her team whom they affected.
1516. Miss Gibbins provided a second tier of customer complaint handling. She had to deal with customers when issues were escalated to her. She experienced negative customer behaviour. On one occasion, following an incident with a customer, she was escorted out of the store by Security because she feared for her safety.

Lutterworth IDC

1517. The Lutterworth Integrated Distribution Centre was described in the Background Job Description as “the first link in a continuous supply chain” servicing all of Asda’s retail stores for a wide range of products. The aim of the depot was to ensure that products were delivered efficiently and safely from suppliers to stores.
1518. Depot colleagues were trained in their Best Welcome induction about the importance of customer service, framed in terms of product handling, accuracy targets and delivery performance targets, and how their personal targets contributed to the efficient distribution of goods to stores. The training materials gave examples of how inaccurate picking could adversely affect the “customer pledge, Always Available”.
1519. Accuracy was fundamental to the cost management and efficiency of the Depot’s operation. Productivity was measured day-to-day.
1520. The most common activities (for example, Manual Store Pick and Large Case Pick) were the subject of individual targets. Hygiene, Multi-shuttle Exceptions and Putaways were not targeted.
1521. There were approximately 1,000 Warehouse Colleagues working at the Lutterworth IDC during the Relevant Period. Of those, 352 colleagues were put into what the job descriptions describe as a “performance management process”. In reality, this consisted of a conversation with a Supervisor of which a record was kept. This was not part of the formal performance management process. The first step in that process was counselling. Only thirty-two people were counselled. Four were required to attend a disciplinary hearing. We do not know how many of those people had abused their breaks or taken demonstrably excessive downtime.

Skelmersdale CDC

1522. The Skelmersdale depot served 53 Asda stores, rising to 74 by the end of the Relevant Period. It had a weekly throughput of between 1.32 and 1.39 million cases of food. A breakdown in the depot’s chain of operation had the potential to result in inaccurate, late or missed deliveries to retail stores. The low prices that were core to Asda’s customer offering and brand could only be provided if the depot managed to run at minimal cost. Efficiency was therefore considered by Asda to be crucial to the success of Asda’s operating model.
1523. As at the other depots, many activities at Skelmersdale were the subject of individual productivity targets. Those targets were only regularly met by a small minority of colleagues (between 10 and 25%). Some of the Skelmersdale workers, such as Mr Welch, consistently exceeded his targets.
1524. If a Skelmersdale colleague’s performance fell below 90% of the target on a 4-week rolling average, there would be an investigation into why the rate was below 90%. In most cases there would be no action beyond that investigation. Between June 2013 and June 2014, there were about 546 meetings, described in the job descriptions as “performance management meetings” at “the informal stage”. About 25% of the workforce took part in at least one of these meetings. We do not know how many of them progressed beyond an informal meeting, but we do know that it was considerably less. Only two people were dismissed for poor performance during that period.

Didcot ADC*Performance targets at Didcot*

1525. Anyone wanting to start work at the Didcot ADC was informed that they would have individual performance targets.
1526. Some activities did not have individual targets. These included Trimming, Hygiene, Chase Pick and Handballing. The core picking activities (such as Stock Pick and Pick By Line) accounted for the great majority of the work at the depot. They were the subject of individual targets.
1527. A probationary worker's productivity was one of the things that was monitored and reviewed at the meetings at Week 3, 7 and 11.
1528. Performance against target was one of the determinants of pay. There were three pay grades for Didcot Warehouse Colleagues. Performance against target was discussed during pay reviews. To stay at the highest level, a jobholder was expected to maintain a work rate of 10% above the target. Approximately 50 percent of colleagues were consistently on the lowest pay grade. The remainder fluctuated between the two higher pay levels. From this we deduce that the target was not easy to exceed substantially. Otherwise, we would expect more people to have stayed at the top rate. As Ms Waller put it, people generally prefer to be paid more for the work they do.
1529. A supervisor worked full-time and checked the hourly pick rate of the depot. An Excel spreadsheet known as the "Shift Tracker" kept track of individual Warehouse Colleagues' pick rates as their shift progressed. The Shift Tracker was reviewed at the end of each shift by a Supervisor to calculate the actual productivity of the Warehouse Colleagues for whom they were responsible. Supervisors watched colleagues on the depot floor. They analysed data in real time. If they noticed a Warehouse Colleague lagging behind, the Supervisor would sometimes speak to a Warehouse Colleague immediately. This happened on most days somewhere in the depot. Depot-floor conversations were visible and audible to any colleagues who happened to be nearby.
1530. Supervisors were usually able to verify the Warehouse Colleagues' account because of their real-time monitoring. It was not in the Warehouse Colleagues' interests to lie, because their explanation could easily be checked. If the supervisor was not already aware of the circumstances, they typically checked to see whether what the colleagues were saying was true.
1531. Various interruptions cropped up in the course of a day, which interfered with a depot worker's ability to meet their target. Examples include:
- 1531.1. bar codes that would not scan properly,
 - 1531.2. mechanised handling equipment running out of battery mid-shift (in Mr Beaumont's case, once or twice per year),
 - 1531.3. damaged roll cages (several times per shift),
 - 1531.4. accidents, hazards or spillages,
 - 1531.5. waiting for a Letdown driver to replenish a pick slot,
 - 1531.6. HRT drivers having to wait for colleagues to clear the bay where they wanted to operate, and

- 1531.7. spot checks by supervisors.
1532. Supervisors and Shift Managers would not necessarily accept a depot worker's explanation for any failure to meet a target. Whether they did so would depend on the manager, the credibility of the explanation and the results of any further investigations. It was not enough for a colleague to show that they were trying hard and not abusing their breaks. That said, the explanation was usually accepted. It was unusual for a conscientious Warehouse Colleague to face action beyond a conversation. Where a colleague was unable to give an acceptable explanation for missing a target, that colleague was usually found to have taken excessive downtime.
1533. Some colleagues at Didcot kept a note of interruptions to their work during their shift. That way, they had their explanation at the ready in case they were asked. Mr Devenney, Mr Dolan, Mr Dennis and Mr Beaumont worked in that way.
1534. Supervisors aggregated data for a week and divided it by the number of shifts to provide a daily average. If a colleague fell below 100% of their target for an activity, the Supervisor would generally wait until the end of the week to see if the worker caught up during subsequent shifts. If their weekly average was still below target, the Supervisor would have a noted conversation with the colleague. This was enough for the vast majority of colleagues. It was not necessary for Supervisors to take any further action beyond a conversation to manage their performance.
1535. An analysis of data over a 16-month period (roughly spanning mid-2013 to late 2014) showed that, on the early shift, 95 colleagues had been spoken to about their performance on 253 occasions; on the late shift, 158 colleagues had had such a conversation on 554 occasions and, on the night shift, 90 colleagues had been spoken to on 287 occasions. During the 6 months from December 2013 to June 2014, supervisors spoke to 132 colleagues on 218 different occasions about instances of underperformance on Stock Pick and Pick By Line. The conversations included asking why the target had not been met and asking the worker to explain downtime in excess of 8 minutes. Most of these conversations elicited a sound explanation, such that no further action was taken.
1536. We do not know how many of these conversations were informal and how many were formal. The tribunal's finding at Stage 2 was that, generally, conversations were about abuse of breaks.
1537. Very few colleagues were dismissed on performance grounds. Of those, we do not know how many had been found to have abused their breaks.
1538. The mere fact of there being a small number of dismissals did not of itself mean that Asda did not take performance seriously. The purpose of the performance management regime was to optimise the flow of goods through the depot, not to dismiss people for the sake of it.
1539. By far the most common reason for taking formal action was that a worker was believed to have taken too much downtime. In only a handful of cases did an underperforming colleague even get as far as formal counselling unless their downtime had been found to be excessive.
1540. Warehouse Colleagues therefore knew that if they failed to meet their target for their shift, they would have to explain any downtime that lasted more than 8

minutes, but would be unlikely to be specifically challenged over any shorter periods of downtime. They also knew that if they substantially failed to meet their target for their shift, and had no significant periods of downtime, they might still have to give an explanation for the underperformance unless the reason was already known to their supervisor.

Accuracy at Didcot

1541. Accuracy was also a priority at the Didcot ADC.

1542. There were 327 loading errors detected and recorded by that depot through the relevant period, most commonly where colleagues had failed to scan containers. This resulted in the store refusing to accept that container. If a colleague made an error three times in a rolling 6 month period, they were given counselling about their work. This was recorded on their personal file.

1543. Motivational signs were displayed on racking in the depot. These included a reference to the lifetime spend of a customer and a reminder of the importance of accuracy, coupled with the slogan, "EveryONE case matters".

1544. Supervisors checked 3,000 cases per week. They also randomly checked cases weekly. "Dummy picks" were included in the Pickers' Talkman schedules, to catch out colleagues who might have been minded to pretend that they had picked an item from an empty pick slot. A 9-hour pick audit was carried out once a month by visitors from outside the depot.

Opelt

1545. Mr Opelt drove his LLOP around the racking aisles at Lutterworth. The aisles and pick slots were arranged out in a logical order, arranged sequentially. He was allowed to confirm his instructions whilst driving, using his Talkman.

1546. In 2007 (before the Relevant Period started) Mr Opelt entered stage one of the performance management process. No further action was taken. After 2007, Mr Opelt was asked again about occasions when he had not met his target, but was always able to provide a satisfactory explanation.

Dennis

1547. Mr Dennis was informed about the importance of accuracy. If he did not pick the correct products this resulted in stores receiving incorrect products, Mr Dennis was reminded about the need for stores having the correct products on the shelves as part of good customer service.

1548. When working on Flow Pick, Mr Dennis used a radio to speak to colleagues on Flow Racking Replenishment. If Mr Dennis saw an empty pick slot, he would ask the colleague to fill it. There is nothing in his job description to suggest that the radio conversation went beyond Mr Dennis making a simple request.

1549. On Flow Racking Replenishment (in Iteration (d)), Mr Dennis was one of the people who had to listen out for those radio requests. He kept track of the requests that come in. He listened as he was doing his other tasks, which included driving his HRT or lowering pallets from height, all of which required concentration.

1550. The job description says that "his ability to maintain that concentration was tested". Asda attach some significance to this phrase, but it does not really add

anything. We can work out for ourselves that Mr Dennis could listen to a radio whilst driving without breaking his concentration, but would have to work harder to keep his focus if the radio was going whilst he was inserting forks into a pallet on the high racking. In neither scenario was Mr Dennis' concentration further tested by working out what to say. He did not have to say anything.

1551. In Mr Dennis' first year on Goods Out, he loaded approximately 900 trailers. His daily target was 6.53 trailers per shift. He worked about 3 Goods Out shifts per week. His job description does not say how familiar he became with particular types of trailer. From the sheer numbers of trailers, the configurations and strapping requirements for the more common trailers must have become second nature to him.

1552. The performance management statistics for Didcot do not break down interventions by activity. There is no evidence of any action being taken specifically for failure to meet a Loading target.

1553. Mr Dennis was on an enhanced rate of pay. At his performance-related pay review meetings, Mr Dennis was sometimes asked about his performance against target. On those occasions, Mr Dennis said that he found certain targets were hard to achieve.

Hore

1554. Mr Hore communicated with colleagues to discuss practical matters such as allocation of tasks. On his (relatively infrequent) De-Kit shifts, he had discussion with Goods Out colleagues to confirm that trailers due for loading had been emptied, and to understand which were needed in priority to others. His Talkman provided him with instructions and updates.

1555. Mr Hore had some contact with City Colleagues (for example, cleaners), and infrequently with engineers about equipment malfunction. He would occasionally ask a driver to straighten a vehicle. He spoke to clerical colleagues about security passes. He interacted with the colleague staffing the Battery Bay.

1556. When working on Pick By Line, Mr Hore discussed with colleagues who would work where.

1557. None of these interactions inherently involved any real tension or emotional demand.

Prescott

1558. Mr Prescott also picked to a target. He encountered the same kinds of interruption to his work the pickers did at Didcot. His battery went flat about twice per week. He noticed a defect in his LLOP or Power Pallet Truck once every couple of months. Between twice and eight times per month, Mr Prescott was asked to move to a different activity mid-shift.

1559. About once or twice per year, Mr Prescott acted as a "buddy" with a newly-trained Warehouse Colleague. His job description contains the same form of words as the other comparator job descriptions. According to that wording, "buddying" entailed:

"providing oral instructions **or** guidance, **or** demonstrating **or** observing and providing oral feedback on performance of tasks".

1560. We have used the bold type for emphasis. What we are trying to emphasise is that we do not know what Mr Prescott actually did. For all his job description said, Mr Prescott might have simply been doing his usual work whilst the new starter watched.

Han

1561. Mr Han was spoken to once about poor performance and the fact that he had logged out 5 minutes early. He could have avoided that conversation by working until the end of his shift.

Makin

1562. Mr Makin had to make enquiries with Supervisors or de-kitting colleagues to check that trailers had been emptied.

Dolan

1563. Mr Dolan did picking activities which included Flow Pick. If he saw an empty pick slot, he would notify a colleague of an empty pick slot, so it could be replenished. When doing Flow Racking Replenishment, he would be on the receiving end of such information from Flow Pickers. He also had communications he had with colleagues about who would replenish which parts of the flow racking and who would act as “floating” driver. He generally coordinated with those colleagues so they could record (and occasionally complete) any requests related to his aisle whenever he went on a break. Contrary to what Ms Waller told us she had taken into account, Mr Dolan did not “manage expectations” by telling Flow Pick colleagues how long they would have to wait before they could expect him to attend to their empty pick slot.

1564. Mr Dolan kept track of how many replenishment assignments he had completed by checking his Flow Letdowns Sheet throughout his shift. He therefore knew whether or not he was working efficiently and to the best of his abilities.

1565. In iteration (b), Mr Dolan was a First Aider. About 6 times per year Mr Dolan attended to a first aid incident. He had to use tact and reassurance when dealing with injured colleagues. He had to use written communications when recording the details of those incidents. On two occasions he had to speak to ambulance emergency personnel.

1566. When doing Putaways, Mr Dolan had to concentrate whilst making fine adjustments to the positioning of the pallets with a joystick.

Sayeed

1567. Mr Sayeed typically met his targets. When he did not do so, he was able to satisfy his supervisor. He was spoken to by his supervisor three or four times from 2009 until 2014.

Uchanski (b)

1568. Mr Uchanski was spoken to a few times a year where he had fallen behind on his target or had too much downtime.

Devenney

1569. Mr Devenney did two picking shifts per week. More than half of his work was untargeted. From March 2013 to June 2014, just over half of his work had targets.

1570. When working on Stock Pick, Mr Devenney concentrated whilst interacting with his Talkman. He listened to the pick slot number to which the Talkman directed him. If he missed it, he could ask the Talkman to repeat the instruction. He selected the correct pick slot out of three in the racking bay. He confirmed he had reached the correct pick slot by giving the Talkman three numbers (chosen by the Talkman) from the pick slot number. Once Mr Devenney had demonstrated he was at the correct pick slot, the Talkman told him how many cases to pick. At that moment he had to concentrate. He could ask for the instruction to be repeated.

1571. As his pallet grew taller, Mr Devenney had to think about whether the pallet was stable enough to continue the pick. He had to concentrate for the duration of that brief visual assessment. At the back of his mind was his progress against his target.

1572. Momentary concentration was required for some incidental tasks, such as shrink wrapping and printing labels.

1573. Mr Devenney's average performance was over 100% of target. He kept a note of interruptions. If he was falling behind on his target, he proactively informed his supervisor of the explanation. It was rare for his supervisor to query his performance. Any such conversation lasted about three to four minutes.

1574. Unlike Mr Opelt, Mr Devenney's job description does not say that he interacted with his Talkman as he drove the LLOP.

1575. Mr Devenney did Tramming for about a third of his working time, averaged over the Relevant Period. Part of his Tramming activity involved breaking down pallets into product types. He had to ensure that the same product types were stacked together. The cases could be similar in appearance, requiring him to read some of the product information (such as sizes and quantities) on the outside of the case.

Beaumont

1576. Mr Beaumont consistently achieved most of his targets.

1577. Mr Beaumont started doing Flow Pick in June 2009. From then on, Flow pick was one of 3 different shifts that he did 1-2 times per week. When doing Flow Pick, he would notify them of empty Flow Pick slots that required replenishment.

1578. Mr Beaumont occasionally buddied with a newly-trained Warehouse Colleague to provide guidance. He was required to use interpersonal skills including patience, tact and the ability to explain and teach the new colleague.

1579. Occasionally, Mr Beaumont had terse exchanges with other Warehouse Colleagues, for example if they drove their LLOP too fast around a corner, he sounded his horn and shouted to the colleague to watch where they were going.

1580. Chase pick and hygiene did not have individual targets.

1581. From August 2009, about half of Mr Beaumont's work was on Putaways. The target was to put away one pallet on average every 3 minutes. The target was not difficult to meet. It was rare for Mr Beaumont to miss it. It was very rare for any Putaway driver to face any kind of performance action beyond an informal word.

Ballard (a) (Without Colleague Circle)

1582. We have described Mr Ballard's basic teamworking at paragraph 767. Most of these interactions would be undemanding. It is unlikely to have mattered to Mr Ballard or his colleague who did what. There were some opportunities for low-level conflict, for example, on Goods In, if both Mr Ballard and his teammate both wanted to drive the CBT.

1583. Mr Ballard's picking and Handballing activities were the subject of targets.

1584. Occasionally, Mr Ballard had what have been described as "terse exchanges" with colleagues. Examples given in his job description are:

- 1584.1. Sometimes Mr Ballard saw a colleague driving too fast around a corner without sounding their horn. He sounded his own horn and shouted at the colleague to slow down.
- 1584.2. Mr Ballard perceived that others were "cherrypicking" on Pick By Line, by choosing a pallet full of smaller cases, which were easier to distribute quickly. They did this to achieve their target more easily. Mr Ballard sometimes retaliated by cherrypicking himself. In turn, Mr Ballard's actions caused annoyance to his colleagues.
- 1584.3. Mr Ballard encountered colleagues on the grids – usually agency workers - who avoided closing down pallets and cages when they were full. This created extra work for him and the more conscientious warehouse colleagues.

1585. These are some of the less attractive forms of human behaviour frequently observed in everyday situations of time pressure. An example that springs to mind is the way many parents drive and park as they drop children at school on the way to work.

1586. Mr Ballard also remembers some difficult conversations with goods vehicle drivers. He wanted them to hand over their keys for safety reasons. The drivers were reluctant to comply. We do not know how many times this happened.

Ballard (b) (Colleague Circle)

1587. As a member of the Colleague Circle, Mr Ballard was a point of contact for colleagues if they had concerns about their work. He listened with tact and patience to issues raised by colleagues and relayed those concerns to management.

Haigh (d)

1588. Mr Haigh typically met his targets. When he did not do so, he was able to satisfy his supervisor that he had a good reason.

Haigh (c)

1589. Until June 2009, Mr Haigh did three shifts per week of Goods In – Yard. There was no target for this activity.

Haigh (a) and (b)

1590. About half of Mr Haigh's work involved a supervisory responsibility of one kind or another.

1591. Mr Haigh met with other shift supervisors to plan the shift and sometimes to discuss whether a shift was going to plan. He needed enough communication skills to be able to exchange information and contribute to a shift planning or allocation decision.
1592. Mr Haigh needed to be able to hold the attention of his team whilst briefing them. He had to be able to listen patiently and speak sensitively to individual colleagues when discussing matters such as health and absence. He needed to be able to communicate clearly and firmly, for example, where there were individual errors that needed rectifying, or a task needed to be done urgently.
1593. If Mr Haigh noticed that a member of his team was underperforming, he would ask them if there was a reason why they were not hitting their target. Usually, his team member would volunteer the explanation without Mr Haigh having to ask. If Mr Haigh did not think his colleague had a good reason, he chose whether to inform the full-time supervisor, who would then decide whether to initiate counselling or further performance action.
1594. When it came to decisions such as annual leave requests, the communication skills that Mr Haigh needed were not quite the same as those needed by Miss Gibbins. He was only the messenger. He wrote down the request and told his colleague what the outcome was when a manager had made the decision. If the colleague was disappointed with the decision, it was relatively easy for Mr Haigh to diffuse the situation by saying that it had not been his decision.
1595. As an End of Chutes Supervisor (Iteration (a)), Mr Haigh spent about 2 hours of his shift doing tasks related to his supervisory responsibilities. The remainder of his shift was spent on the End of Chutes activity itself.

How related responsibilities are measured in other schemes

Service user responsibility

1596. The NHS Handbook contains a factor headed, "Responsibility for Patients". It measures differing levels of responsibility for service users, and does so separately from the communication skills needed to fulfil that responsibility.

Emotional demand

1597. One of the factors in the NJC JES is headed, "Emotional Demands". According to the guidance notes, "emotional demands are those which cause emotional pressure, and which may result in the jobholder feeling upset, or grieved, or angry". The guidance notes remind assessors to concentrate on the source of emotional demand, rather than the jobholder's reaction to it. The factor does not try to measure the stress of having to meet deadlines. Nor does it measure the impact of verbal abuse.
1598. The NHS Handbook contains an Emotional Effort factor. The guidance measures the effort of sustaining work. Exposure to distressing information is assessed by way of its "emotional impact". The factor does not mention pressure of work or exposure to rude or unhappy members of the public. Examples given of the second level of demand include occasionally witnessing a dead body, or occasionally making a written report of child abuse.

Mental effort

1599. There is a factor in the NJC JES with the heading, “Mental Demands”. The accompanying notes state,

“This factor measures the degree and frequency of the mental concentration, alertness and attention required by the job.

It takes into account features which may make concentration more difficult, for example, repetitive work, interruptions or the need to switch between varied tasks or activities, and other forms of work related pressure, for instance, arising from conflicting work demands...”

1600. At the higher levels of demand within this factor, jobholders have “prolonged periods of concentrated sensory attention” or “high levels of work-related pressure, for example, from deadlines”. An example of “concentrated sensory attention” is being alert for traffic. The guidance notes refer specifically to the role of a School Crossing Patroller.

Communication and Customer Service – the IEs’ scheme

1601. The IEs’ scheme contained a single factor, headed, “Communication and Customer Service”.

1602. The scheme read as follows:

Responsibility to create and maintain relationships, communicate with customers, external agencies, internal clients and other staff, and maintain corporate reputation.	
Moderated by + or – by breadth of contact types AND/OR proportion of time spent communicating with others.	
LEVEL	LEVEL DESCRIPTION
A	The jobholder encounters difficult people or situations which may be emotionally demanding and which are a regular and important aspect of the work, managing these situations without support and/or Maintains and/or improves corporate reputation through high responsibility for customer service usually as a supervisor or team leader and/or Information exchange regularly includes complex advisory material requiring careful explanation and/or adaptation to suit the audience.
B	The jobholder encounters difficult people or situations which may be emotionally demanding but will be limited to specific tasks or duties and with limited support available and/or The visibility of the role to customers, external agencies or internal clients is such that the reputation of the unit is daily dependent upon the jobholder and/or Information is predominantly factual but difficult to convey because of its complexity or the need to adapt the message to suit the audience.
C	The jobholder will encounter difficult people, situations or incidents which may be challenging. Support from others is readily available and/or Interacting with customers, external agencies or internal clients is an integral part of the role and/or Information is factual but can be complicated and/or technical in nature and it will be necessary to ensure the intended recipient(s) have understood the message.

D	The jobholder's interactions are straightforward. Difficult people or situations are rarely encountered, and support from others is always available and/or Interaction with customers, external agencies or internal clients will be expected, but will not be the main purpose of the job and/or Information is factual and straightforward but might occasionally require basic guidance or a simple explanation of terms to those unfamiliar with the subject matter.
E	The jobholder will have no direct contact with customers/internal clients outside the existing management structures in place. Information is factual, straightforward and uncontentious.

Genesis of the factor

1603. We take up the procedural history in Briefing Note Two and the Provisional Factor Plan.

1604. Amongst the factor headings proposed at that stage were:

1604.1. Requirement for Concentration, Accuracy and Memory; and

1604.2. Communication and Relationships.

1605. The IEs at that stage envisaged that the Communication and Relationships factor would have a component of communication and interpersonal skills, and a separate component of managing relationships.

1606. With regard to the "managing relationships" component, Mr Kennedy and Ms Spence observed:

"There may also be instances for some jobholders where relationships – interface with customers for example, can involve difficult or problematic encounters. Where this is the case, it should be reported here. We would also want to know what support is available in such situations."

The omission of a separate Emotional Demands factor

1607. On 13 April 2018, in response to representations from Leigh Day, Mr Kennedy informed the parties that the IEs were considering whether or not to include of a further factor, called "Emotional Demands and Stress". Mr Kennedy observed, "it is clear that job elements relating to" that factor were "present for both comparators and claimants".

1608. The Revised Factor Plan of 18 April 2018 duly included a factor headed, Emotional demand – Stress in the job". Its "general definition" stated that the factor would assess:

"emotional demands which may arise from a requirement to deal with difficult and demanding people/situations. It also takes account of stress and pressures from the requirement to meet deadlines or targets and manage a schedule of work, which may be interrupted by changing and conflicting priorities".

1609. On 19 November 2018, Mr Kennedy e-mailed the parties to request that the job descriptions provide evidence of stress and pressure in the claimants' and comparators' work. The evidence he was soliciting included examples of challenging encounters with people and difficulties in meeting targets. Mr Kennedy stressed that it was not a foregone conclusion that there would be an emotional demands factor.

1610. What this correspondence shows is that:

- 1610.1. the IEs used to think that these jobs gave rise to some measurable emotional demands;
- 1610.2. those demands included the demands arising from difficult targets as well as people;
- 1610.3. they were careful not to commit to measuring either type of emotional demand in a separate factor; and
- 1610.4. they did not yet know how much variation (if any) there was between the emotional demands of the jobs.

1611. There was no emotional demands factor in the IEs' finalised scheme. They explained their thinking in the joint report:

"It is the IEs' opinion that the everyday work stressors relating to performance targets and interaction with people are adequately assessed under the factors of, respectively, Mental Demands and Communication.

The IEs believe that a dedicated factor for Emotional Demands is not justified in relation to the cohorts under consideration. The requirement for emotional resilience in the face of exposure to challenging behaviours, disturbing materials etc, which should be the prime demand captured by such a factor, is more properly deployed when considering roles which feature ongoing relationships with service users, such as Social Workers or Care Assistants."

1612. In other words, the IEs' opinion was that the range of emotional demands amongst the Asda jobs was considerably smaller than might be found in other workplaces, in particular social care settings.

The Communication and Customer Service modifier

1613. As with the other factors, an assessment could be modified (plus or minus) under the IEs' scheme. The criteria for this modifier were, "breadth of contact types and/or proportion of time spent communicating with others".

1614. It was hard to understand how the two criteria operated together. For example:

- 1614.1. Home & Leisure (2). The IEs picked out an iteration of Ms Darville's role that included her involvement in the Recruitment Squad. That iteration was assessed at C+. The Recruitment Squad expanded Ms Darville's breadth of contact, in that she was providing feedback to Human Resources, with whom she would otherwise not be communicating. That gave Ms Darville a case for a "plus" modifier. On the other hand, it was only a small proportion of her role. That would merit a "minus" modifier.

1614.2. Ballard (1)/(b). Mr Ballard's monthly Colleague Circle responsibilities likewise involved a larger range of contacts, but a smaller proportion of working time.

1615. Even on its own, the "proportion of time" criterion appeared to have different meanings at different levels of the scheme. For instance, the IEs assessed Personal Shopper at Level D+. In answer to a question from Leigh Day, the IEs agreed that customer interactions were "an integral part" of Ms Hills' role. Pausing there, on the face of the IEs' level definitions, that should have been enough for Level C. The IEs added, however,

"The jobholder did not encounter difficult people, situations or incidents which may be challenging as required for a C score. Most of her interactions are straightforward. As most of her work is driven by online orders, her face-to-face interaction with customers is incidental."

1616. When asked questions by Mr Short, Ms Spence agreed that Personal Shopper could easily be awarded as a C-, "but no higher". It was, in her view, an "anomaly". When Mr Cooper brought her back to this subject, she agreed that it was hard to distinguish Ms Hills' demands from those of Mrs Wilby in Produce. To our minds, this raised a question about the application of the modifier. As with other factors, it looked as if a high proportion of time at one level was treated as a low proportion for a role that was in the level above.

Mental Demands – the IEs' scheme

1617. The IEs' scheme assessed mental demands in this way:

Measures the degree of mental concentration, accuracy, alertness, and attention required as well as changing deadlines and how much the work is interrupted.	
Moderated (+ or -) by frequency of interruptions AND/OR the amount of concentration and accuracy required.	
LEVEL	LEVEL DESCRIPTION
A	The work is subject to constant change and unpredictable work schedules, and requires the continuous management of conflicting priorities and deadlines. Concentration and accuracy are required for a large majority of duties and the jobholder's attention is disrupted by frequent unavoidable interruptions.
B	The work is subject to deadlines involving frequently changing circumstances and conflicting priorities; or deadlines which are difficult to meet, interruptions or conflicting demands, and changes to work schedule will have to manage at little notice. Concentration and accuracy are required frequently or for prolonged periods for the majority of tasks.

C	The jobholder is expected to meet deadlines for the majority of tasks which will be subject to interruptions involving differing and/or changing problems, circumstances or demands, with some changes to work schedules. Concentration is required for the majority of tasks and accuracy is important for some tasks.
D	The role is subject to interruption to tasks but does not involve any significant change to its programme of work. Some work is subject to easily met deadlines. Concentration and accuracy will be required from time to time but nearly always in the context of a singular aspect of a short term physical or mechanical activity.
E	The work requires similar tasks which are not normally interrupted and the overall objectives do not change each day. Few targets need to be met. The requirement for concentration and / or accuracy is limited to tasks performed only occasionally.

The IEs' assessments

1618. The IEs assessed Chilled, Edible Grocery and Produce at the lowest level of demand, at Level D. They thought that Chilled and Produce were close to the Level C borderline.

1619. Section Leader was at Level B.

1620. All the other roles were assessed by the IEs as being at Level C. Within that level, all the depot workers (except Mr Haigh) were placed slightly below all the remaining store workers.

The level definitions

1621. Each level definition referred to four features of mental demand, as they saw them. Those features escalated through the levels. The features were, in the order in which they appeared:

1621.1. Interruptions

1621.2. Priorities and deadlines

1621.3. Requirement for concentration

1621.4. Requirement for accuracy.

1622. Interruptions and deadlines are examples of the “workplace phenomena” that the IEs believed were empirical indicators of demand (see paragraph 243).

1623. Leigh Day asked the IEs how these features were ranked in order of importance. In reply, the IEs stated,

“The IEs consider these factors to be more or less equally weighted but wish to point out that it is the *combination* of these sub-factors that generally informs the assessment of any individual’s role”.

1624. They added, in the joint report, that the components “do not necessarily rise in lockstep...but the fact that they do not means that a ‘best fit’ approach will sometimes be necessary”.

Memory

1625. The IEs’ final factor scheme did not separately recognise the demand of having to remember things. In making that decision, the IEs departed from their Revised Factor Plan. Their proposed factor in that document was headed, “Requirement for Concentration, Accuracy and Memory”. It originally aimed to measure, amongst other things, “the requirement to use memory to recall events, information, procedures or instructions...”

1626. This was no accident. The IEs made a conscious decision to leave “memory” out of their definitions. Their view, expressed in the joint report, is that “memory...cannot be considered separately from Knowledge.” Its inclusion as an element in a separate factor “appears to be a clear example of double counting”. Mr Walls amplified the IEs’ thinking in his oral evidence. He had a conceptual difficulty with the proposition that you can remember something by thinking hard enough about it.

Deadlines

1627. In their rationales, the IEs treated “full for 9, fit for 5” as an indicator that replenishment tasks were “time dependent”. Here they drew an equivalence with targets in the depots.

1628. This was an indicator to us that the IEs did not assess any emotional demand of meeting targets under this factor.

1629. It was also an expression of the IEs’ opinion that the depot workers did not work at a rate that required any more mental effort than the replenishment workers needed to apply when replenishing shelves in the stores. In our view, that was an opinion that was open to the IEs to draw. Whilst the job descriptions emphasised the importance of working quickly in the depots, they did not say that the depot workers actually did any task any faster than an equivalent task in a store.

Intensity of concentration and multi-tasking

1630. Some of the roles required jobholders to keep their minds on two things at once. Mrs Webster, for example, had to think about what toppings to put on a pizza, or concentrate on filleting a fish, whilst remembering the time the next chicken temperature check was due. Mr Dennis sometimes had to listen to a request on the radio whilst moving the forks of his HRT. The IEs scheme allowed them room to reflect the additional demands of multi-tasking by putting some of the roles in Level B: multi-tasking involved “conflicting demands”, in that concentrating on one task got in the way of concentrating on another. The IEs did not take that opportunity. This was not necessarily a problem with their scheme. We could simply rectify that omission by adjusting some assessments.

1631. There was another feature of mental demands that exposed a more knotty problem with the IEs’ scheme. The problem came to the surface when the IEs assessed roles requiring more intense concentration. The IEs had in mind that “intensity” of concentration was a potential driver of mental demand. In their rationales, the IEs referred to the intensity of concentration required in jobholders’

tasks. Mr Walls also accepted in his oral evidence that a role that required intense concentration might be as demanding as one that required frequent interruptions. Nevertheless, the concept of intensity of concentration did not expressly feature in the level definitions. Had it done so, they would have had a clearer signpost to put roles that required more demanding mental effort into a higher level.

1632. For some roles, that signpost would not have made any real difference to the assessments. For example, all depot workers had to drive LLOPs or Power Pallet Trucks. Mr Cooper asked Mr Walls about the mental demand of driving mechanised handling equipment whilst interacting with a Talkman. Mr Walls accepted that at those times, a depot worker (such as Mr Devenney) was concentrating more intently than Ms Darville was when doing her tasks. He would not accept, however, that there was a level step of difference, and was reluctant to characterise the difference as “significant”. In Mr Walls’ words, “we have held that a task...for which individuals are well trained and well versed in, is not necessarily going to elevate the concentration levels.” LLOP driving was not going to put Mr Devenney a level step above Ms Darville.

1633. Other roles, however, required an intensity of concentration that – even without interruptions – would obviously be more demanding than Ms Darville’s tasks. Filleting fish with a knife was a prime example. So were the roles that required manoeuvring of a pallet in and out of a confined space at height.

Interruptions

1634. In the IEs’ scheme, interruptions tended to take a role into Level C if they involved “differing and/or changing problems, circumstances or demands”. Interruptions that “do not involve any significant change to [the] programme of work” were more likely to put a role in Level D.

1635. In answer to our employment judge’s question, Mr Walls agreed that they were trying to capture how easy or difficult it would be for the role holder to go back to what they were doing just before they were interrupted.

1636. “Differing” or “changing problems, circumstances or demands” might include interruptions from customers. At the time of writing their report, the IEs did not have customer interruptions in mind at this level. They explained their thinking in answer to a question from Leigh Day:

“The specific nature of the interruptions tends to be predictable and similar in impact to the jobholder’s performance of their primary task”.

1637. In his oral evidence, Mr Walls rowed back from the concept of predictability of interruption as a determinant of demand. That was a sensible concession to make. Predictability of interruptions did not explain the differences in the IEs’ actual assessments. For example,

1637.1. Ms Ohlsson’s customer queries were predictable, in one sense. She knew that at some point a customer was bound to approach her and ask her something, and at that point she would have to stop whatever she was doing. In another sense, though, the interruption was unpredictable: Ms Ohlsson never knew when she would be interrupted until the customer was in front of her.

- 1637.2. Likewise, Mr Prescott began work on a Monday morning knowing that he would get a flat battery sometime that week. He just did not know when it would happen.
- 1637.3. Ms Ohlsson's Chilled role was assessed at D+. For essentially the same character of interruption, Mr Prescott was placed into Level C.

The Mental Demands modifier

1638. There were two components of the modifier for Mental Demands. One was "frequency of interruptions". The other was "the amount of concentration or accuracy required".
1639. The IEs assessed Edible Grocery at Level D+. Ms Forrester did not qualify for a Level C in her rationale, because "schedules of work were only rarely interrupted". Their rationale explained also why the "plus" modifier had been awarded:
- "Although at a lower intensity, the majority of tasks required a degree of accuracy and concentration with some interruption".
1640. It was hard for us to understand which component of the modifier had been applied here. It was not the intensity of concentration. Mr Walls confirmed in his oral evidence that the IEs "felt the intensity of concentration applied to [Ms Forrester's] tasks was somewhat less than some of the other roles on the shop floor". Some tasks (such as the monthly date code check) required greater concentration, but they were infrequent. The IEs might possibly have had in mind the duration of low-intensity concentration, or the duration of the requirement for accuracy. If that was what had merited the "plus" modifier, it would also entitle all the depot roles to a "plus" modifier, as they had to concentrate and be accurate in their work, too. Mr Walls told us that "the modifier was for the interruptions". In that case, the modifier should have reflected the frequency. By that criterion, the modifier would have been "minus", not "plus", as the IEs thought her interruptions were "rare".

The Leigh Day experts' factors 5A and 5B

1641. The claimants contend that the IEs' factor for Communication and Customer Service undervalues the demands of their work. The solution, say the Leigh Day experts, is to split the IEs' factor into three separate factors. This is what they did in their report.
1642. The first factor (which the Leigh Day experts labelled 5A), was headed "Responsibility for Customer Service". The rubric read:

Responsibility for maintaining/improving corporate reputation through creating and maintaining relationships, responding to customer demand/s, and/or communicating with customers or other external or internal personnel, other than jobholder's own workgroup and supervisors/managers, and maintaining corporate reputation.	
Modified by + or – by proportion of time spent responding to customer demand/s, or other external or internal personnel, other than jobholder's own workgroup and supervisors/managers (+ for more than 75%, - for less than 25%).	
LEVEL	LEVEL DESCRIPTION
A	The jobholder maintains and/or improves corporate reputation through high direct responsibility for customer service usually as a supervisor or team leader.
B	The visibility of the role to customers, or other external or internal personnel, other than jobholder's own workgroup and supervisors/managers is such that the reputation of the unit is daily dependent upon the jobholder.
C	Direct responsibility for maintaining/improving corporate reputation through responding to customer demand/s, and/or interacting with customers, or other external or internal personnel other than jobholder's own workgroup and supervisors/managers, is an integral part of the role.
D	Direct responsibility for maintaining/improving corporate reputation through responding to customer demand/s, and/or interaction with customers, or other external or internal personnel other than jobholder's own workgroup and supervisors/managers, is expected but may not be the main purpose of the job. The job involves indirect responsibility for maintaining/improving corporate reputation through, for example, contributing to the efficient supply of goods to stores.
E	The jobholder has little or no direct contact with customers, or other external or internal personnel other than jobholder's own workgroup and supervisors/managers. The job involves indirect responsibility for maintaining/improving corporate reputation through, for example, contributing to the efficient supply of goods to stores.

1643. The second factor (5B) was headed, "Communication Skills". The Leigh Day experts set out their assessment scheme as follows:

Communication skills required for exchanging oral or written information with other people as part of the job.

Modified by + or – by variety of contact types (e.g. customers, other employees, suppliers, external personnel).	
LEVEL	LEVEL DESCRIPTION
A	The job requires communications skills for exchanging information which regularly includes complex advisory material requiring careful explanation and/or adaptation to suit the audience.
B	The job requires communications skills for exchanging information which is predominantly factual, but difficult to convey because of its complexity or the need to adapt the message to suit the audience.
C	The job requires communications skills for exchanging information which is factual, but can be complicated and/or technical in nature and it will be necessary to ensure the intended recipient(s) has/have understood the message.
D	The job requires communications skills for exchanging information which is factual and straightforward but might occasionally require basic guidance or a simple explanation of terms to those unfamiliar with the subject matter.
E	The job requires communications skills for exchanging information which is factual, straightforward and uncontentious.

1644. In her oral evidence, Mrs Hastings explained to us how the Leigh Day experts had arrived at the wording for these two factors. She told us, and we accept, that the Leigh Day experts formed a provisional view that the IEs' factor undervalued customer service by eliding its different demands. This was confirmed in their minds when they carried out their test assessments under the IEs' scheme. They amended the wording of the IEs' scheme (see below), but this did not in their view correct the undervaluation. The solution, as they saw it, was to create separate factors. At that point, they could have returned to the drawing board and analysed from scratch what made the roles more or less demanding in terms of responsibility for customer service. What they did instead was to demerge the wording of the

IEs' factor scheme and to place relevant words and phrases into the factors that reflected different demands.

Customer service and corporate reputation

1645. The factor table for Factor 5A began with a definition of the responsibility that the factor is intended to assess. The phrase, "corporate reputation" appears twice in that definition. Mrs Hastings was asked a number of questions to clarify what she understood that phrase to mean. She acknowledged that it was a clumsy phrase which they had extracted from the IEs' factor definition. It was intended to capture corporate reputation through delivery of service to customers. Other aspects of Asda's reputation, such as its financial reputation, were not relevant to these jobs. Mrs Hastings often used the phrases, "customer goodwill" or "customer satisfaction" to convey the facet of corporate reputation she was seeking to describe.

1646. In fact, when carrying out their assessments, the Leigh Day experts did measure jobholders' contribution to other aspects of corporate reputation. Their rationale for Checkout, for example, took into account Ms Ashton's contribution to corporate reputation by "adhering to legal restrictions on sales and food safety standards". Mrs Hastings agreed that it was wrong to include these considerations.

Contributions to stock availability as an element of customer service

1647. The Leigh Day experts' scheme professed to measure the contribution made by all role holders to the availability of goods as an element of customer service. In fact, they did not think that such a contribution was as demanding as the lowest level of direct interaction with a customer.

1648. Mrs Hastings was candid about this judgement in her oral evidence. She told us that the Leigh Day experts had assessed the responsibility of contributing to customer service by making products available. They had assessed it at the baseline of demand. As she put it, "All the jobs contribute to goods on the shelves equally importantly". She added that, "dealing directly with customers needs to be reflected by way of a different demand."

1649. This would be a fair approach if all the roles did indeed have equal weight of responsibility for getting the goods to the shelves. In fact, the responsibility for product availability was quite varied amongst the roles. Many roles had no replenishment responsibility at all. Checkout, Service Host and Customer Service Desk are three obvious examples.

Contributions to stock availability in depots

1650. The relegation of stock availability to the baseline of customer service was particularly apparent where the activity happened in depots.

1651. This can be seen in the level definitions:

- 1651.1. There was a common feature to the level definition for both Level D and Level E. This was, "The job involves indirect responsibility for maintaining/improving corporate reputation through, for example, contributing to the efficient supply of goods to stores." The level

definitions did not expressly refer to any contribution that a store colleague made to the efficient supply of goods onto the *shelves*.

- 1651.2. Making an indirect contribution was not sufficient, by itself, to place a role into Level D. Something else was needed. That would be an interaction with a customer or other external person. For example, Mr Haigh was assessed at Level D. The responsibility that lifted him away from Level E was not his responsibility for his team moving stock efficiently. Rather, it was his Recruitment Team activity.
1652. The Leigh Day experts explained their thinking in their report:
- “3.2.20 Factor 5A Levels E and D contain the sentence: ‘The job involves indirect responsibility for maintaining/improving corporate reputation through, for example, contributing to the efficient supply of goods to stores’. This is to acknowledge and to be able to assess indirect responsibility – pertaining mostly to Warehouse Colleague jobs – which is not taken into account under original Factor 5.”
1653. In her oral evidence, Mrs Hastings accepted that the word “indirect” did not add anything to the level definition. She could not think of any other examples of a contribution to the supply of goods to stores, except by imagining roles that are outside the scope of these claims.
1654. A contribution made at a depot was viewed as “indirect” where same activity done at a store was seen as “direct”. See, for example, the rationale for Ms Hutcheson’s Warehouse role, where “ensuring supplies correctly dealt with” was considered to meet the Level C definition.
1655. The logical result was that, by definition, roles in depots could not be assessed higher than Level D and roles in stores could not be assessed lower than Level C.
1656. Mrs Hastings was asked about the logical consequence of the level definitions. She agreed that they logically drove all the depot-based roles into Levels D and E.
1657. In case further proof were needed of the Leigh Day experts’ view of efficient delivery as being a baseline responsibility, their approach was demonstrated in their application of their own modifier. They set themselves a criterion of “proportion of time spent responding to customer demands...” The threshold for a “plus” modifier was 75% of working time.
1658. The Leigh Day experts assessed the Edible Grocery role at C=. In their rationale, they explained why they had not applied the modifier:
- “No modifier applied (jobholder deals personally with customers on 2 out of 3 of her shifts (66% of her working time))”
1659. The Leigh Day experts evidently did not think that helping to ensure that products were available on the shelves was a way of responding to customer demand. Otherwise, they would have modified the Edible Grocery role upwards to C+. Ms Forrester spent well over 75% of her working time replenishing stock.
1660. Likewise, Personal Shopper was assessed at C=. Had efficient picking for customers been the contribution Ms Hills made to customer service, she would have been given a “plus” modifier, as this was almost all her role entailed.

1661. The depot workers were not given “plus” modifiers, even though they spent over 75% of their time contributing to the efficient delivery of stock.

Communication skills

1662. The Leigh Day experts’ Communication Skills factor uncontroversially stepped up the levels of demand according to the complexity of the information that a jobholder would need to convey. That was one distinguishing feature of the demand. The other distinguishing feature – range of contacts – was used to determine the modifier.

1663. Interpersonal skills were measured to some extent. Providing “uncontentious” information (at Level E) would require less interpersonal skill than saying anything controversial. Levels A and B involved the need to adapt a message to suit an audience. It was hard to know what levels of interpersonal skill would qualify a role for Levels C and D.

1664. The Leigh Day experts took into account the frequency with which a jobholder exercised their communication skills. Explaining why Mr Prescott was assessed at D-, the Leigh Day experts commented that Mr Prescott had contact with others outside his work group, but only “occasionally”.

The Leigh Day experts’ amendments to the IEs’ factor plan

1665. Leigh Day’s fallback position was to amend the IEs’ factor plan for their composite Communication and Customer Service factor. Their amendments clarified the sorts of people with whom role-holders might have contact at different levels. Essentially, they clarified that the factor should not measure the demands of communications within a jobholder’s own work group or supervisors.

1666. The IEs test-assessed the roles using the IEs’ composite factor. They did not find it easy. When deciding whether store roles should be assessed in Level C, for example, the Leigh Day experts resorted to the Oxford English Dictionary definition of “integral” in order to work out whether customer interactions were “an integral part of the role”.

The Leigh Day experts’ scheme for Emotional Demands

1667. The Leigh Day experts devised their own factor to assess Emotional Demands:

<p>Measures the emotional demands arising from dealing with people, other than those who are part of the jobholder's own workgroup and supervisors/managers. Such demands may arise from the ongoing requirement to be polite and cheerful when dealing with the people concerned and/or there may be more intense demands arising from people (other than jobholder's own workgroup and supervisors/managers) who are rude, abusive, aggressive or vulnerable.</p>	
<p>Modified by + or – by proportion of time spent communicating with the people in question and/or the frequency of the emotional demands.</p>	
LEVEL	LEVEL DESCRIPTION
A	The jobholder encounters difficult people or situations which may be emotionally demanding and which are a regular and important aspect of the work, managing these situations without support.
B	The jobholder encounters difficult people or situations which may be emotionally demanding, but will be limited to specific tasks or duties and with limited support available.
C	The jobholder encounters difficult people, situations or incidents which may be challenging. Support from others is readily available.
D	The jobholder's interactions are straightforward. Difficult people or situations are rarely encountered, and support from others is always available.
E	There are few if any emotional demands. The jobholder will have no direct contact with other people outside jobholder's own workgroup and supervisors/managers.

1668. The vast majority of depot workers were assessed at Level E. The Leigh Day scheme did not allow for any other outcome. Except for Mr Haigh, none of the Warehouse Colleagues had any substantial interactions outside their own work groups.

Emotional demands contrasted with work-related pressures

1669. The Leigh Day experts did not regard work-related pressure as an emotional demand.

1670. Ms Branney accepted that a difficult personal target could trigger feelings of stress, vulnerability and worry. She sought to distinguish these kinds of feelings from the emotional demands of dealing with people.

1671. Ms Branney appeared to us to have four bases for drawing that distinction:

- 1671.1. People interactions require a jobholder to expend effort in managing their own behaviour, whereas stress and worry are just a “by-product” of the pressure of the job;
- 1671.2. Whether or not a jobholder experiences any stress or worry will depend on the jobholder’s own subjective perception;
- 1671.3. Work pressure is controllable by the employer; interactions with the public are not.
- 1671.4. The demands of work related pressure can be assessed under Mental Demands.

Stress as a by-product

1672. The Leigh Day experts have not always been so reluctant to assess the stressful impact of working to time-bound targets. In *Forward*, where one of the factors was “Stress and Pressure”, Mrs Hastings positively argued that the assessments of the roles in that case had insufficiently recognised the demands of working to deadlines. If Mrs Hastings had thought that “by-product” emotions were not demands, we are sure she would have said so then.

Subjective perception

1673. Ms Branney was right to point out that the subjective experiences of the depot workers are not what matters. We need to look at the impacts that are “intrinsic” to the role. What we found harder to understand was why this meant we should assess one source of emotional demand and not the other. As Mr Cooper pointed out to Ms Branney, different store workers will have different emotional reactions when they deal with people. Some will relish being on show, others will shrink from any kind of attention.

Employer’s control

1674. We also find it hard to understand why it is relevant to consider the relevance of the employer’s control. In every equal value case, the employer will have some control over the demanding features of the work. Asda had control over all the claimants’ and comparators’ physical demands. They dictated how much knowledge a role holder had to acquire and demonstrate before they could start their role.

How the Leigh Day experts assessed the Mental Demands of work pressures

1675. The Leigh Day experts did not actually measure any emotional impacts of stressful targets in their Mental Demands factor.

1676. We have seen that the IEs' scheme sought to measure "the degree of mental concentration, accuracy, alertness and attention required as well as changing deadlines and how much the work is interrupted". The level definitions mentioned deadlines, and the difficulty of achieving them, but there were no words to capture how intrinsically stressful those deadlines might be. Ms Branney was asked an open question about what the Leigh Day experts were trying to measure. She replied that the Mental Demands factor measured "concentration", "accuracy", "visual attention" and "the impact of interruptions". She did not mention any emotional impact.

1677. This approach was borne out in the Leigh Day experts' individual rationales. In Mr Opelt's rationale, for example, the Leigh Day experts mentioned the existence of deadlines and the requirement for "concentration for majority of tasks", but did not mention any emotional impact.

1678. The Leigh Day experts knew that the IEs' scheme was not trying to measure the stressful impact of deadlines or targets. They knew it and agreed with it. This was the Leigh Day experts' reaction to the IEs' decision to exclude their proposed Emotional Demands and Stress factor:

"Attempting to assess stress also appears to have been (wisely) abandoned."

The Leigh Day experts' assessments of Mental Demands

Relativities

1679. The Leigh Day experts assessed all the comparators at Level C+. They assessed most of the claimants at Level C+ as well, with Personal Shopper and Section Leader reaching scoring points within Level B.

1680. This did not involve any unfair compression, in their opinion. When assessing Edible Grocery and Mr Han, the Leigh Day experts stood back and took an overview:

"Although [the] balance of mental demands is different between Warehouse Colleagues (work rates, attention to detail) and Shop Floor Assistants (interruptions, time pressures, attention to detail), [the Leigh Day experts'] view on the basis of [the job description] evidence is that all these jobs are broadly equal and for all working time..."

Level definitions

1681. The Leigh Day experts had misgivings about the IEs' level definitions. Having reviewed the IEs' factor scheme, they commented,

"...the level definitions appear to give priority to deadlines and interruptions, rather than to concentration and accuracy. This could favour jobs experiencing deadlines and interruptions, depending on how they are defined, over those requiring particular concentration and accuracy."

1682. Once they had carried out their test assessments, the Leigh Day experts reiterated their concern that concentration and accuracy had been undervalued in the IEs' scheme.

1683. The Leigh Day experts also found the combination of mental demands with “external pressures” (such as interruptions) “made this factor difficult to apply”. Their struggles leapt off the pages of their test assessments. As they assessed Edible Grocery, the Leigh Day experts attached importance to an Oxford comma, rather than a semi-colon, in a level definition as the means to separate Ms Forrester’s role into a different level from Personal Shopper.

1684. The Leigh Day experts made some amendments to the level definitions. They used bullet points to list the different features of mental demand “in order to try to ensure that they are equally weighted in application”. The bullet points achieved clearer presentation. They did not, however, alter the balance of what the factor was supposed to be measuring. Relative to the measures of duration and intensity of concentration, interruptions and deadlines carried the same weight as they did before. As the Leigh Day experts themselves acknowledged in the joint report, their amendments “made no changes to the content of the level definitions”.

Memory

1685. The Leigh Day experts approved of the IEs’ decision to abandon “memory” as a distinct feature of mental demand. Their assessments did not, therefore, include any assessment of the job descriptions “pertaining to the exercise of the jobholders’ memory”.

Interruptions

1686. Once the Leigh Day experts had seen the IEs’ more detailed rationales, they held firm to the view that there were “[no] material differences between the nature of the interruptions and their impact on the work of these jobholders”. From that premise, they stood by their original test assessments.

1687. Ms Branney was questioned at length about Personal Shopper, who had been assessed a level higher than all the depot workers. The Leigh Day experts’ rationale was that Ms Hills had pick rates and time pressures, with customer interruptions on top. When her interruptions were compared to the interruptions endured by depot workers Ms Branney was driven to concede that the assessments had been inconsistent.

1688. There followed a vigorous debate as to what should follow from that concession. Was Ms Branney impliedly conceding that the store workers should be assessed at a level below Personal Shopper? Or that all the depot workers should be hauled up a level because they had to concentrate as hard as Ms Hills did? Like Ms Hills, they all had time pressures, pick rates and interruptions to their work. Ms Branney disagreed with those propositions. Her evidence, for the first time, was that the Leigh Day experts had assessed Ms Hills’ role too high. Mr Cooper made much of this sudden U-turn. He highlighted the various opportunities that the Leigh Day experts had had to change their minds about Ms Hills had they wished to do so. Nevertheless, we accepted Ms Branney’s explanation. The Leigh Day experts just got one of their assessments wrong. It was an obvious outlier. It also happened to be the first role that they test-assessed.

The Mental Demands modifier

1689. The Leigh Day experts found the modifier difficult to apply at the higher levels, especially for Personal Shopper, the only role at Level B=.

1690. Just as the IEs had done, the Leigh Day experts gave a “plus” modifier to Edible Grocery. Ms Branney accepted that this assessment was “inevitably a compromise”. Ms Forrester had the fewest interruptions. She could not articulate what made the “amount of concentration and accuracy” greater in her role than the standard for that level.

1691. Another compromise that the Leigh Day experts were prepared to entertain was a possible upgrade of Mr Matthews’ assessment from C+ to B-. In their view, “A case can be made for B- on concentration and accuracy...or deadlines are difficult to meet, interruptions or conflicting demands and changes to work schedules”. In the end, they stuck at C+. What this shows, though, is that the Leigh Day experts thought that a greater amount of concentration and accuracy might cause a “plus” to be converted to a “minus” at the level above. That was the opposite of what the modifier definition was telling them to do.

The Asda experts’ scheme for Communication and Relationships

1692. The Asda experts’ scheme, as we have presaged, omitted Customer Service altogether from the factor heading.

1693. Their scheme, headed “Communication and Relationships” began with the following relevant narrative:

“This factor measures the demands arising from the type, level, range of communications and interpersonal skills.

...this is a single factor because of the close relationship between

communications and interpersonal skills which means there is only one distinct type of demand involved and it would be impossible in practice to separate them into separate factors without double-counting or over valuing that demand.

The key drivers of demand under this factor are interpersonal skill and complexity of communication (whether oral or written) so those are the elements we have used.

Neither of those elements is inherently more demanding and a higher level of demand under either would justify a higher overall assessment.

In defining levels key distinguishing features in practice for these particular jobs are:

- In relation to the Interpersonal Skills element – The range of contacts and the extent to which tact / persuasion / issue resolution are required.

- In relation to the Complexity element – The range of issues covered and the extent to which the communication requires more complex explanation.

...”

1694. The Asda experts defined the levels in this way:

Level	E	D	C	B	A
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Complexity	Requires straightforward exchange of transactional information.	Gives information, or assistance on 'signposting' and transactional matters. Issues are generally factual and not complex but may require more explanation.	May give information, advice, or assistance, on a range of issues. Interactions are mostly straightforward but may be more complex or contentious, requiring explanations and/or referral to others.	Required to give information, direction, advice on a wide range of issues/complaints, some of which will be contentious or more complex, requiring explanation.	Required to give directions or detailed explanations throughout the day on a range of topics/disciplines some of which will be more complex and/or sensitive.
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Level	E	D	C	B	A
Interpersonal Skills	Primarily works independently and interaction with others is mostly limited to speaking with individual colleagues. Normal politeness and civility are required.	Wider but still limited range of interactions that require some straightforward cooperation / discussion. Politeness and civility are required in those interactions.	Wider range of interaction with colleagues / customers / suppliers individually and within occasional working teams with some demands for empathy and reassurance. Sustained requirement for politeness and civility with some requirement to handle and / or defuse difficult situations but can escalate where necessary.	More demand for empathy, reassurance, and persuasion is required. There is an expectation of issue resolution. Sustained requirement for politeness and civility with greater demand to defuse difficult situations, which may include communicating unpopular outcomes.	Interaction in formal structures providing direct supervision /management of colleague groups. Demands of leading / maintaining / motivating in a team. There is a high expectation of issue resolution through informational, persuasive, and interpersonal skills and communication.

1695. The Asda experts did not find it necessary to adopt any conventions to supplement this factor.

1696. As with many other factors, the Asda experts divided the level definitions into two “elements”: Interpersonal Skills and Complexity. The Complexity Element was defined broadly in the same way as the Leigh Day experts’ table for Factor 5B – “pure” communication skills.

Customers

1697. Interactions with customers were not left out of the level definitions entirely. Their importance was, however, relegated from their status in the IEs’ level definitions. To the Asda experts, the relevance of customer interactions appears to have been merely as an example of a “wider range of interaction” that might qualify a role to be assessed at Level C. Other interactions within that “wider range” could include suppliers and “colleagues within occasional working teams”.

Teamwork

1698. Working in small teams was considered by the Asda experts to demand “Straightforward cooperation and discussion”. This was enough to move a role up a level from the baseline of demand. The sorts of straightforward cooperation and discussion that the Asda experts had in mind included:

- 1698.1. Mr Prescott and his teammates deciding between them who would do which Goods In activity. This involved some forced choices – teammates were either trained in those activities or they were not. There was also some room for negotiation and compromise. Some of the activities, such as Breaking Down, required more physical effort than Marshalling.
- 1698.2. Mr McDonough speaking with his colleagues to coordinate break times. There were low-level compromises to be made here, as two people might want a break at the same time.
- 1698.3. Mr Dolan on Flow Pick radioing a HRT driver to inform them that a pick slot needed to be replenished. This was nothing more than a one-way communication of information.
- 1698.4. Mr Dolan on Flow Racking Replenishment “liaising with colleagues doing picking”. This was based on an assumed fact that had not been found at Stage 2.
- 1698.5. Mr Dolan and his fellow HRT drivers dividing up areas of the racking shelving between them. There was no real need for cooperation here. There were no facts to suggest that any Flow Racking Replenisher would prefer any one set of racking shelves over any other.

Buddying

1699. The Asda experts took into account the communication skills required of depot workers when acting as a “buddy” with a new starter. For example, buddying featured in Mr Prescott’s rationale for being assessed at Level D for Interpersonal Skills. Ms Waller told us that this was not the “primary reason” for the assessment. It could not sensibly be any reason. There were insufficient facts on which to assess any interpersonal skill that Mr Prescott needed to use.

The Asda experts' scheme for Emotional Demands

1700. This is how the Asda experts' scheme went about measuring emotional demands:

"This factor measures the demands arising from dealing with sources of stress in the job and the requirement to use resilience and emotional energy.

...We recognise there is a relationship between the emotional demands of dealing with people and the Communication and Relationships factor but in our view they are different demands and can be measured as such without double counting. The Communication and Relationships factor measures the demands arising from the skill of communicating and dealing with people. It is about the jobholder's impact on others. The emotional demands arising from interacting with people are about their impact on the jobholder and the demands on resilience and emotional energy in dealing with them.

The main sources of stress and pressure which drive the demands under this factor in these jobs are dealing with people and performance requirements, so they are the elements that we have identified.

There is nothing inherently more demanding in stress and pressure arising from those different sources and a higher level of demand under either would justify a higher overall score.

In defining levels key distinguishing features in practice in these particular jobs are:

- In relation to the People element – The emotional impact / stress of exercising self-control in the face of increasing levels of provocation / aggression.
- In relation to Performance element – The difficulty of meeting the requirements and the likelihood of personal consequences for any underperformance.

This is no developed definition for Level C in the Performance element because we could not objectively identify such a level for this factor within the roles in question. Our broad framework is that a Level C requirement entails moderate demands for this factor as a frequent and expected part of the role as compared with Level B, which is a frequent and high level of difficulty of demand that is a dominant part of the job, and Level D, which is some demand but at a low or basic level.

We have identified many roles which have some targets that are easy to meet and where there is assistance or flexibility available and little likelihood of personal consequences. Those clearly reflect a level of demand in line with Level D in our broad framework. We have also identified a large number of roles where there are challenging targets that are closely monitored and where there is a real likelihood of personal consequences for failing to meet them. Those clearly reflect a high level of demand in line with Level B in our broad framework.

We have not identified roles with moderately challenging targets and a moderate level of monitoring and moderate likelihood of personal consequences, which would be in line with Level C. But it is clear that within our broad framework there must be such a notional step between the levels applying the principle that we are attempting to ensure equal steps both within and across factors. We have therefore included a notional Level C and given an indication of what it would encompass but have not been able to produce a detailed definition because there is no role that actually fits within it.

Similarly, there is no definition for Level A in the Performance element because we found that we could not objectively identify such a level for this element within the roles in question. Our broad framework is that a Level A requirement entails a very high level of difficulty of demand within the overall range of these jobs and we have generally reserved that level for supervisory levels of demand.

The sort of role that might fit within Level A would therefore be one where a supervisor could face personal consequences for failing to motivate their team to meet challenging targets. But there is no role within these jobs that represents such a step up from Level B and we have not therefore attempted a definition for Level A.

Level	E	D	C	B	A
People	Has limited contacts in circumstances with few or no demands outside of normal transactional behaviours.	Required to co-operate and work with others at times in a team context. More likely to feature low level demands on patience and self-control. And / or Infrequent exposure to low level stressful / difficult behaviour with demands on self-control which may rarely be more significant.	Sustained requirement to display a positive outward demeanour to others. Frequent exposure to stressful / difficult behaviour, which places demands on patience, self-control, and / or emotional energy.	Extensive contact with others where resolving issues of others is a primary feature. Frequent exposure to stressful / difficult behaviour, which places significant demands on patience, self-control, and / or emotional energy.	Involves emotional demands of leadership, support, direction, etc., often involving difficult decisions involving sensitivity, confidentiality, and / or emotions. Demands on patience, self-control, and / or emotional energy are significant.
Performance	Has no or very flexible team / unit targets / deadlines. Readily achieved, little or no likelihood of personal sanction, assistance readily available. Limited personal consequences of performance issues specifically or generally that would cause stress.	Team / unit or individual targets / deadlines apply. More individual focus / accountability, but readily achieved and assistance readily available and / or flexibility is expressly allowed where employees are told that they should prioritise other tasks if necessary. Personal consequences of performance issues are unlikely to be serious but could have some	<i>"No role fits this level; therefore, a more developed definition is not possible. The key elements would be specific individual targets with limited flexibility and / or assistance available, some limited monitoring and some potential for individual consequences for failing to meet targets."</i>	Challenging individual targets/deadlines which are continually monitored. Personal accountability for performance outcomes with little or no assistance Real likelihood of direct personal sanctions for failing to meet targets, with commensurate potential for stress.	

Emotional Demands Conventions

- Infrequent in Level D refers to instances of once a month or less and rare has the same meaning as the IE schematic (i.e., annually or less).

- Frequently in Levels C and B refers to instances of more than once a month.”

Assessments of depot roles

1701. The Asda experts did not distinguish between the demands of any of the depot roles, apart from Mr Haigh’s supervisory iterations. They were all placed at Level B for Performance, giving them all a Level B overall.

The People Element

1702. A role qualified for Level D of the People Element if the role holder was “required to cooperate and work with others in a team context”, where such cooperation was “more likely to feature low level demands on patience and self-control”. This was considered broadly equivalent to a role which exposed the worker infrequently to “low level/stressful behaviour”.

1703. An example of a role within Level D for People was Mr Beaumont. According to his rationale, his patience and self-control were tested at a low level on Goods Out when he “sometimes worked with a team mate to load a trailer and had to communicate with them in order to divide the work.” It was not clear from Mr Beaumont’s job description what aspect of that communication required self-control. The other example of patience and self-control being required came from Flow Pick. This was when Mr Beaumont radioed a colleague to ask them to replenish a pick slot.

1704. Ms Hutcheson was assessed at Level D. She encountered low-level rudeness from customers about once per month. On a weekly basis she had to manage late deliveries, some of which required her to placate a queue of waiting drivers. Edible Grocery was also considered to be at the same level, having to face rude or drunk customers (pro rata) more than once per month. In fairness to Ms Waller, when this was pointed out to her, she accepted that Ms Forrester’s role was “right on the borderline with C”.

Performance – what is a target?

1705. The Performance Element focused exclusively on “targets” and “deadlines”. Other kinds of performance standards were ignored. For example, no attempt was made by the Asda experts to measure the emotional demand of being subject to Mystery Shopper inspections. This would be a serious failing in the Asda scheme if the potential for a Mystery Shopper visit gave rise to an emotional demand. Ms Waller told us that she could not find any facts in the job descriptions to suggest any such demand. We could not either. There were no recorded instances, for example, of any of the store workers changing their behaviour in any way that would indicate that Mystery Shopper was any cause of stress or worry.

Frequency of performance demand

1706. The depot workers all did some targeted activities. They did not all do those activities with the same frequency. The Asda experts did not distinguish between those worker who had targets nearly all of the time and those who only had difficult targets some of the time. In Ms Waller’s view, if a depot worker did an activity with

individual targets “more than once a week...then we would count that.” Later in her evidence, she said that these demands would be counted “whether it was once a week or all week”.

1707. None of the assessments was considered marginal: the depot workers were all placed squarely in Level B. The opinion of the Asda experts was, therefore, that there was no measurable difference in the emotional demand of having to work to a target once per week or all week. Consistently with that approach, Mr Ballard was assessed as having the same level of Performance emotional demand as the others, despite doing untargeted work for at least half his time.

Difficulty of meeting targets

1708. The Asda experts did not differentiate between activities when deciding whether a target was difficult to meet. As long as the activity had an hourly target, which was monitored, that was enough. They formed a conclusion that all the targets were difficult. This, according to Ms Waller, was based on “all the information in the job descriptions”. Ms Waller could not recall any specific facts that supported a conclusion that Putaways and Letdowns had difficult targets. Later in her evidence, our employment judge asked her if she had any basis for thinking that the targets were difficult. Ms Waller was unable to think of one, except to say again that they had considered the facts in the job descriptions about the amount of monitoring and performance interventions as a whole. Her evidence was not a memory test, of course. We had a look at Mr Dolan’s job description to see if there were any facts that might have slipped her memory under the (very real) pressure of giving oral evidence. We were unable to find any such facts.

Personal sanctions

1709. Within the Performance Element, the third paragraph of each level definition referred to the stress caused by the potential severity of the consequences of underperformance. Ms Waller was asked about what the Asda experts meant by phrases such as “personal consequences” and “real likelihood of personal sanctions”. Consequences or sanctions for whom? Ms Waller answered that, here, the Asda experts had in mind the consequences for the individual jobholder.

1710. The Asda experts did not try to do an activity-by-activity breakdown of which targets faced “personal consequences”. Since different depot workers did different activities, there could therefore be no bespoke assessment of the risk of individual sanctions that each jobholder might face.

1711. Ms Waller accepted that it would be wrong to try to measure the demand of worrying about the consequences of misconduct. If a depot worker was tempted to take an additional 20 minute break, they might well think, “I’ll get into trouble”, but that weight of worry would not register in an equal value assessment. From that premise, Ms Waller was driven to acknowledge that there was a low risk of any personal consequences beyond being spoken to by a supervisor, provided that they did not take excessive downtime, remembered the reasons for any interruptions to their work and did not try to lie about them.

1712. Nevertheless, in Ms Waller’s view:

- 1712.1. the risk of personal sanctions did not go away altogether; that residual risk was something which, in the Asda experts’ view, continued to weigh on the jobholders;

1712.2. depot workers would in any case have “the emotional drain” of having to remember all the interruptions on a shift and have their explanation at the ready; and

1712.3. being asked for an explanation on the depot floor was itself a “sanction”.

1713. The magnitude of the residual risk was known by the Asda experts to be reduced for depot workers who had passed their probationary period. As Ms Waller put it,

“If you don’t keep your targets and that’s continual, you will be out of the door fairly quickly”.

The Asda experts’ scheme for Mental Effort

1714. The Asda experts built a factor from scratch to assess mental demands. They called it “Mental Effort”. According to their report,

“This factor measures the demand of the effort of using concentration and memory.”

1715. Memory was seen as distinct from concentration. The Asda experts measured it in a separate element of the factor scheme.

1716. The level definitions were:

Level	E	D	C	B	A
Concentration	Concentration is required only for short periods at low levels. And / or There are interruptions but these are infrequent and have little impact.	Required to concentrate for long periods at low levels. And/or There are short periods of moderate concentration, during the working day. And / or There are interruptions, and / or concurrent or multiple tasks some of which make	Moderate concentration is required for long periods in order to meet delivery demands. And / or There are frequent interruptions and / or concurrent or multiple tasks which make concentration more difficult.	Concentration is required for long periods including frequent periods of intense focus in order to meet delivery demands. And / or Sustained multi-tasking which requires mental effort to maintain concentration.	

Memory	Required to recall straightforward information related to a singular task or process.	Required to recall straightforward information related to a number of tasks, procedures, or data.	Required to recall different pieces of information related to a range of tasks, procedures, or data.	Required to recall detailed and specific information regarding a range of procedures, instructions, or data sets.	Required to recall detailed information in relation to multiple different areas including products, procedures, policies, people.
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The Asda assessments

1717. The Asda experts placed Mr Haigh's (a) and (b) iterations at Level A along with Section Leader. Loaders, HRT drivers and CBT drivers went into Level B, with Customer Service Desk. Depot workers whose most demanding activity was picking were in Level C, along with Counters, Process and Service Host. All the other claimants were assessed in Level D, apart from Edible Grocery who was in Level E.

The Memory Element

1718. The Asda experts took the view that the demand of using memory would rise in accordance with the "range and complexity" of the information to be recalled. These also happened to be the distinguishing features of the Knowledge demand in their scheme.

1719. The Asda experts recognised the potential for double-counting memory with knowledge. This is how they sought to draw the line:

"In respect of the Memory element the demands under this factor are distinct from those under the Knowledge factor because here we are measuring the effort involved in using working memory to recall, apply and use information and knowledge, whether the information or knowledge is short term (e.g., remembering when food came out of the oven in order to do a regular temperature check in the display cabinet) or long term (e.g., recalling what toppings go on particular pizzas, or applying loading rules to different trailer types). As far as longer term knowledge is concerned, we therefore avoid double counting with the Knowledge factor by focusing on the effort of recall and application as opposed to the demands of acquiring and retaining that knowledge in the first place."

1720. There was no difference of principle in the Asda experts' minds between short-term or long-term memory. The distinction, as they saw it, was between acquiring knowledge and remembering it. Thus, in the opinion of the Asda experts, it took mental effort for a Loader to bring the loading rules to the front of his mind. This was different, in their view, from the demand of having to learn the loading rules in the first place.

1721. We are no neuropsychologists, but it is common knowledge that familiarity generally makes things easier to remember. Facts can be retrieved from long-term memory more easily if they have been learned through repetition. School children rote-learn their times tables and the numbers 1-10 in French. Those sorts of things are generally easier to remember than something that has only been heard once. The Asda scheme did not recognise familiarity as a feature that would decrease mental demand. Applying the Memory Element level definitions, Mrs Webster would have to put in no more mental effort to remember the toppings on a newly-introduced pizza than on a Margherita pizza that she may have made 100 times before.

1722. The Asda experts assessed Personal Shopper at Level E for Memory (and Level D for Concentration). Mr Opelt was assessed at Level D for Memory (and Level C for Concentration). The Asda experts' rationales for Memory included the demand of remembering the location of his next pick slot. The aisles were familiar and logically laid out. If Mr Opelt forgot his destination, he could ask the Talkman to repeat the instruction. The Memory rationale also included the effort Mr Opelt had to put in to remember how many cases he had just picked so he could update his Talkman. The cases were there on the back of his LLOP. He could tell the Talkman how many cases he had picked as soon as he picked them. If he lost count, he could count them again; they were right there on the back of his LLOP. All of these kinds of information would also have to be remembered by Ms Hills, who was assessed at the level below. Mr Short's questions to Ms Waller exposed the Asda experts' overvaluation of Mr Opelt's demand of using his memory. They made for some entertainment in the process. As we have already observed, though, the Memory Element did not ultimately make a significant difference to any of the comparator assessments apart from Mr Haigh.

The Concentration Element

1723. The Asda experts considered that the distinguishing features of concentration were:

“The duration and intensity of the focus and the impact of interruptions / multi-tasking on the degree of effort required.”

1724. Interruptions were not, however, a prerequisite for higher levels of demand. Unlike the IEs' scheme, the Asda experts' Concentration Element expressly recognised that uninterrupted periods of intense concentration could be just as demanding as less intensive work that was frequently interrupted.

Duration of focus

1725. The Asda experts adopted a convention to clarify how they measured how long a jobholder had to concentrate.

“Demands of concentration are affected by the period for which the attention is needed, and these are broadly described as follows:

- Short periods refers to periods of typically minutes, up to around a couple of hours.
- Long periods refers to periods of hours at a time, for example most of

the morning or afternoon.

- Sustained multitasking refers to multitasking for all or most of a working day but does not require that there is no pause or break.”

1726. The reference point for calculating the duration of concentration was the length of a shift. By this convention, work that required concentration for a whole shift once per week was considered to be more demanding than work that required less than a couple of hours’ concentration every day. By this logic, Ms Hutcheson’s Forklift Truck driving was considered less demanding than Mr Ballard’s CBT driving, despite the possibility that they may actually have been driving those vehicles for the same proportion of their working week (see Responsibility for Assets).

Intensity of focus - convention

1727. There was a convention for intensity of concentration, too.

“

‘Low levels of concentration’ covers straightforward tasks such as reading, counting scanning

‘Moderate concentration’ covers tasks which require a greater degree of attention such as driving, using knives, reviewing technical information

‘Intense concentration’ requires undivided attention.”

Low and moderate levels of concentration

1728. The judgement there was plain to see. In the opinion of the Asda experts, a depot worker had to concentrate more intensely to drive a LLOP than any of the jobholders needed to concentrate in order to read. In case there were any doubt about that, Ms Waller confirmed in her oral evidence:

“...driving a piece of machinery and all of the attention that has to be paid driving that, and focusing on all of the rules of the road and all of the things around you, I think objectively requires greater level of attention than reading.”

1729. For the vast majority of the time Mr Opelt spent driving his LLOP, the relevant “Rules of the Road” were the one way system and the Two Bay Rule. He was driving at between 0 and 10.5 km per hour. He was generally aware of the things around him, but so were all the store workers who were vigilant against suspicious behaviour.

1730. The individual assessments revealed a further example of what the Asda experts regarded as “moderate concentration”. Mr Devenney’s task of separating cases into product types was “complicated because many of the products were similar in appearance and difficult to distinguish, except by careful reference to the case labels”. By contrast, Mrs Wilby rotating stock according to date codes was considered to be a low level of concentration.

1731. Ms Waller accepted that “moderate concentration” would also be demanded of a Service Host when overseeing the self-scan checkout units. This was a daily

responsibility for Ms Billings and, for one shift per week, a prolonged one. The Asda experts assessed Ms Billings' role at Level D for Concentration. According to their rationale, "her self-scan related tasks...required low level concentration".

Intensity of focus – undivided attention

1732. Concentration would be at Level B where work required "frequent periods" of "undivided attention".

1733. Ms Forrester's date code checks required her undivided attention at the precise moment when she was reading a date code. She could then switch her attention away momentarily until she had the next date code in front of her, at which point she would have to focus exclusively on reading that date. She had to do the same when reading a list of allergens on a product label. These were not "periods of intense focus", in Ms Waller's opinion, because of the split-second demand on Ms Forrester's attention. Edible Grocery was assessed at Level E.

1734. All Shop Floor Assistants were required to give their undivided attention to customers if they were approached. Mrs Fearn spent most of her time interacting with customers. Although she reached Level B for the Memory Element, she was only assessed at Level C for Concentration. Her rationale stated that "the jobholder was required to use moderate levels of concentration for long periods".

Discussion – Responsibility for Customer Service

1735. There is nothing wrong in principle with a factor that assesses the demand of taking responsibility for people, or a particular group of people, provided that the demand of that responsibility is sufficiently distinct and measurable. It is not uncommon for public-sector equal value assessments to include "responsibility for others". Typically, at least one of the roles under comparison will involve caring for a vulnerable person. None of the experts' factor plans have included such a factor in this case. Doubtless this is because none of the Asda roles have caring responsibilities.

1736. So what is the demand of taking responsibility for customer service? It is not confined to being responsible for interacting with customers. We agree with Mr Cooper that having conversations with customers is just an activity; it is not a demand in itself. The weight of responsibility would have to come from something that made a positive customer experience important. In the case of all these jobs, the importance stems from the value of the customer's goodwill.

1737. Customer goodwill is undoubtedly an intangible asset. Moreover, it is a precious one, because of each customer's average lifetime spend.

1738. Ms Waller (Asda expert) accepted that everyone has a responsibility for customer goodwill. Her position, through the joint report and in oral evidence, is that this does not create a distinct demand, because the demands of activities that contribute towards customer goodwill have been assessed under other factors. We do not accept that. None of the experts chose to assess responsibility for goodwill under the heading of "Responsibility for Assets". This means that, in the absence of a separate "Responsibility for Customer Service" factor, there may be a danger that the weight of responsibility is not counted.

1739. That danger will not affect the fairness of an equal value assessment unless some jobholders have a more demanding responsibility than others.

1740. This is where Ms Waller's analysis is more convincing. None of the roles has a direct responsibility for maintaining market share, or targets of customer footfall. Before we can say that there has to be a distinct Responsibility for Customer Service factor, we would have to be satisfied that there are distinct and different demands amongst the jobholders caused by their responsibility for contributing towards customer goodwill. Those demands would have to be measured by the degree to which the jobholder was in a position to influence a customer's willingness to come to an Asda store and spend their money.
1741. The Leigh Day experts recognise that customers do not shop at Asda purely because of polite and helpful interactions with store employees. Customers also expect the products they are shopping for to be on the shelves, of an acceptable quality and a price that they are willing to pay. If Mrs Webster made a bad pizza, customers in Wigan would be more likely to go to a supermarket that makes good pizzas. If Mr Devenney and his colleagues routinely failed to pick cases of beer accurately, there would be a risk that the full range of beers would not be on display at stores nationwide. A choosy customer might go somewhere else for their favourite beer. Cheese might be more expensive if Warehouse Colleagues in Skelmersdale did not pick the cases quickly, because Asda would be paying more Warehouse Colleague wages per unit of cheese delivered to stores. Likewise, if a shop floor assistant does not replenish goods accurately and efficiently, they are less likely to be on the shelves at the time when customers want to buy them, and there will be increased costs of bringing the goods to the point of sale, which Asda would have to absorb or pass onto the customer.
1742. An assessment under the proposed Factor 5A would therefore have to find a way of assessing the influence on customer goodwill of the different ways in which jobholders contribute to the efficient movement of stock to the shelves. It would also have to facilitate a comparison between the weight of that responsibility (on the one hand) and the weight of being responsible for promoting goodwill through customer interaction, or through other activities such as picking orders for online deliveries.
1743. Asda argue that there is no information at all in the job descriptions to enable that comparison. We do not go that far. We are not concerned with precise measurement. None of the experts could precisely assess risk under the factor of Responsibility for Health and Safety, but that impediment did not stop Asda from arguing that the all the experts should have a go.
1744. Some general observations are possible. Other things being equal:
- 1744.1. The closer a role-holder operates in the journey of a product from creator to customer, the more likely it is that their actions or inactions will influence the customer's satisfaction, because there are fewer controls, or variables, in place to stop the customer's experience from being adversely affected. If Ms Hills failed to pick an item (or a substitute) for an online customer, that would lead directly to the customer having that item missing from their delivery. If Mrs Wilby made a Would I Buy It? decision incorrectly, a customer could see an off-puttingly bruised apple on display, or – worse – buy it and not realise until they had taken it home. Pickers who miss a case might cause the stock in a store to run out; they might not. If the unpicked product did run out from the shelves, a customer might or might not want to buy it. Mr Cooper focused on fast-

selling items such as eggs, but for other items, such as a particular pasta sauce, it would be a matter of chance whether any customer would want to buy that item on the day it went missing.

1744.2. A person whose role it is directly to address customers' problems is in a greater position of influence over those customers' satisfaction than somebody who has no idea what the customer's problem is.

1744.3. Responsibility to handle larger volumes of stock efficiently and accurately will tend to have a greater impact on availability of stock on the shelves than responsibility to handle smaller volumes. If Mr Dennis failed to scan a load of fast-selling stock onto a trailer, the entire load would be returned to the depot and would be missing from store until a replacement load could be correctly loaded and transported. That could potentially disgruntle dozens or hundreds of shoppers. A further determinant of responsibility for customer goodwill is the influence over product quality. But nobody has assessed the demand of responsibility for customer goodwill through product quality.

1744.4. A role (such as Counters) that is accountable for the final quality of a product is more likely to influence customer satisfaction than a role that has no such responsibility.

1744.5. Product quality will depend not just on how it is made, but how it is handled. A person's whose actions or inactions can influence the deterioration of a product will have more responsibility for product quality than someone who has no such influence.

1744.6. Each Warehouse Colleague's activities, and each replenishment activity, was only one part of a long supply chain. The impact of one jobholder's efficiency on cost (and therefore price) would be relatively small.

1745. These sorts of comparisons reveal the first problem with the Leigh Day expert's proposed factor. Proximity to the customer is only one of the determinants of a role-holder's influence over customer goodwill. Unless scale and product quality are factored into the assessment, the responsibility cannot be measured properly.

1746. The second difficulty with the Leigh Day experts' analysis stems from the way in which they actually assessed the relative demands. They say that they assessed the responsibility of moving products efficiently to shelves, but in actual fact they did not. In Mrs Hastings' words, "the levels build up". Responsibility for moving goods to stores was treated as the baseline: the lowest level of demand. The only way of reaching a higher level was to have some additional responsibility. This was not just a problem with definition. It was reflected in the substance of the assessments. In-store replenishment roles achieved Level C and above, not in any way because of their responsibility for putting things on shelves, but solely because of their interactions with customers. Otherwise, the Leigh Day experts would have given them a plus modifier to reflect their responsibility for replenishment for over 75% of their role. Moreover, some of the roles at the higher levels did not have any responsibility for making stock available on the shelves. Because "the levels build up", the absence of that responsibility was not taken into account when assessing the demands of their roles relative to those of the replenishment roles or the Warehouse Colleague roles.

1747. For these reasons we agree with the Asda experts and the IEs that Customer Service should not be a separate factor.
1748. This conclusion has a knock-on effect. As a result of our decision, there is no separate factor that reflects the weight of *responsibility* for customer goodwill. Yet we know that many of the role holder did activities (whether in a depot or in a store) that could affect that valuable intangible asset. This could result in a gap: there could be a failure to recognise differences in demand, or the extent of those differences. For the reasons we have given, these differences have not been properly measured, but that does not mean that they do not exist. As we have said, in some direct comparisons of roles, the differences are obvious.
1749. To our minds, this is an example of an unassessed demand. This is unlikely to come as a surprise to the parties, in view of the example given by our employment judge during the hearing (see paragraph 292). It is appropriate for consideration at the equal value stage.
1750. In his closing submissions, Mr Short argued that, if we rejected Leigh Day's Responsibility for Customer Service factor, we should build our own factor scheme to assess Responsibility for Customer Goodwill. He argued that such a scheme would have four or five levels of demand. Section Leader should be at the top, Customer Service Desk and Service Host at the next level, the remaining claimants at the level below and all the depot workers (apart from Mr Haigh) below them.
1751. We cannot accept that submission. We agree with Mr Cooper that there are insufficient facts to enable us to make such a comprehensive assessment. In particular, there are not enough facts to enable us to assess the relative contribution that the depot workers make to product availability, quality and price, and how that weight of responsibility compares to the replenishment roles in the stores.
1752. Instead, we have decided to compare roles head-to-head as part of the equal value test. If a claimant role and a comparator role fall within the margin of potential equal value, we compare them directly to see if one has a more demanding responsibility for customer goodwill than the other.

Discussion – Communication Skills

Choice of scheme

1753. We prefer the Asda experts' scheme for measuring Communication Skills. This is because:
- 1753.1. The Leigh Day experts' scheme uses a modifier. There is no modifier in the factor schemes that we have adopted so far. For the reasons we have given in paragraph 214, it is difficult to use a modifier fairly for some factors, but not others. Even if we were wrong about that, we would not use the Leigh Day experts' modifier definition, because it removes one of the key drivers of demands (range of contacts) from the level definitions.
- 1753.2. The Leigh Day assessments appear to have included frequency of use as an indicator of the level of demand. As we explain in more detail under the heading of Physical Skills, we do not see the relevance of

frequency when it comes to measuring the skill that a person needs to have in order to do their job.

- 1753.3. The Asda scheme reflects the escalating need for interpersonal skills through all the levels, whereas the Leigh Day experts' scheme only does so at Levels A and B (and the absence of them at E).

Relativities

1754. Generally speaking, we find the Asda experts to have got the relative demands of the roles about right.
1755. Mr Haigh's supervisory roles achieve Level A alongside Section Leader, but only marginally so. Mr Haigh had to be able to participate in a planning and organising meeting. They both had to ask investigative questions and challenge performance. He did not need quite as much skill to communicate unpopular decisions: if he wanted to, he could disarm the listener by saying he was only the messenger.
1756. We have altered some of the Asda experts' assessments at the lower levels. This is because we disagree with the Asda experts about the level of interpersonal skill needed to pass on information over the radio, or receive a request for replenishment. We accept that there was some interpersonal skill needed to coordinate break times in the Frozen Chamber, but it was the most basic of compromises. It was insufficient to distinguish the jobholders such as Mr Opelt who just got on with their own picking. Likewise, there was no real skill needed in reaching agreement about who would work on which set of racking shelves. There are no facts to suggest that colleagues had any preferences about the aisle in which they worked.
1757. A greater degree of cooperation, and therefore communication skill, was needed when dividing tasks in Goods In and Goods Out. Here, there was potential for disagreement, especially where the different tasks would involve greater or lesser amounts of effort.

Communication Skills scores

1758. Here are our scores under the Communication Skills factor:

Level	Store roles	Depot roles	Points
A	Section Leader		50
Marginal A		Haigh (a) and (b)	50
B	Customer Service Desk, Service Host (a) and (b)		40
C	Bakery, Checkout, Chilled, Counters, Edible Grocery, George, Home & Leisure (a) and (b), Personal Shopper, Process, Produce, Warehouse	Ballard (b), Beaumont (b), Dolan (b), Haigh (c) and (d), Morris (a)	30

D		Ballard (a), Beaumont (a) and (c), Dennis (c) and (d), Han (a) and (b), Makin (a) and (b), Matthews, Morris (b), Prescott, Sayeed (a) and (b), Uchanski (a) and (b)	20
E		Dennis (a) and (b), Devenney, Dolan (a), Hore, McDonough, Opelt, Welch	10

Discussion – Emotional Demands

Should there be a separate factor for emotional demand?

1759. In our view, the emotional demands of the roles should be assessed under a separate factor. On this point, we agree with the party-instructed experts and the initial opinion of the IEs. We disagree with the IEs' current view.

1760. There were distinct demands on the jobholders of having to deal with the emotional impact of certain features of their roles. The IEs candidly say that they did not assess the stress or worry of performance targets. They say that they measured the emotional demands of interacting with people, but that is not what they actually did. They took into account conversations with customers, but only measured the skill required and its effect on the claimants' ability to concentrate.

Is the pressure of targets an emotional demand?

1761. We agree with the Asda experts that the pressure of working to performance targets can, in principle, create a distinct emotional demand.

1762. We ought, therefore, to deal with the claimants' arguments as to why performance targets do not give rise to a distinct demand.

1762.1. The claimants argue that if there is a demand here at all, it is adequately captured under the factors of Physical Demands and Mental Demands. That is how the NJC JES sought to capture the pressure of deadlines. We agree that there is some danger of double counting here. This, to our minds, is essentially the same point that Mr Walls made, but he expressed it in a different way. Features of a job are more likely to be stressful if they are outside the jobholder's control. If Mr Devenney was picking behind his target, he knew that he could make up the deficit if he selected his pick slots more quickly, carried cases more quickly, and concentrated immediately on driving to the next pick slot instead of allowing his mind to wander. That would involve more mental and physical effort, but it also meant that Mr Devenney would have less cause to worry. In our view, this risk of double-counting can more be fairly reflected in the level of demand than by ignoring its existence.

1762.2. Another of Mr Short's arguments is that a feature of work is only emotionally demanding if it involves emotional effort that is "required in order to perform the job", as opposed to being "a consequence" or "by-product" of the job. This is an argument that appeared to find favour with

EJ Malone's tribunal in Forward. We cannot fully accept it. The difficulty with the argument is that it stems from the classification of the factor as an "effort factor". Certainly, there is an effort involved in managing emotions, but that is not all there is to it. Impacts are relevant, too. The NHS Handbook used the phrase "emotional impact" when explaining its level definitions of emotional effort. The NJC JES expressly defined "emotional demand" by reference to the feelings that would "result" from the "emotional pressure" placed on the jobholder. If work is likely to cause a jobholder to experience negative emotions, that will have an impact on the jobholder, whether they have to make an effort to suppress those emotions or not. It might not be necessary to assess emotional impacts if the experts had tried to measure them under a Working Conditions factor, but none of the experts tried to do that. Under Working Conditions, the experts only took into account the risk of physical assault.

- 1762.3. Where we find Mr Short's argument more convincing is when it comes to assessing the level of demand. Where there is effort involved in managing emotions, as well as the negative impact of experiencing them, the emotional demand is likely to be greater. To put it in context, Mr Opelt could grumble all he liked about his targets and Asda would not mind, as long as he achieved them. Mrs Wilby, on the other hand, had to smile when she saw a customer, even if she did not feel like smiling. When a customer was rude or aggressive to her, she was required to appear calm, even when she was not calm inside. In both situations, the requirements of her role came into conflict with her emotions. Those conflicts required effort to manage. It is another reason for assessing these demands at a higher level. It is not a reason for assessing these demands exclusively. Nor is it a reason for pretending that work pressure was emotionally undemanding, simply because it did not test a jobholder's self-control.

Emotional demands - relativities

1763. In our view, there is a relatively narrow range of emotional demands amongst the Asda jobs. We agree with the IEs about that. The range is, for example, far smaller than the emotional demands that the NJC JES or the NHS Handbook aims to assess. Exposure to low-level rudeness or pressure of targets does not even register under those schemes.
1764. We draw a broad equivalence between working to targets in a depot and working in the front-of-house area of a supermarket:
- 1764.1. Most Shop Floor Assistants were on display for most of the time. They knew that Asda wanted them to look cheerful. They also knew that Asda monitored their outward demeanour through observations and Mystery Shoppers. They put up with occasional low-level rudeness. They encountered more hostile behaviour every few months. They never knew who was going to be the next unpleasant customer.
- 1764.2. Depot workers experienced mild feelings of injustice at colleagues resorting to gamesmanship to meet their target. These feelings were vented in "terse exchanges". They had to work at speed, even if they did

not feel at their best. Otherwise, they would have the worry of having to make up their target the next day, or face counselling. They were interrupted in their work. When that happened, they had to have an explanation at the ready to satisfy a supervisor that they had a good reason for falling behind. That was a small, but real, weight on their minds. They faced being challenged by a supervisor on the depot floor, possibly in the presence of a colleague. They were sufficiently apprehensive about such a conversation that they tried to get their explanation in first. If they took these precautions, they had little cause to worry about formal disciplinary action. These were all negative emotions that store workers did not have to experience.

1764.3. These pressures were not measurably more demanding than what the store workers had to face. This is because: (a) The depot workers did not have to work to keep their emotions under control in the way that the store workers did. Mr Ballard could sound a beep of his horn to express his annoyance; store workers had to keep smiling. (b) We agree with Mr Walls that the level of demand is reduced by the fact that the depot workers had some control over the source of their worry. They could pick cases more quickly. They could give the information to their Talkman more promptly and get back on their LLOP without letting their minds wander. This would increase the physical and mental demands, but would reduce the emotional demand.

1764.4. There were some depot workers who just could not keep up, no matter how hard they tried. That must have been severely demoralising for them. None of the lead comparators had cause to experience that drain on their emotions. They had all passed their probation. As Ms Waller put it, people who underperformed consistently were “out the door fairly quickly”.

1765. We do not think that there was a sufficient range of emotional demands within the depots to place any of the depot workers at different levels. This was a modest level of emotional demand. The Asda experts did not think it made a significant difference whether a depot worker was on a targeted activity for two or five shifts per week. That in itself is an indicator of the relatively low level of demand. Had performance targets really been such a source of anxiety as Asda make them out to be, it would be important to know whether a role holder faced that pressure all week or only half the week.

1766. The emotional toll on Ms Hutcheson was about the same as it was for her colleagues who spent more time on the shop floor. She did not encounter rudeness from customers as often as they did, but she did have to manage drivers waiting for their deliveries to be unloaded.

1767. Ms Forrester’s Edible Grocery role was noticeably less demanding, emotionally. For a third of her working time, her workplace was closed to the public. She did not have to rein in her emotions any more than in a depot. She only interacted with any member of the public once or twice per shift. She encountered rudeness or drunkenness once a month. We notionally pro-rated that frequency up to 18 times per year. True it is that she could never be sure that the next customer would not be one of those 18. Nevertheless, her day-to-day work was

not emotionally draining. It was not the equivalent of what Ms Ashton put up with on the checkout, or Mr Ballard put up with at Didcot.

1768. Mr Haigh had to make additional emotional effort. He had the pressure of supervising a team, having tense conversations with underperforming colleagues, and experiencing the disappointment of colleagues if he passed on an unfavourable decision about annual leave. In our view, the emotional demands on him were equivalent to people who faced higher levels of customer complaints in stores.

1769. Miss Gibbins, the Section Leader, had a still higher level of demand. She had the pressures of leadership. This included challenging low-level conduct issues. She had to own and explain unpopular decisions.

Emotional Demands – choice of scheme

1770. We prefer the Asda experts' scheme as a tool for measuring emotional demands. This is because it is the only scheme that allows us to measure the stress of working to targets in depots. It is also capable of being adapted to reduce the number of levels of demand without having to make fundamental changes.

Emotional Demands scores

1771. Here, then, are the scores we gave to each role to reflect their emotional demands.

Level	Store roles	Depot roles	Points
B	Section Leader		40
C	Customer Service Desk, Service Host (a) and (b)	Haigh (a) and (b)	30
D	All other claimant roles and iterations	All other comparator roles and iterations	20
E	Edible Grocery		10

Discussion – Mental Demands

What is the demand?

1772. Mental demands are the demands of a jobholder using their mind to do their work. What makes the work demanding is the effort of conscious thought. Concepts such as concentration, alertness and attention are all helpful means of describing that effort.

Memory

1773. It can take effort to remember something. That effort does not need to be measured in a separate element of a scheme. In our view, the effort is

sufficiently well captured by concentration, alertness and attention. Mrs Fearn had to concentrate harder to remember a customer's name whilst following the gist of their reason for wanting a refund, whilst simultaneously thinking about whether the refund criteria were met.

1774. There is little measurable effort in remembering something that has already been learned. This is especially so if it has become familiar through repetition. Conversely, we disagree with the premise of the Asda scheme that, the harder a jobholder tries to remember something, the more likely it is that they will remember it. Mr Walls is right, in our view: that is not how the mind works.

Accuracy

1775. Accuracy is not a demand in itself. Nor is it the only thing that affects how much a person has to apply their mind. It is, however, a useful feature to take into account. A job that requires accuracy will generally demand more concentration than a job that tolerates high margins of error.
1776. All the Asda jobs had to be done accurately. They all had their work checked. Replenishers in stores had to match displays to shelf edge labels and ensure that products were in date. Pickers in depots were taught and reminded of the importance of accurate picking. This tends to suggest that the range of demands is likely to be narrower than where different job tolerated different margins of inaccuracy.

Interruptions

1777. Other things being equal, interruptions will make the effort of concentration more demanding. More so than a shift in attention where a jobholder decides to move from one task to another. This is because the jobholder does not know when the interruption will come. It is also because they have to change their focus twice: first, to deal with the interruption and, second, to get back to what they had been doing.
1778. It is relatively easy to make an assessment of how often a jobholder is interrupted. It has the advantage of being objective and less likely to be tainted by any conscious or subconscious biases. But that does not mean it should be the sole measure of the demand, or even the main measure. This is because it leaves out important features of mental demand. The effect of an interruption will depend on what the jobholder was doing when they were interrupted. If it is easy for a jobholder to pick up where they left off, there will be less mental effort. If Ms Forrester was halfway through facing up the shelves, she would be able to tell by looking at them that the job was only half-done, and she could get back on with it. Likewise, when Mr Opelt's battery went flat, he could ask his Talkman to repeat the latest instruction once he had come back from the Battery Bay. On the other side of the coin, when Mrs Trickett was approached by a customer in the middle of a count, she would have to hold the numbers in her head or start again once the customer had gone.

Targets and deadlines

1779. Targets and deadlines can increase the mental demands on a worker. They incentivise the jobholder to work faster than they otherwise would. This demands

additional concentration. See our paragraph 1762.3 and 1764.3 for an example of how pickers' mental demands were affected.

1780. In the stores, there were few tasks that were the direct equivalent of what was done in the depots. Where the tasks were broadly the same (such as breaking down or Ms Hutcheson tipping trailers), there are no facts in the job descriptions that say the depot workers did them more quickly than the store workers.
1781. There were less onerous personal consequences for store workers if they did not achieve their targets. The incentive for them to work quickly was not as powerful as it was in the depots. But it was still there. Store workers in replenishment roles were encouraged to prioritise their work to meet "Full by 9, Fit for 5". Ms Hutcheson's pace of work was dictated by the arrival of trailers. Ms Ashton and Ms Hills had scanning speeds and pick rates to meet.
1782. The differing incentives to work quickly are relevant to the relative demands on the workers in the different settings. They do not indicate large differences of demand. This feature has to be balanced alongside the intensity of concentration that the different tasks required.

Duration of concentration

1783. It is harder work to concentrate intensely for long periods than for a brief moment. This is hardly controversial, yet the Asda experts are the only ones to say it in their scheme. This aspect of their level definitions allows them to capture, for example, the difference between a "split second" reading of a date code and a more prolonged operation such as inserting forks into a pallet at height.
1784. The duration of concentration must still be assessed fairly. As with other factors, the Asda assessments rest on the premise that it is more demanding to sustain effort for the occasional shift (with less arduous days in between) than it is to sustain effort for a portion of every shift, with no lighter days in which to recover. We do not accept that proposition without evidence.

Intensity of concentration

1785. The Asda scheme recognised intensity of concentration as a distinguishing feature of demand across all the levels. As we have attempted to illustrate when examining the Asda assessments, the Asda experts overvalued the concentration that was needed to drive a LLOP. This is to be expected. It is one of the risks of a scheme where the level definitions allow room for the assessor's value judgements. But it is also one of the scheme's strengths. We can change the assessments if we disagree with them.

Choice of scheme

1786. We accordingly prefer the Asda scheme over that of the IEs.
1787. We also consider that there are more levels of demand amongst the non-leadership roles than the IEs' scheme would allow us to assess.
1788. In any case, we would prefer to start with a set of levels that did not depend on the use of the modifier to capture steps in demand. It was not just there for shading. When the Leigh Day experts tried to apply it, they gave every single role a "plus".

Relativities

1789. Section Leader, in our view, had to concentrate to a higher level than Mr Haigh. She had to sustain her concentration to analyse information on multiple systems, to plan the rota and deal with escalated customer complaints. This was different from Mr Haigh, who switched his concentration from his substantive activity to the Warehouse Management System every 30 minutes or so. His substantive activities did not require demanding concentration. In Iteration (a), he drove a CBT, which pushed his overall mental demands marginally higher.
1790. Leigh Day say that one level is sufficient to capture everyone else. They are wrong about that, and the Asda experts are right. Where we disagree with Asda, however, is over how many levels separate the vast bulk of the jobs. With the exception of Edible Grocery, Mr Haigh and the more intensely customer-facing roles, all the claimants and comparators can be separated by one level step. The IEs are right to point out that all the roles required accuracy and involved some interruption. The nature of most of the work was such that, if they were interrupted, the role holder could go back fairly easily to what they were doing. The frequency of interruptions was broadly equivalent.
1791. There was little concentration required when driving a LLOP or a Power Pallet Truck in a depot aisle. We know, of course, that Mr Opelt's LLOP went about 2-3 times the speed of Ms Hills' multi-order pick trolley, and was heavier. That is balanced by the fact that Mr Opelt drove it in a wide depot aisle where everyone was trained in the Two Bay Rule. Ms Hills had to keep an eye out for the unpredictable behaviour of customers in a narrower aisle. Occasionally, Mr Opelt would have to think a little harder, for example, when rounding a corner, or manoeuvring the LLOP into a pallet. That was not enough to justify a level difference. Broadly we agree with Mr Walls: there was an extra degree of intensity of concentration, certainly, but, like Mr Walls, we would dispute that the difference was "significant".
1792. Each of the replenishment roles (apart from Edible Grocery) had features of their work that required more intense concentration, and which made up for the fact that they were under less personal time pressure. Ms Ohlsson had to keep the Challenge 20 deadlines constantly in mind whilst concentrating on her replenishment tasks. Mrs Gardner had to concentrate harder when operating the L-sealer and photo-cake machine, moving hot rolls and filling doughnuts. Ms Ashton was constantly customer-facing as well as quickly scanning, and intermittently had to check and count cash. Ms Hills had to concentrate on substitution decisions as well as picking at speed. In Home & Leisure, Ms Darville moved frequently from one task to another. Mrs O'Donovan had to operate the George till, speak to customers, process returns, make markdown decisions and allocate the waste budget in addition to her usual replenishment. In Process, Mrs Trickett was interrupted in the middle of counting. All of these claimants had to give the customer their undivided attention whilst they were interrupted. By contrast, depot workers had downtime during many of their interruptions. They waited for their pick slot to be replenished, or for their battery to be changed. If their roll cage or pallet was defective, they walked or drove to find another one.

(Edible Grocery also had some periods of intense concentration, for example, when carrying out the monthly date code checks, or (occasionally) reading out

allergen lists. This happened less often than in the other roles. She was also less frequently interrupted.)

1793. At the next level were roles with regular Loading, Goods In using a CBT, Putaways and Letdowns. These were a level above picking and LLOP driving. Additional concentration was needed for moving pallets on forks at height in and out of confined spaces. An equivalent level of mental effort was needed for sustained problem-solving (planning loads for about 25 minutes per trailer), interspersed with moving equipment in and out of trailers.
1794. Ms Hutcheson's role required a similar level of mental effort to Mr Ballard. They both had to concentrate to move pallets at height using similar equipment, for a similar proportion of their working time. For the reasons we have given, we measure that time over a week. Mrs Webster's role in Counters was at the same level. She had to multi-task as well as concentrating on delicate knife work. We also consider that Service Host required a similar level of sustained focus, in that Ms Billings frequently gave undivided attention to customers when approached, and had to split her attention across numerous self-scans continuously for about a fifth of her working time.
1795. We considered whether to assess Service Host (b) at a higher level, as the Asda experts did. Their reason for doing so is to reflect her attribute of covering the Customer Service Desk and Kiosk. In our view, this did not substantially add to the mental demands of her role overall. She only did this work for about 30 minutes per month.
1796. Customer Service Desk was the most demanding of all the roles, apart from Section Leader. Mrs Fearn had to give customers her undivided attention, one after another, for the whole of her shift.

Amendments to the Asda scheme

1797. The Concentration Element of the Asda scheme is adequate to capture these relativities. It should be understood that we regard intermittent date-code checking of long-life products to require a "low level" of concentration, even though it requires undivided attention at the precise moment of reading the code. Driving a LLOP and also requires "low level" concentration, punctuated by moments of more intense focus as we have described. Planning a load and manoeuvring inside a trailer required long periods of moderate concentration. Operating the forks of a CBT or HRT required undivided attention, which was interspersed with lower levels of concentration whilst driving along the aisles or through the yard. "Frequent intense focus" should therefore be moved to Level C.
1798. There is no need for the Memory Element. Counters achieves Level B because her combination of multi-tasking and intense concentration, rather than having to remember the pizza toppings. Likewise, Loading is at Level C because of the need for concentration on solving a complex problem, rather than remembering the loading rules. Mrs Fearn on the Customer Service Desk gave undivided attention to customers for most of her shift and gets into Level B that way. Miss Gibbins had to maintain high levels of concentration to investigate and analyse data over multiple systems.

Mental Demands scores

1799. After moving the roles around within the Asda scheme, we end up with the following scores:

Level	Store roles	Depot roles	Points
B	Customer Service Desk, Section Leader		40
Marginal B		Haigh (a)	40
C	Counters, Service Host (a) and (b), Warehouse	Ballard (a) and (b), Beaumont (a), (b) and (c), Dennis (c) and (d), Dolan (a) and (b), Haigh (b) and (c), Makin (a) and (b), McDonough, Morris (a) and (b), Sayeed, Uchanski (b)	30
D	Bakery, Checkout, Chilled, George, Home & Leisure (a) and (b), Personal Shopper, Process, Produce	Devenney, Dennis (a) and (b), Haigh (d), Han (a) and (b), Hore, Matthews, Opelt, Prescott, Uchanski (a), Welch	20
E	Edible Grocery		10

Chapter Twelve - Physical Skills

1800. We now turn to the Physical Skills Factor.

Issues relating to Physical Skills

The demand to be measured

1801. It is common ground that there should be a separate factor to measure the demand of physical skills required for the jobs. The skills being assessed should include both motor skills and sensory skills.

1802. All the experts agree that the factor should capture the demand of “exercising” physical skills in the job. The word, “exercising” is significant here. The experts all seem to draw a distinction between the demand of acquiring the skill and the demand of using it. We discuss whether this distinction is helpful.

1803. The party-instructed experts have chosen subtly different words to describe the distinguishing features of the demand. The Asda experts use the phrases, “extent or difficulty” or “degree or difficulty”, whereas the Leigh Day experts are more comfortable with “degree of skill”. We do not detect any real difference of substance here.

1804. It is also undisputed that, when assessing the degree of physical skill that is required, it will be relevant to consider (at least to some extent) how long it takes to acquire the skill, either by way of formal training or in-work experience. The extent

to which this consideration is relevant is, however, a matter of dispute between Asda and the IEs.

Range

1805. None of the experts thought that this factor should try to assess the range of activities requiring physical skill.

Knowledge

1806. All the experts acknowledged, at one stage or other, that this factor overlapped with the Knowledge factor, and that care was needed to avoid the risk of double counting.

Frequency

1807. The main dispute between Asda (on the one hand) and the IEs and Leigh Day experts (on the other) concerned whether the level of demand depended to any extent on the frequency with which a person exercises a particular skill.

Modifier

1808. Related to the dispute over frequency is the recurring fault-line over the use of the modifier to shade smaller differences in demand. Asda say that the IEs' modifier is incapable of coherent application and in fact has not been coherently applied.

Relativities

1809. There is some measure of agreement about how these concepts translate into the actual relative demands of the Asda jobs.

1810. As between Asda and the IEs, it is agreed:

- 1810.1. Personal Shopper and Chilled required the least demanding physical skill of all the roles, in the sense that no roles were assessed lower than these two;
- 1810.2. Service Host and Bakery were a level step more demanding than Personal Shopper and Chilled;
- 1810.3. Counters and Mr Prescott's role were a further level step up from Service Host and Bakery; and
- 1810.4. Some iterations of Mr Sayeed's and Mr Haigh's roles were more demanding than Counters and Mr Prescott's role (although Asda say they should have been assessed as a whole level step higher, whereas the IEs reflected the difference by applying the modifier).

1811. The Leigh Day experts, for their part, also agree with Asda that none of the roles should be assessed below Personal Shopper and Chilled. Between the party-instructed experts, it is also agreed:

- 1811.1. Checkout is a level step up from Personal Shopper and Chilled;
- 1811.2. Bakery and Service Host are more demanding than Personal Shopper and Chilled (but not, in the Leigh Day experts' view, by a full level);

- 1811.3. Hore, Matthews, Opelt, Prescott, Han and one of the Uchanski iterations are all a level step up from Bakery and Service Host; and
- 1811.4. Some iterations of Mr Sayeed's and Mr Haigh's roles are a full level step up from Warehouse.
1812. The key relativities in dispute appear to be:
- 1812.1. whether the degree of skill needed to operate a HRT and/or CBT is a level step higher than the skill needed to drive a LLOP, and two level steps higher than the skill needed to operate a checkout;
- 1812.2. whether the degree of skill needed to plan a load is a level step higher than the skill needed to drive a LLOP and two level steps higher than the skill needed to operate a checkout; and
- 1812.3. whether there are any level step differences in the degree of skill required amongst the different replenishment roles, Personal Shopper, Customer Service Desk and checkout-based roles.

Facts relating to Physical Skills

Personal Shopper

1813. Ms Hills operated her Palm Pilot to scan bar codes at pace. She picked items carefully from the shelves, fast enough to meet her pick target, and placed them into the totes on her multi-order pick trolley. She had to peel labels from totes before replacing them with new ones. She was doing these tasks for the vast majority of her working day.
1814. We have seen that, for the last two years of the Relevant Period, Ms Hills picked from the Produce aisles (this is relevant to the Asda experts' assessment). Items such as tomatoes needed to be handled delicately.
1815. When she had finished picking the items she needed within her reach, she moved the multi-order pick trolley to the next location. Her job description does not say how many seconds she spent manoeuvring the trolley or how many seconds she spent picking items from shelves each time she parked it. This is unsurprising.
1816. Ms Hills needed to acquire some additional physical skills in order to manoeuvre a multi-order pick trolley around supermarket aisles. The skill went a little way beyond what an ordinary shopper would need in order to push a supermarket trolley. Not by much. This is a disputed finding, so we have set out our reasons here:
- 1816.1. Asda say that the additional skill is negligible. Mr Cooper put it to Ms Branney that there are no facts to support any contrary finding. Ms Branney rejected that proposition. In our judgment, she was right to do so. A trolley laden with 8-10 totes is likely to require more skill to manoeuvre than an ordinary shopping trolley. That is not a new fact: it is a simple deduction from what the job descriptions say about the size and weight of the trolley. The multi-order pick trolley was wider and higher than average trolleys. Each tote held up to 15kg when full. The job description also tells us that Ms Hills had to use spatial awareness.
- 1816.2. The degree of additional skill needed was limited. Mr Holt's independence comes in useful here. He agreed that Ms Hills would have

been able to learn how to manoeuvre the pick trolley after a few practice attempts. This view is consistent with Asda's training requirements. It would not take much time or practice to acquire the necessary motor or spatial skills, otherwise there would have been some specific training on the use of that piece of equipment.

Chilled

1817. Ms Ohlsson worked at a steady pace, handling different items of chilled food and drink. Some of these were fragile. Whilst fragile items clearly required greater care, we could not find evidence that they required greater skill to handle.

1818. Ms Ohlsson had to move flat-bed trollies, roll-cages and milk cages around aisles that could be busy with customers.

Produce

1819. Mrs Wilby moved containers around busy aisles, as her replenishment colleagues did. She also handled delicate items such as tomatoes and placed them into the display units. We could not find anything in the job descriptions to say that this required any greater level of skill than Ms Hills needed when picking the same items up and putting them into totes.

Checkout

1820. Ms Ashton was expected to pass items through the checkout not only carefully, but quickly, to keep queues down and reach her scan speed target. She was expected to learn and apply a particular technique to help her do this. Ms Ashton picked up a product using the hand nearest the conveyor belt. She passed it over the barcode scanner and placed it in the bagging area. Using this technique helped her to reduce the amount of physical lifting she had to do. If the scanner could not read the barcode, Ms Ashton had to use keyboard skills to enter the product codes manually. She had to remove security tags by twisting the item over the de-tagger.

1821. Part of Ms Ashton's role was to check for counterfeit currency. This was done partly by feeling the notes and coins.

Service Host

1822. The part of Ms Billings' role that required the highest level of physical skill was her work on the checkout.

1823. On most days, Ms Billings worked on the checkout for 15-30 minutes. Occasionally she worked between two hours and a whole shift.

Section Leader

1824. Miss Gibbins needed keyboard skills for the systems and reports on which she worked.

1825. During busy periods at the checkout, Miss Gibbins did checkout duties herself. This happened frequently. For this, Miss Gibbins needed the same skills that Ms Ashton needed.

Process

1826. Mrs Trickett used the Telxon for a wider variety of operations than her replenishment colleagues. For this, she had to have more advanced keyboard skills than they did.

1827. During the course of her work Mrs Trickett also placed small items onto bay hooks. These items have been described as “fiddly”.

Customer Service Desk

1828. Mrs Fearn needed keyboard skills to operate the National Lottery and PayPoint terminals.

1829. She used sensory skills, paying attention to the feel of banknotes and coins to check whether they were counterfeit. When counting notes and coins, she had to use some manual dexterity to pass them through her fingers. Mrs Fearn de-tagged items, some of which were difficult to manoeuvre as the tags were often fitted underneath the product. Small items could be difficult to de-tag because the tags contained a small pin which had to be removed.

1830. Mrs Fearn had to be able to drive a mobility scooter in order to demonstrate its use to customers.

Edible Grocery

1831. Ms Forrester’s role involved hanging some products onto bay hooks, and some spider-tagging.

Bakery

1832. Mrs Gardner had to pack delicate, freshly-baked, products into bags, using the L-sealer. If any of the wires in the L-sealer broke, Mrs Gardner had to change them. This involved using a pair of pliers and a screwdriver. The wire had to be threaded precisely so as to avoid touching any metal parts other than the wire holder. She had to pull the wire taut using the pliers.

1833. This kind of operation required roughly the same level of physical skill as re-wiring a plug. That is something that many people are skilled at doing, but not everybody. The same can be said of driving.

Counters

1834. Mrs Webster needed fine motor skills to fillet, de-bone and de-scale fish. At least part of her bespoke fish course was devoted to teaching her that technique. It is described as a “delicate process” requiring “dexterity and skill”. Mrs Webster needed to produce evenly-sized fillets with minimal waste. This involved visually gauging portion sizes.

1835. When dividing chicken into portions, Mrs Webster had to gauge the sizes and use fine motor skills to achieve a neat, straight, cut.

Opelt

1836. Mr Opelt, as we know, drove a LLOP. He did so for all of his activities, on and off, for virtually the whole length of his shift. The machine was 1.3 metres long and 0.8 metres wide. The forks extended behind the body of the vehicle. They added

2.4 metres to the total length. His LLOP had a steering wheel, on which were mounted the stop/go controls, designed to be twisted like a motorcycle throttle. Forks were raised and lowered at the push of a button. There were no pedals.

1837. Mr Opelt needed to be aware of the length of his LLOP when turning a corner. We were not given the precise dimensions of the turning space available at the end of each aisle. From the plan and photographs, it appears that there was at least an aisle's width in which to execute the turn.
1838. He was incentivised by his target to drive more quickly, up to a maximum speed of 10.5 kilometres per hour.
1839. There was no need for Mr Opelt to turn his LLOP around in the aisles. The one-way system prohibited it.
1840. Some precision and spatial awareness was needed to insert the forks correctly into the pallet.
1841. If Mr Opelt was picking on one of the upper floors, his completed picks would have to be lowered to the Goods Out lanes on the ground floor. During the Relevant Period, Asda installed a Pallet Lowerator, designed to assist with this task. Mr Opelt reversed the LLOP into the Lowerator and deposited the pallet onto the infeed conveyor. This required spatial skills going beyond what was needed to drive a LLOP in a straight line.

Devenney

1842. Whilst on his probation, Mr Devenney's activities were LLOP-based. Ultimately, the parties agreed that we should not assess Mr Devenney's probationary period. The probationary period is nonetheless informative. It was identified by the IEs as Iteration 2 and test-assessed by the Leigh Day experts.

Welch

1843. Mr Welch did Stock Pick, Pick by Line and Breaking Down (Chilled).
1844. On Pick By Line, Mr Welch moved a laden hand-pump truck around the Pick By Line grids. There could be up to 10 other people working on those grids at the same time. Mr Welch's job description does not provide the dimensions of the grids. From the photographs in the background document, there look to be several pallet-widths of space around each grid. More space, for example, than one would find in a supermarket aisle.
1845. Breaking Down required Mr Welch to assemble roll-cages physically, in the same way that a replenishment colleague in a store would do. The activity was located in the Chilled Chamber. There was no need to enter physically confined spaces such as trailers.

Prescott

1846. Mr Prescott's activities were Hygiene, Pick By Line, Goods In – Tipping, Checking and Marshalling.
1847. When tipping, Mr Prescott manoeuvred a Power Pallet Truck in and out of a vehicle to unload pallets. His truck was 0.7 metres long and 0.8 metres wide. Double-deck trailers and vans did not allow sufficient headroom for Mr Prescott to stand on the Power Pallet Truck, so he converted it into walk-on mode. The forks

extended forwards for 1.2 metres. Space inside the vehicle was restricted. His time target incentivised him to move the equipment faster than he otherwise would have done.

Uchanski

1848. From May 2009, Mr Uchanski began a profile of activities that was assessed by the IEs as Iteration 2. For 4 shifts per week, those activities were LLOP-based.

1849. We have seen that Mr Uchanski began driving a HRT in March 2011, and that this marked the start of the IEs' Iteration 4 (Asda Iteration (b)).

Dennis (c)

1850. Mr Dennis' (c) and (d) iterations ought by now to be familiar. They map across to the IEs' Iteration (2). For this period, Mr Dennis was a Loader.

1851. There was some additional physical skill required for Loading. Mr Dennis had to move pallets in and out of confined spaces in trailers, without damaging the side curtains.

1852. He also had to visualise loads before physically arranging the queue of pallets, roll cages and dollies. This involved some spatial awareness. Asda say that this was "advanced". What it involved was imagining what two square pallets would look like side by side across the width of a trailer. He had to perform the same feat when imagining the width of three rectangular-based roll cages. He had to visualise the length of the trailer, but he already knew how many rows of containers there were for each type of trailer. Where the load included dollies, he had to visualise a larger number and imagine whether there was room for them alongside a pallet or roll cage. Dollies were also rectangle-based and of a consistent size and shape.

Dennis (d)

1853. Mr Dennis' Iteration (d) covers approximately 60% of the period covered by the IEs' Iteration (2). From October 2011, Mr Dennis worked one or two shifts per week on Letdowns, Flow Racking Replenishment and Putaways, driving an HRT.

1854. The high racking aisles were 3.1 metres wide. His HRT was 2.5 metres long and 1.3 metres wide. As part of his role, Mr Dennis sometimes turned the HRT around within the aisle. Part of the manoeuvre included reversing without looking at his back wheels. He had to be aware of his vehicle was fitting within the space available. At times he only had 60 cm of clearance across the width of the aisle.

1855. The requirement for sensory awareness was sufficient for Asda to monitor his colour and depth perception. Mr Dennis underwent a medical check for this purpose.

1856. Mr Dennis used a joystick to move a pallet up and down on the forks. He had to feel for resistance from the joystick mast as the forks entered the pallet.

1857. On Putaways, Mr Dennis worked to a target of 3 minutes per pallet, although, as we know, that target was flexible owing to the importance of health and safety.

1858. On Letdowns, Mr Dennis had a target of 4.5 minutes per pallet. Some additional skill was needed here, as Mr Dennis had to perceive what was happening several metres above his head by looking at a display screen and by

judging the feel of the joystick mast. Occasionally, Mr Dennis had to coordinate with an HRT driver on the other side of the racking to retrieve a pallet safely.

Dolan

1859. Mr Dolan worked on Putaways for 3 shifts per week, using HRT. As a First Aider, he attended about six first-aid incidents per year.

Han

1860. Mr Han drove a LLOP and Power Pallet Truck. Up to October 2008, most of his activities involved driving this equipment.

1861. From October 2008 (iteration (b)), Mr Han was engaged on 1 or 2 shifts per week on Infeeding, Rear Tipping, Checking and Handballing. The addition of these activities to his profile meant that Mr Han was not driving mechanised handling equipment for over 75% of his time.

1862. Rear Tipping involved using a Power Pallet Truck to unload containers of stock from trailers. He had to manoeuvre his Power Pallet Truck in and out of confined spaces.

Sayeed (b)/(3)

1863. From May 2012, Mr Sayeed was trained in the use of a CBT. He used this equipment in the yard to remove containers from the sides of lorries. For this, he needed broadly the same physical skills that Ms Hutcheson needed in her warehouse in Hamilton. His three-day training course (partially assessed under Knowledge) also involved a practical skills course, during which he practised and honed the skill.

1864. Unlike a LLOP and a Power Pallet Truck, the CBT was partly pedal-controlled. There was one pedal to accelerate and one to brake. Mr Sayeed operated the pedal simultaneously with the other controls, as a car driver would. When side-tipping trailers, Mr Sayeed raised the forks of his CBT from ground to deck level and inserted them into the next pallet. Once in place, Mr Sayeed operated the tilt control on the forks to ensure that the pallet did not slip off. He could see the pallet in front of him, but also relied on the feel of the controls to ensure that the pallet was firmly on the forks. He then transported the pallet into the depot. Sometimes the pallet stack was so tall that it obscured his vision. When he had a pallet like that, Mr Sayeed drove the CBT in reverse and looked over his shoulder.

Ballard

1865. From our breakdown at paragraph 1084, we estimate that Mr Ballard was driving a CBT almost continuously for approximately 10-20% of his working time. This is relevant when we come to examine the IEs' frequency modifier.

1866. Mr Ballard's CBT was like Mr Sayeed's CBT. When tipping containers, Mr Ballard used the slip-sheet attachment. Like the tilting mechanism, the slip-sheet required Mr Ballard to judge the stability of a load partly by feel.

1867. If the conditions in the yard were wet or icy, Mr Ballard had to use some additional skill to manoeuvre his CBT with impaired visibility or traction.

Haigh

1868. In iterations (a) and (c), Mr Haigh drove a CBT in the yard, in a similar way to Mr Ballard and Mr Sayeed.

1869. One of Mr Haigh's activities in iterations (b) and (d) was De-Kit. We have seen that, for this activity, Mr Haigh learned to drive a Beast (essentially a LLOP with elongated forks). He had to manoeuvre the Beast in and out of trailers.

How other schemes measure physical skills

1870. The NJC JES contains a factor headed, "Physical Skills". The lowest levels of demand include ability to use a pen, pencil and ruler. Ability to drive an ordinary car is at Level 2, with driving a JCB or articulated vehicle at Level 4. Driving in confined spaces might cause the skill to be assessed at a higher level. An example of the kind of skill required at Level 3 is the "use of a knife to peel or chop vegetables".

1871. The NHS Job Evaluation Handbook also has a Physical Skills factor. The level definitions expressly incorporate the amount of training, experience and practice needed to reach the level of skill required for the role.

1872. Neither the NHS Job Evaluation Handbook nor the NJC JES refer to the frequency with which the skill is exercised.

The IEs' scheme for Physical Skills

1873. In the IEs' second report, their scheme for assessing Physical Skills looked like this:

Considers the jobholder's need to exercise particular manual skills or dexterity in the use of tools and equipment.	
Proportion of working time spent at the skill level indicated. More than 75% = "+". Less than 25% = "-".	
LEVEL	LEVEL DESCRIPTION
A	The work requires specific, trained skills requiring a very high degree of dexterity, eye-hand coordination AND sensory skills in order to manipulate machinery, tools, goods and/or electrical equipment. Such skills are learnt by lengthy formal training with certification required before employees can commence tasks. Precision and speed in execution are always required
B	The work requires specific, trained skills requiring a high degree of dexterity, eye-hand coordination AND/OR sensory skills in order to manipulate machinery, tools, goods and/or electrical equipment. Such skills are learnt by formal training with certification required before employees can commence tasks. Precision and speed in execution are always required.

C	The work requires specific, trained skills requiring dexterity AND/OR eye-hand coordination AND/OR sensory skills in order to manipulate machinery, tools, goods and/or electrical equipment. Such skills are generally learnt by formal training which may be learned under supervision whilst carrying out duties. Precision AND/OR speed in execution is usually required.
D	The work requires some physical dexterity and coordination in order to manipulate goods, machinery, tools, electrical equipment or hand held devices. Such skills are generally learnt by informal demonstration or very short formal tuition. Some precision AND/OR speed in execution is required.
E	No particular dexterity and hand-eye co-ordination skills are required in the course of normal working.

Level definitions

1874. In their supplementary report, the IEs set out the conventions they had used in their level definitions:

‘At Level A

“Very high” dexterity/coordination would be such as would be required for multi-limb manipulation, or fine calibration of, delicate equipment.”

“Lengthy” formal training meaning at least two weeks specialist, dedicated instruction.

At Level B

“High” dexterity/coordination would be such as would be required for multi-limb manipulation, or manual adjustment of, machinery or vehicles.’

(They also made an important statement in relation to the modifier, as we set out in paragraph 1887 below.)

1875. The Leigh Day experts asked the IEs what sorts of equipment would require “multi-limb manipulation”. In reply, the IEs stated,

“Multi-limb is intended to include any items of machinery or plant requiring the simultaneous, co-ordinated use of at least three limbs, eg forklift trucks”.

1876. As with other factors, we see the IEs trying to make their level definitions as objective as possible. That was a fine endeavour. Just as in previous factors, it had unintended consequences. One of the effects of these conventions and answers was that none of the Asda roles could realistically be assessed into Level A. No roles involved fine calibration of delicate equipment. There was no delicate equipment that required multi-limb manipulation by any Asda worker. (As an aside,

Mr Cooper suggested that no job in the real world would require manipulation of delicate equipment by using the feet. We thought a Cathedral organist might qualify, but it is hard to imagine a job further removed from an Asda supermarket or depot.) The most demanding skill in a store or a warehouse required less than two weeks' formal tuition.

1877. As we have discussed in relation to other factors, this was not necessarily a problem in itself. It illuminated the IEs' thinking about how much more demanding a role would have to be to get from Level B to Level A. But whilst that transparency was helpful, it shone a light on a different problem: that level step was a large one compared to the steps between the lower levels, with the attendant risk of compressing the more demanding jobs into the same level.

1878. Here are some examples.

1878.1. Mr Holt accepted that driving a HRT required a higher level of physical skill than driving a LLOP, though not enough to justify a full level step. Hence Dennis (2) was assessed at B+ and Mr Opelt was assessed at B=. When Mr Opelt's frequency-based modifier was explored with Mr Holt, however, Mr Holt accepted that it was "likely" that Mr Opelt would have been assessed at B+. That left Mr Dennis with nowhere to go. He and Mr Opelt were stuck at the same precise scoring point, despite Mr Holt thinking that Mr Dennis' equipment needed a higher level of skill.

1878.2. The IEs assessed both iterations of Mr Dolan's role in Level B. In his second iteration (the equivalent of Asda iteration (b)), Mr Dolan was a First Aider. This attracted a "plus" modifier. He was assessed at B= for his use of the HRT in Iteration (a). This was inconsistent with Dennis (2) and with the modifier criteria that the IEs said they had applied. We agree with Mr Cooper that the most likely conclusion is that the IEs felt compelled to leave themselves some room to reflect Mr Dolan's first aid skills. This was because Mr Dolan could not achieve Level A.

1878.3. (The IEs also produced some anomalous assessments of Mr Sayeed's role iterations. This does not tell us much about the scheme. The IEs picked out so many different iterations for Mr Sayeed that the likelihood is that they just became confused.)

1879. The Leigh Day experts' report proposed some amendments to the IEs' scheme. Chiefly, the amendments sought to soften the status of indicators such as speed, precision, and formal training, so that they were not determinative of a level, but simply relevant considerations. Or, to put it another way, the amendments meant:

1879.1. that a role holder could achieve a level of skill at each of Levels B, C and D by learning it on the job, without the necessity for formal training; and

1879.2. that a role holder could achieve Level B without necessarily having to work with speed or precision.

1880. The IEs did not object to those amendments in their joint report. Mr Holt in his oral evidence confirmed that they clarified the IEs' scheme without changing the assessments. Later in his oral evidence, however, Mr Holt appeared to row back from this concession. Specifically, he maintained that "lengthy formal training" was a firm requirement before any role could be assessed into Level A.

Interrelation with Knowledge

1881. As they did in the Knowledge factor, the IEs relied on differing means of acquiring the skill as an objective indicator of the demand. This can be seen from the wording of the scheme. Mr Holt confirmed that this was the case, by saying,

“Certainly, if you were doing something complicated and demanding, it’s likely you would take longer to acquire that skill.”

1882. Mr Short asked Mr Holt whether this measure “could give rise to some overlap with Knowledge”. In reply, Mr Holt told us,

“Well, knowledge is something you acquire just by observing people doing something and you don’t necessarily put that knowledge into practical application in manipulating machinery and doing other physical tasks”.

1883. When it was put to him that it was “possible to avoid double-counting with Knowledge in practice”, Mr Holt said that the knowledge of how to do something “didn’t necessarily come into our assessment of physical skills”, clarifying that “one builds up knowledge to be able to use the physical skills, but at no point did we refer to knowledge in assessing physical skills.”

1884. It appeared, therefore, that the IEs thought they could avoid double-counting with Knowledge by assessing tasks learned by practice under Physical Skill, and assessing tasks learned by mere observation under Knowledge.

1885. If that was the watershed between factors, we were unsure which would be the correct factor to assess:

1885.1. product knowledge gained through the first four weeks of supervised work in a replenishment role, or

1885.2. the knowledge of an additional depot activity cemented through back-to-back shifts.

Modifier*Which modifier did the IEs actually use?*

1886. Readers will have noticed that, in the IEs’ original scheme, the criterion for the modifier was the proportion of working time in which the skill was exercised. For convenience, we call this the “frequency-based modifier”.

1887. In their supplementary report, and later in the joint report, the IEs stated that this had been a mistake. According to the IEs, the frequency-based modifier belonged to an earlier, development-phase, version of their scheme and had been accidentally left in place. The modifier they said they had actually applied was:

“moderated + or – for the cumulative requirement of particular dexterity, sensory perception and pace of operation.”

1888. This new modifier, which we call the “cumulative requirement modifier”, was supplemented by a convention, which read as follows:

“For moderation +/-

Jobs with all three requirements of particular dexterity, sensory perception and pace of operation are likely to merit a '+'. Those with just one, a '-'."

1889. This correction did not affect the individual assessments; nor would it, because the IEs were saying that they had applied the cumulative requirement element all along.

1890. Mr Short asked Mr Holt about the application of the modifier for Personal Shopper. This prompted him to make a further correction. He said,

"We didn't replace the percentage time modifier, we added the new one to it. It didn't change any of our assessments. We added the extra line about demands."

1891. In answer to Mr Cooper's questions, Mr Holt repeated that the individual results were the same, whichever modifier definition had been applied. If the criterion for just one of the "plus" modifiers was satisfied, the plus would be awarded.

1892. We saw an example of the IEs' dual gateway approach in operation. It emerged as Mr Holt gave evidence about the IEs' assessments of Checkout and Service Host. Both roles were placed into Level C. Checkout was given a "plus" modifier. According to the IEs' rationale, this was because:

"...speed of operation...physical dexterity...and sensory perception (eg to detect possible intoxication) are required."

1893. In his oral evidence, Mr Holt told us that, in fact, the real reason for Ms Ashton's modifier was that she spent more than 75% of her time doing the task (that is, operating the checkout) that required these skills.

1894. Service Host was assessed at Level C=. The part of Ms Billings' role that satisfied the Level C definition was her operation of the checkout. There is no evidence that the IEs considered whether there was any particular requirement for dexterity, sensory perception, or pace of operation in relation to Ms Billings' role. Mr Holt could not think of any examples of such considerations having been taken into account. We agree with Mr Cooper that the most natural explanation is that the IEs thought that Ms Billings did not spend 75% of her role on the checkout. Putting the two assessments side by side, Checkout qualified for a "plus" via one or both gateways, whereas Service Host did not get in through either gateway.

1895. It was not clear what the IEs thought would happen if the criteria for just one of the minus modifiers was satisfied. Mr Holt thought that this was an academic question. In his words, "I don't know of any case where they only did one of three possible things. It never occurred."

The cumulative requirements modifier

1896. Mr Holt gave oral evidence about how the IEs intended the cumulative requirements modifier to work. This new criterion contained three strands: dexterity, sensory perception and pace of operation. In order to satisfy the dexterity strand, the role holder would need a greater degree of motor skill than what would normally be required for the level. Likewise for the other two strands: some extra sensory awareness or faster pace of work was required.

1897. This explanation, on the face of it, would mean that a role-holder would be given a minus modifier if they met the level definition in full and exceeded it in

relation to one strand. Mr Holt told us that this was not what he intended the modifier to do.

The frequency-based modifier

1898. The frequency-based modifier proved difficult to apply in practice.

1899. As with Training & Mentoring, it was not always clear how the IEs had measured the frequency with which a role holder did something. For example, the IEs assessed Personal Shopper at Level D=. Leigh Day were not happy with that assessment. They questioned the IEs in writing about why they had not given Ms Hills a “plus” modifier. In particular, they put it to the IEs that Ms Hills would need as much spatial awareness to manoeuvre a multi-order pick trolley as a colleague would need when manoeuvring a roll cage. The IEs disagreed. They added,

“There was no evidence that she used the picking trolley or any other equipment that required physical skills for more than 75% of the time to justify a + modifier.”

1900. In one sense, the IEs were right about that. Ms Hills’ job description does not say how many seconds she spent on each component of her picking activities. But the same could be said of all the job descriptions. Mr Opelt, for example, was getting on and off his LLOP for most of every shift. We do not know how many seconds he spent driving between pick slots or how many seconds he spent at each pick slot. We do not know how many seconds Ms Ashton waited between scans whilst a customer paid for their groceries and finished packing their shopping. Applying the IEs’ logic, there would be insufficient facts on which to award the plus modifier to anyone. In fairness, when it was put to Mr Holt that Ms Hills had to push her picking trolley around for the entirety of her shift, and thus merited a “plus”, Mr Holt accepted that this was a “valid point”.

1901. This revision of the modifier had knock-on effects. It resulted in less demanding roles scoring more highly than equivalently demanding roles and even more demanding ones. Mr Ballard, for example, was assessed at B= for driving a CBT 10-20% of the time. Mr Ballard drove other mechanised handling equipment on shifts when he was not driving a CBT. Mr Holt accepted that the level of physical skill needed to drive a CBT was somewhere between the skill level for a LLOP and for a HRT. When pressed, he told us that CBT driving was nearer to HRT driving than LLOP driving. Mr Ballard was assessed at B=. Mr Hore was assessed at B- for driving a LLOP, a Power Pallet Truck and a Beast. Mr Uchanski (in Iteration 2) drove a LLOP for 80% of his time and was given a minus modifier. Yet Mr Opelt would (likely) be assessed at B+ for driving a LLOP all of the time.

1902. The modifier was applied inconsistently to the HRT drivers. Dennis (2) was awarded a “plus”, whereas Uchanski (4) was not.

1903. Putting aside difficulties of measurement, and application, the frequency-based modifier ran up against a more conceptual problem. The agreed position of the party-instructed experts was that the distinguishing feature of the demand was the level, or degree, of skill required for the role. When asked by Mr Cooper about Ms Hills, Mr Holt accepted that the modifier was intended to reflect “a higher level of skill, not just doing a skill more.” Yet the IEs struggled to explain how a task requires a more demanding level of skill if it is done more frequently. When Ms Billings was working on the checkout, she needed the same level of skill as Ms

Ashton did. It made no difference that Ms Billings worked on the checkout for a smaller proportion of the time. When that proposition was put to him, Mr Holt agreed with it.

The Leigh Day experts' assessments of Physical Skills

1904. The Leigh Day experts' final position is that the IEs' scheme for Physical Skills is workable, but more easily understood if the wording is amended.

1905. It is worth examining how the Leigh Day experts arrived at that conclusion by reference to some of the issues we have to decide.

Relevance of frequency

1906. We start with the Leigh Day experts' initial appraisal of the IEs' scheme. At that time, the IEs' modifier appeared to be based on frequency of demand. They observed:

"This is clearly a skills factor. It is not usual in conventional job evaluation to give credit for the proportion of time spent using a skill on the grounds that if you need a skill, for example, driving, you need it, even if you are only required to use it infrequently. The level of skill, which is what is being measured, should be the same, whether used for 10, 50 or 90 percent of working time."

1907. The IEs nevertheless carried out their test assessments under the IEs' scheme using the frequency-based modifier. Whilst we accept that they did so "in good faith", as Ms Branney told us, they must have had a sense of resignation that they were working with a modifier that they themselves would not have chosen.

1908. The Leigh Day experts then read the IEs' supplemental report. They learned that the IEs were claiming to have included the frequency-based modifier by mistake. They tried to apply the IEs' cumulative requirements modifier, but did not find it to be workable. They therefore did the best they could with the original frequency-based modifier. Their rationales, for the most part, continued to explain their decisions on their application of the modifier in terms of frequency.

1909. In their joint report, the Leigh Day experts offered a qualified defence of the frequency-based modifier. On the one hand, they reiterated their observation that frequency was not customarily taken into account in a JES, and reiterated the example of a driving job. On the other hand, they added,

"...in relation to the jobs in question, not taking any account of the frequency of the exercise of physical skill risks undervaluing the demand in respect of the majority of the Claimant and Comparator jobs.

...In relation to physical skills that are acquired or developed through doing the work (eg packing or replenishing goods), frequency of use can indicate a higher level of skill".

1910. In her oral evidence, Ms Branney maintained the view that it is permissible to differentiate the demand of physical skills based on the frequency with which they are exercised.

1911. Ms Branney was asked about the apparent contradiction between the Leigh Day experts' opinions about frequency. She sought to reconcile her current view with the Leigh Day experts' initial observation. The apparently contradictory

opinions were explained, first, by the fact that the initial observation was about JES and not equal value assessments. She told us that she had the NJC JES in mind. But, despite a number of attempts, neither Mr Cooper nor our employment judge were able to draw out of Ms Branney any differences between the two types of scheme that could have any bearing on whether frequency was an appropriate measure of demand. Ms Branney's second reason was that the jobs evaluated under the NJC JES had "a mix of different skills". But so do the Asda jobs. In the end, Ms Branney accepted that the distinction "does not carry much weight".

Interrelation with the Knowledge factor

1912. The Leigh Day experts' preliminary appraisal also took issue with the IEs' reliance on "certification of skills". In their opinion, certification of skills would tend to overvalue skills acquired through formal training, at the expense of skills "developed through practice and experience".

1913. They noted that the IEs had assessed the comparator jobs at Level B, and the claimant jobs across Levels B to D. They added:

"This may be a correct spread of assessments, but only if certified physical skills are not also taken into account under Knowledge."

1914. The explanation:

"At all levels it is the nature of the skill plus requirements for precision and/or speed which should predominate, not "how knowledge [of physical skills]" is obtained (which is included in the Knowledge factor definition). The nature of the acquisition may be an indicator of the level of skill but should not be a barrier to the level".

1915. We agree with this opinion and go further. If certified physical skills should not be taken into account under Knowledge, nor should physical skills developed through practice and experience. As we have explained, the Knowledge demand stems from the demand of acquiring the knowledge. There was little discernible difference in demand stemming from the effort of sitting the test at the end of it.

1916. The Leigh Day experts' assessments echo this view. Mr Devenney was separately assessed for his probationary period iteration. He was given a lower score for physical skill than in the iteration where he had completed his probation. The lower score was reflected through the use of the modifier, but that was inconsistent with any of the modifier criteria. Ms Branney explained the rationale in her oral evidence:

"I agree it's not actually covered by this modifier; we considered that as he worked solely on stock pick for that 12 weeks, his skill level – and he was learning a job, albeit he met the productivity target in that time..."

1917. The Leigh Day experts appear, therefore, to have thought it relevant that Mr Devenney's physical skill requirements were slightly less demanding during his probationary period because he was still learning the job.

Modifier

1918. The Leigh Day experts tried to apply the IEs' cumulative requirements modifier. For example, they applied it in their rationale for assessing Mr Han. By the time they had completed their test assessments, they abandoned it. The cumulative

requirements modifier was not even used as one of two gateways, as the IEs said they had used theirs. Instead, they reverted to the frequency-based modifier.

1919. Thus, Ms Billings and Ms Ashton received the same respective assessments as had been given to them by the IEs.

1920. Unfortunately, the Leigh Day experts did not retrofit their test assessments to accommodate the change in modifier criterion. At any rate, they did not do so whilst preparing their report. Where, for example, Mr Han had been given a “plus” for the cumulative requirements modifier, the Leigh Day experts did not revisit it to see if Mr Han met the criterion for the frequency-based modifier. As a matter of fact, he was not eligible. He did not drive mechanised handling equipment for 75% of the time. (In fairness, at the start of her oral evidence, Ms Branney told us that the Leigh Day experts had reassessed Mr Han at B=.) Mr Devenney was given a “minus” modifier for Iteration (2), despite all his activities being LLOP based. The Leigh Day experts’ rationale was based on considerations other than frequency.

1921. Anomalies were also generated where depot workers spent some of their time driving at a higher skill level and the rest of their time driving at a lower skill level. For example:

1921.1. Mr Ballard’s role was assessed at B=. Ms Branney told us that he achieved Level B on the basis of all the mechanised handling equipment he drove generally. For the purpose of the modifier, Mr Ballard was considered to be using mechanised handling equipment (in general) for between 25 and 75% of his time. The fact that this equipment included a CBT did not register.

1921.2. Likewise, Dennis (2) was assessed at B+, with the “plus” modifier being applied to reflect Mr Dennis’ frequent use of mechanised handling equipment. As we know, for 60% of Iteration (2), Mr Dennis regularly drove a HRT. Ms Branney agreed that HRT driving required a higher degree of skill than a LLOP or Power Pallet Truck (although she disagreed that the difference was worth a full level step). But there was no way that the Leigh Day experts’ scheme could even shade that increased level of demand.

The Asda experts’ scheme for Physical Skills

1922. The Asda experts devised their own scheme for assessing Physical Skills. They introduced it in this way:

“This factor measures the demands arising from the requirements for motor and sensory skills.

1923. The words, “requirements” and “required” followed repeatedly through the scheme. We return to what the Asda experts thought this meant.

1924. It can be seen that, as with the other experts, the Asda experts recognised both motor skills and sensory skills. Each was accordingly treated as a separate Element.

1925. The narrative continued,

“To avoid double counting with the Knowledge factor this factor captures the demands of exercising the skills as opposed to the demand of obtaining and retaining knowledge and practical know-how with regard to processes and equipment.”

1926. Ms Waller gave oral evidence about the overlap between Physical Skills and Knowledge. We were not sure exactly what her position was. In answer to one of Mr Short’s questions, she appeared to be saying that the demand of acquiring a physical skill ought to be assessed under Knowledge. That appeared to us to be different from the evidence she gave about the level definitions for Physical Skills. She was asked whether level definitions should include the training needed to acquire the requisite level of skill. She accepted that both training and on-the-job learning were “an indicator” of demand, although they were not “a prime determinant”.

1927. In our discussion, we return to the question of whether the Asda experts really did avoid double counting with Knowledge.

1928. In the Asda experts’ view, the distinguishing features of the demand were:

“In relation to the Motor Skills element: The extent or difficulty of additional skills required and the degree of speed and precision. (For this factor, we do think that there is a close relationship between the need for precision, coupled with any requirement to do so with speed, and the difficulty of exercising the skill involved to meet those requirements, so it is appropriate to reflect this in the level definitions.)

In relation to the Sensory Skills element – The degree or difficulty of the skills required.”

1929. So, for Motor Skills, the Asda experts took into account the degree of speed and precision with which the jobholder was *required* to work. The relevance of speed and precision appeared to be that it increased “the difficulty of exercising the skill”.

1930. Having identified the distinguishing features of physical skill, the Asda experts developed the following level definitions:

Level	E	D	C	B	A
Motor Skills	No additional motor skills above those used in general life.	Required to apply some additional motor skills with precision.	Required to apply more developed motor skills with speed, and precision.	Required to apply advanced motor skills, with speed, and precision.	
Sensory	Requires normal everyday sensory and spatial skills.	Requires some additional sensory and/or spatial skills.	Requires the application of more developed sensory and/or spatial skills.	Requires advanced sensory and spatial skills.	

1931. These definitions were supplemented by the following conventions:

“The terms additional, developed, and advanced are intended to capture escalating degrees of difficulty over and above everyday skills. Examples which we have identified in the course of our testing and moderating of assessments which we regard as helpful indicators for maintaining consistency are:

- (a) High Reach Truck requires advanced motor skills because it involves difficult hand-eye coordination, fine motor skills and the added difficulty of operating at height and distance via a display screen
- (b) Loading requires advanced spatial skills in order to visualise and assess the best way to fit multiple differently shaped containers into the space available in different types of trailers
- (c) Use of a LLOP requires developed motor skills because it involves difficult hand-eye coordination to manoeuvre the vehicle and the forks in often confined spaces.
- (d) Examples of additional motor skills which are over and above everyday life, but which do not reach the level of developed are efficient scanning on checkouts, the assembly of mannequins, or replenishing particularly small / fragile items.

The reference to everyday at Level E is again intended to capture the degree of difficulty. The task being performed may not be one that is done in everyday life but what we are assessing is if the level of skill is commensurate with that used by the vast majority of people in everyday life so that the task could be undertaken by most people without having to develop any additional skill."

"Additional skill" and "developed skill"

1932. The logic that underpinned the scheme was that a "developed skill" was a subset of the "additional" skills that people could not be expected to have in everyday life. There was no point in assessing the developed skills that everyone had. Tying shoelaces would be a developed skill, in the sense that required complex hand-eye coordination, but virtually everyone learns to do it in childhood.

1933. The use of this concept nonetheless required some care. As Mr Short pointed out, a large proportion of the adult population is able to drive a car. Little additional skill was needed to drive a LLOP. Had the Relevant Period begun 10 years later, we might have taken a similar view of the additional skills needed to operate a Telxon or Palm Pilot, in the days where almost everybody uses a smart-phone.

"Advanced spatial skills"

1934. The Asda experts gave us a helpful convention to explain what sorts of tasks would require "advanced spatial skills". They made no secret that such tasks included Loading. They did not try to formulate a convention for spatial skills that were not advanced. It would have been interesting to see one. We have already identified what spatial awareness Mr Dennis needed to have.

1935. Mr Dennis also had to use his spatial awareness when making decisions, of course. As he imagined what two pallets looked like across the width of a trailer, he had to apply that awareness to his decisions about whether the configuration would exceed the maximum weight across axles, and the order in which containers would have to be unloaded at their destination. His need to take these considerations into account is already fully assessed as adding to the complexity of the decisions he had to make. At one point, Ms Waller told us that she thought Mr Dennis needed to use his sensory skills to judge the weight of a container. She retracted that opinion when asked which sensory skill would have helped him to do that.

Warehouse

1936. Ms Hutcheson was initially assessed at Level C, but upgraded to Level B at the start of Ms Waller's evidence. The Asda experts realistically had no choice but to make that concession. It took the same level of skill to drive a forklift truck as a CBT.

Physical Skills - DiscussionWhat is the demand?

1937. Our starting point, as with other factors, was to consider what demand this factor is supposed to be measuring. The experts all say it is the "exercise" of skill. That could mean two things:

- 1937.1. Having the skill. That is to say, the demand is the skill that a jobholder needs use in order to be competent in the role; or
- 1937.2. Using the skill, which is to say the demand is only engaged whilst the role-holder is actually exercising the skill to perform a task.

The Asda experts

1938. Our understanding of Ms Waller's evidence is that she actually understood the Physical Skills demand to fit into the first category: having the skill. What is being assessed is the skill that the role holder needs to have in order to do their role competently. Thus, in answer to a question from Mr Short, Ms Waller said,

"I think the primary differentiator is the requirement to have the skill as long as you are required – if you are not required to use it at all, then of course that's different".

1939. It is possible that Ms Waller meant to draw a distinction between having the skill (on the one hand) and exercising the skill (on the other). When Mr Short was asking her questions about Knowledge, he asked her about the training that Warehouse Colleagues such as Mr Dennis received when learning how to drive a HRT. Ms Waller agreed with Mr Short that "some of the week's training is practising and honing your skills, your ability to use the control[s]" and that this part of the training was "counted under Knowledge, rather than Physical Skills". Ms Waller added,

"Yes, because I think it's a different demand. The demand of learning how to do it is different from the demand of actually operating it in the job."

1940. Mr Cooper also sought to draw such a distinction. In his final submissions, he argued that the demand was the use of the skill in the course of each day, "or at least the potential for being required to exercise that skill in the course of [the jobholder's] work, as and when it arises."

1941. We cannot see how that demand is different from the demand of having the skill in the first place. This is for five reasons:

- 1941.1. First, there is no point in assessing the demand of having a skill, such as the ability to play a musical instrument, that Asda never expects a colleague to use in their role. It would not be a demand of the work. Ms Waller accepted this point in answer to a differently-phrased question

from Mr Short. So, by definition, the demand of having any skill will be a demand of being ready to use that skill in the workplace at least once.

- 1941.2. Second, the Asda experts consider it to be irrelevant how frequently a role-holder has to exercise the skill. But if the demand is driven by using the skill, rather than having it, we do not understand why the Asda experts would not want to measure how much the skill was used.
- 1941.3. Third, the concept of having the skill (as opposed to using it) is mirrored in the wording of the Asda experts' scheme. The Motor Skills Element concentrates on the degree of skill that the role holder is "required to apply". The Sensory Element makes no mention of the exercise of the skill at all.
- 1941.4. Fourth, this understanding of the demand is the one that is most consistent with the Asda experts' individual assessments. For example, when assessing Customer Service Desk, Chilled, Produce and Service Host (amongst others) the Asda experts made no mention of using any skill, just the skill that the jobholder "required".
- 1941.5. Fifth, our understanding of the demand is consistent with how it is understood in at least one large JES. The NHS Handbook's Physical Skills factor scheme expressly invites consideration of the training needed to acquire the skill as a determinant of the level of skill required for the role.

The Leigh Day experts

1942. The claimants argue that the Physical Skills factor should measure the use of a skill, and not just having the skill in the first place. They are driven to that position by the logic of their defence of the frequency-based modifier. Their defence of that modifier is expressed through their test assessments, the joint report, and Ms Branney's oral evidence.
1943. The reliability of the Leigh Day experts' opinion is undermined, in our view, by their initial views about the relevance of frequency. It was significant in their view that Physical Skills was a "skills" factor. Their example of a driving-based job was a good one. The physical skill demand of a driving-based job is the ability to drive.
1944. The Leigh Day experts were quite properly concerned to avoid overvaluing skills acquired through formal training (such as the LLOP course) and undervaluing the demands of skills acquired through on-the-job training and work experience. But that does not mean that the demand was driven by how much the jobholder used their skills. All they were saying was that the amount of practice a jobholder had at a task was an indicator of the *level* of skill required for it.
1945. We also find it hard to fit the Leigh Day experts' current position into the scheme as a whole. It is difficult to understand what demand is engaged by actually using the skill that is not being separately assessed under Mental Demands, Physical Demands and (in the case of Loading) Problem Solving and Decision Making.

The IEs

1946. The IEs believed that they were assessing the demand of "the jobholder's *need* to exercise particular manual skills or dexterity" (our italics). To our minds, this

suggests that they thought that demand was driven by having the skill in the first place. That understanding is consistent with their reliance on the amount of training required to develop the skill. It is, of course, inconsistent with the IEs' use of the frequency modifier. But, to use the Biblical phrase, they disowned the frequency-based modifier three times: first in the supplemental report, second in the joint report, and for a third time when Mr Holt gave oral evidence about the respective Physical Skills demands of Checkout and Service Host.

Speed and precision

1947. The experts all regard it as relevant to consider the speed and precision with which certain tasks had to be carried out, as an indicator of the skill required of the role holder. In our view, this is consistent with a factor that measures having the skill, as opposed to the demand of using it on any occasion. The faster a skilled task is expected to be carried out, such as driving a LLOP, or passing delicate items across a checkout, the greater the degree of skill that the role holder will need in order to do it competently.

1948. Whilst exercising the skill, the speed of the work will also drive up the demand. The role holder has to concentrate harder, and may have to put in more physical effort. These demands are assessed separately.

Frequency-based modifier

1949. The IEs' scheme and the Leigh Day experts' scheme award more points for skills that are exercised more frequently.

1950. It follows from our characterisation of the demand that it is irrelevant how frequently the role holder has to exercise it. All the role holder has to do is have the skill. The demand is therefore better measured without a frequency-based modifier.

Double-counting with Knowledge

1951. There is a further consequence to our finding about the nature of the demand. The demand of acquiring the physical skill should not be separately assessed under the Knowledge factor. Otherwise, the same demand will be counted twice.

Choice of scheme

1952. We prefer the basic framework of the Asda scheme for physical skills. This is because:

1952.1. Correctly in our view, the Asda experts' scheme disregards frequency of demand; and

1952.2. The IEs' scheme is dependent on the modifier which is hard to apply.

Relativities

1953. We agree with the Asda experts that the highest levels of physical skill are found amongst jobholders who drove HRTs and CBTs. This is two level steps higher than the roles for which the most skilled activity was the checkout.

1954. Where we disagree with the Asda experts is on the relative position of the Loaders. We do not accept that loading requires physical skill at the same level as HRT driving. The Asda experts double-counted the spatial skills needed to plan a

load, when these skills had already been assessed under Problem-solving and Decision-making. Loading did, however, require additional physical skill beyond what was needed to drive a LLOP, because of the confined spaces in which loaders were required to operate. We regard the skill level required for loading as being broadly the same as for Rear Tipping, using a Power Pallet Truck, or De-Kit, using a Beast.

1955. The party-instructed experts agreed that LLOP driving demanded a higher level of skill than operating a checkout or maintaining a Bakery L-sealer. We do not interfere, but we assess this relativity as marginal. The controls for a LLOP were simple. The LLOP moved along wide lanes at roughly double walking speed. Spatial awareness was needed to turn corners, but this was within a wide space. The level of skill needed for these kinds of manoeuvres was only marginally higher than what was needed to re-wire a piece of electrical equipment or dress a mannequin.

1956. The skills required for pedestrian activities such as Pick By Line did not add to the overall physical skills demands of any of the roles. Although the Pick By Line grids could be busy, they were no busier than a supermarket aisle. We did not think there was a high level of skill required to move a hand-pump truck around those grids.

1957. In our view, the Asda experts assessed the store-based roles broadly accurately relative to each other. Counters, in our view, was undervalued. Mrs Webster needed to have physical skills at a similar level to the operators of the more sophisticated equipment in the depots.

Physical Skills scores

1958. Here, then, are our scores for the roles by reference to the Physical Skills factor.

Level	Store roles	Depot roles	Points
B	Counters, Warehouse	Ballard (a) and (b), Beaumont (b) and (c), Dennis (d), Dolan (a) and (b), Haigh (a) and (c), McDonough, Morris (a) and (b), Sayeed (b), Uchanski (b)	40
C		Beaumont (a), Dennis (c), Haigh (b) and (d), Han (b), Hore, Makin (a) and (b), Matthews, Prescott, Sayeed (a)	30
Marginal C		Dennis (a) and (b), Devenney, Han (a), Opelt, Uchanski (a), Welch	30
D	Bakery, Checkout, Edible Grocery, George, Home & Leisure (a) and (b), Process, Produce, Section Leader, Service Host (a) and (b)		20

E	Chilled, Customer Service Desk, Personal Shopper		10
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Chapter Thirteen - Physical Demands

1959. The next factor is Physical Demands.

Issues relating to Physical Demands

1960. Everyone agreed that physical demands should be assessed by a separate factor.

1961. The experts used subtly different wording to describe the demand, but they all agree, in substance, that it is captured by the amount of physical exertion, or, to put it another way, the drain on the jobholder's physical endurance.

1962. Physical exertion is required when applying force to something. Often the force is used to move an object, whether by pushing, pulling, lifting or carrying it. At other times, no external object is involved, yet force is still used. The experts all recognise that it is also a drain on endurance for a person to support their own bodyweight by standing, or crouching. Likewise, it takes effort to move one's body by walking or reaching. Where these efforts are combined (for example by walking with a case of stock, or pushing a roll cage) the demand is likely to increase. More endurance is required to do these things in an awkward position, for example, when reaching down to a low shelf or pick slot.

1963. It is agreed that, as a matter of law, we must assess the physical demands of the roles without any reference to the actual physical strength or stamina of the individual job-holders, or how tired they actually felt at the end of a day's work. The assessment is objective.

1964. The party-instructed experts agree that, other things being equal,

- 1964.1. the longer a jobholder has to sustain a physical effort at any one time, the more demanding it will be;
- 1964.2. the more frequent repetitions of that effort during the course of a shift, the more demanding it will be;
- 1964.3. the more force the role holder has to apply, the more demanding it will be; and
- 1964.4. the greater the recovery time in between the application of physical effort, the less demanding it will be.

1965. A more vexed question is whether any of these considerations are weightier than others. Is it, for example, more demanding to work one intensely-physical shift every two weeks than it is to work several moderately-physical shifts back-to-back? Mr Cooper argues that it is. He contrasts the demand of a running a marathon every two weeks with the demand of running two miles every day. Mr Holt would not be drawn on that question.

1966. At the start of the hearing, it appeared that there might be another dispute of principle. The dispute related to the Asda experts' use of Elements to distinguish

between different types of physical demand. Was it acceptable in principle to assess one element over a different number of levels than another?

1967. The IEs made their position clear in the joint report. They said:

“Having two elements in a factor creates an uneven foundation for assessment. The differences in the 5 levels of the effort element are marginal, while the movement element is compressed.”

1968. A closer look at the three schemes revealed that there was actually less of a dispute than first appeared. Nobody really thought there should be five levels to assess the differing demands of a jobholder supporting their own bodyweight. All three schemes reserved Level A for roles with sustained or ongoing requirements for lifting, pulling or pushing. Posture, or body movements such as walking, bending or stretching, could not get any role above Level B in any of the three schemes. The Leigh Day experts went one step further. In their revised assessments, they recognised that some roles involving ongoing heavy lifting had greater demand than the most demanding roles that did not have this feature.

1969. The real point of disagreement, it appeared to us, was about *how many* additional levels should be reserved for lifting, pushing and pulling. Should it be one or two? Viewed in that way, the IEs' comments still had relevance. We had to examine whether the demands of movement and posture were being unfairly compressed, or the demands of applying force to objects were being unfairly stretched.

Relativities

1970. There was significant disagreement between the experts about the spread of demands across the levels.

1971. By the time we began to hear oral evidence about Physical Demands, the gap between the party-instructed experts had narrowed somewhat due to some late revisions by the Leigh Day experts to their assessments. In particular:

- 1971.1. It was common ground that all the comparator roles were more demanding than the most demanding store-based roles (with the possible exception of Mr Makin, whom the Leigh Day experts did not assess).
- 1971.2. There was one whole level step up from Checkout to Chilled, Produce, and Warehouse (although the party-instructed experts disagreed about where to place these roles relative to the other roles).
- 1971.3. There was one whole level step from Section Leader to Edible Grocery, Personal Shopper and Service Host.
- 1971.4. Chilled, Produce and Warehouse were more demanding than Edible Grocery, Produce and Service Host (but the Asda experts thought that the gap was wider than the Leigh Day experts thought it was).
- 1971.5. There was a further level step up from (on the one hand) Edible Grocery, Personal Shopper and Service Host to (on the other hand) the roles of Mr Dennis, Mr Hore, Mr Opelt, Mr Uchanski and Mr Devenney.

1972. The dispute about relativities boils down to the number of levels of physical demand there really were amongst these jobs. The IEs say it was two levels (plus a modifier), Leigh Day say three, Asda say four.

Facts relevant to Physical Demands

1973. As usual, we set out some of the facts of the jobs that informed the competing assessments.

Personal Shopper

1974. Ms Hills spent her whole shift pushing a trolley and picking individual items.

1975. Until 2012, she walked to and from the warehouse 20-30 times per shift in order to collect new totes. After that, she was able to collect empty totes from the front of house area.

1976. Ms Hills' job description tells us about the weights of items for sale in the Brighton store. The average weight of a single item was 720g. 5% of items weighed over 7kg. There were 10 products in the whole of the store that weighed over 15kg.

1977. We are not told what Ms Ashton's pick rate was, or how many items Ms Ashton handled during an hour.

1978. The multi-order pick trolley weighed 20kg when empty and up to 170kg when full. Its average weight during the course of a pick run was therefore no more than 95kg.

Checkout

1979. Ms Ashton's role involved moving objects on a constant basis. She was able to slide products without having to lift them, having learned the most efficient technique for doing so, but she had to turn items over if necessary to ensure that the barcode was facing towards the scanner.

1980. It is safe to assume that the profile of items that Ms Ashton was scanning in Accrington broadly matched the items that Ms Hills was picking in Brighton.

1981. Under the heading of Responsibility for Assets, we have recorded our calculation that Ms Ashton physically moved the equivalent of 1.5 cases of stock per minute. Her scan speed target was 19.1 items per minute (rising to 19.4 items). At an average unit weight of 720g (as it was in the Brighton store), Ms Ashton typically scanned 13.86 kg per minute, or 831 kg per hour. Over an 8-hour Monday shift, with breaks, Ms Ashton was physically moving over 5,000 kg of stock. A 30-hour week would involve nearly 25,000 kg.

1982. Once per week, Ms Ashton lifted and manoeuvred a large bag of pet food with a weight range of 2kg to 17kg. Up to 30 times per shift, she handled multi-pack bottled or canned drinks, soft drinks or boxes of beer up to 10kg in weight. She was trained to ask a customer to leave large, heavy items in their trolley. If an item was left in a trolley, she would stand to scan those items with her hand-held scanner.

1983. Ms Ashton's workstation was designed to enable her to operate the checkout from a seated position. She stood up briefly if necessary. The sorts of operations that were more easily done standing included:

- 1983.1. Helping a customer to pack their shopping;
- 1983.2. Scanning or de-tagging a bulky item.
- 1984. The floor by the checkout was fitted with an anti-fatigue mat. This lessened the physical effort involved in standing, if standing were needed.

Edible Grocery

- 1985. Ms Forrester spent most of her time on the shop floor, moving stock from containers onto the shelves. This took several hours on every shift. Some items Ms Forrester replenished one-by-one. Other replenishment tasks involved moving a case at a time. For most of the Relevant Period, Ms Forrester's cases weighed on average between 2 and 5 kg. When Ms Forrester worked on the biscuit aisles (for about 18 months), the products were typically smaller and lighter, but there were more of them to replenish. In Health and Beauty, Ms Forrester replenished some cases of an average weight of 4-6 kg, as well as individual items. We do not know the breakdown as between cases and single units.

Chilled

- 1986. Ms Ohlsson spent virtually the whole shift on her feet. She did not have the option of sitting down unless she was on her break.
- 1987. Regularly, Ms Ohlsson's shift began by breaking down and replenishing stock that had been left over from the night shift. This would take up to an hour. Her job description describes the amount of left-over stock as "small".
- 1988. When breaking down, Ms Ohlsson moved chilled products, one case at a time. She picked them from the roll cage that had been left over, and sorted them into different roll cages for different aisles. Cases typically weighed between 15 and 20 kg.
- 1989. Ms Ohlsson was asked to help deal with overspill deliveries, which involved moving 10-15 roll cages of stock as part of a team. This only happened about six times per year.
- 1990. Ms Ohlsson replenished the milk stock every one to two hours. Milk was transported onto the shop floor from the back-ups using a Milk Roll-in Unit. When fully loaded, the Roll-in Unit weighed up to 200kg.
- 1991. Other chilled stock was moved around the back-ups, or into the shop floor, using a roll cage or a smaller flat-bed trolley. A fully-laden roll cage could weigh up to 450kg. Ms Ohlsson had to lean her full bodyweight against the roll cage to get it moving. We do not know how many times during a shift Ms Ohlsson had to move full roll cages. We do know that Ms Ohlsson had to move to and from the back ups at least every 20 minutes in order to comply with Challenge 20. We also know that Ms Ohlsson was permitted to bring roll cages onto the shop floor for the first three hours of her shift, between the hours of 6am and 9am.
- 1992. When replenishing shelves, Ms Ohlsson worked in positions of varying height and comfort. For about 30 minutes cumulatively during a shift, Ms Ohlsson had to kneel down and bend into the base shelf.
- 1993. The weights she handled ranged from small individual items to bulk units of retail-ready packaging. Mostly, Ms Ohlsson handled individual items which

weighed between 200g and 1 kg. Retail-ready boxes of spreads typically weighed 6kg each.

1994. Ms Ohlsson was trained to seek help if needed, and not to attempt lifts that were outside her physical capabilities.

Produce

1995. Produce was another standing role, with no opportunity for sitting outside break times. Mrs Wilby moved between the produce department and the warehouse about 50 times per day.

1996. Up to once per week, Mrs Wilby's working day began with breaking down stock left by the night shift. If it happened, it was on a Monday morning, when Mrs Wilby began her shift at 7am. She had colleagues to help her. Together, they sorted pallets or roll cages of stock and moved them, a case or a tray at a time, into receptacle containers. We do not know how much stock they moved, but we know that the task had to be complete by 9am.

1997. Fruit and vegetables were typically heavy. A tray of potatoes, carrots or onions weighed approximately 17kg. They were displayed in Bulk Display Units, which could weigh up to 200kg when they arrived in store. A Bulk Display Unit was typically 1.2 metres deep. Mrs Wilby had to reach into the unit to remove bags of produce (such as sacks of potatoes). She had to sustain physical effort to replenish layered bags of produce into the unit.

1998. Mrs Wilby used hand-pump trucks to move pallets around the back-ups. On the shop floor, she generally used a roll cage or a dolly. The average weight of a full roll cage was 350kg, but it could weigh up to 450kg. Mrs Wilby leaned her full body weight into the roll cage to get it moving or to bring it to a stop.

1999. Once per week, Mrs Wilby moved trolleys of houseplants along the length of the store.

2000. Replenishing the lower shelves required Mrs Wilby to bend down or kneel. She stretched upwards to reach the higher shelves or the backs of shelves. Trays of heavy produce were generally displayed on a shelf above a dolly unit. Mrs Wilby had to reach over the dolly unit below and push the tray of produce onto the shelf above.

2001. Replenishing the dolly unit generally involved bending or crouching to build up a stack of three trays.

Home & Leisure

2002. Ms Darville spent her shift on her feet, sitting down only during breaks. She walked to and from the warehouse about 15 to 20 times per shift. She frequently had to reach up to the top-stocking shelves and reach across those shelves. She replenished stock on the base shelves, requiring her to bend or kneel.

2003. The home and leisure products varied greatly in weight, from individual toys and cushions to boxes of garden furniture and dinner sets.

2004. On about 16 occasions per year, Ms Darville was asked to help "split down" a delivery of pallets into cages that could be more easily pushed around the shop floor. This lasted up to four hours and involved repeatedly moving bulky items by hand.

2005. At a similar level of frequency, Ms Darville rolled and lifted a helium cylinder onto a platform for transportation onto the shop floor. The helium cylinder weighed about 30kg when full. She usually had assistance, but occasionally did the task on her own.

2006. About two or three times per week, Ms Darville helped a customer to lift a heavy item (such as a 27kg bag of compost) into their trolley. With similar regularity, she helped to lift heavy items into a customer's car.

Process

2007. Mrs Trickett's core role involved scanning items, rather than physically moving them. She repeatedly bent down or knelt so that she could scan items on the base shelves. She stretched to reach stock on the higher shelves, including the top-stocking shelf from 2013 onwards.

2008. She spent her shift on her feet, walking around the store and to and from the warehouse. The Rawtenstall store was a split-level store with a two-storey shop floor and a 3-storey warehouse. Mrs Trickett frequently moved between levels.

2009. At the start of her shift, Mrs Trickett assisted with replenishment from deliveries that had been received overnight. This was required about two or three times per week. When it did happen, it lasted between 30 minutes and two hours. She used a replenishment trolley to move stock around the shop floor. She physically lifted individual items and cases to put them onto the shelves.

George

2010. Mrs O'Donovan was on her feet for the duration of a shift. As with the other replenishment roles, she walked regularly between the shop floor and the warehouse. On average she walked 10,000 steps per shift. The clothing displays required her to bend and stretch regularly in order to hang out clothes.

2011. She pushed clothing rails, but did not have to push heavy containers as her food replenishment colleagues did.

Bakery

2012. Mrs Gardner had a standing role. For the majority of her shift, she was bending, lifting, reaching, or pushing and pulling a container. She had to reach up to racking at a height of nearly two metres in order to retrieve trays and cooling wires, which she then set down on a worktop.

2013. For about a third of her shift, Mrs Gardner was replenishing on the shop floor. When replenishing, Mrs Gardner handled mainly light bakery goods. She retrieved heavier items every other shift. They included boxes of grated cheese, which weighed 12 to 15 kg, and bags of yeast. On average, she spent up to 30 minutes per shift retrieving the heavier items for bakers.

2014. Wrapping rolls and other fresh-baked items involved repeated movement of the L-Sealer arm – over 100 times per shift. She had to replace the rolls of L-Sealer wrapping, which weighed 13 to 14kg.

2015. Occasionally, Mrs Gardner helped to move promotional tables from the bakery onto the shop floor. These were wheeled but could be difficult to be manoeuvre when laden.

2016. About ten times per day, Mrs Gardner walked around the bakery department, or sometimes to another department, in order to show a customer where to find an item.

Customer Service Desk

2017. Mrs Fearn generally took up a static standing position behind the desk. She did not have to bend or stretch to the extent that her replenishment colleagues did. Between 10 and 30 times per day, Mrs Fearn handled items that customers were returning to store. Some of those items, such as televisions, could weigh up to 30kg. Assistance was available if Mrs Fearn needed it.

2018. Generally, if items were returned, it was not Mrs Fearn's role to put it back on the shelves. Mrs Fearn called a Service Host, or a colleague from the relevant department. If they were not available to assist immediately, Mrs Fearn sometimes waited for a quiet period and took the items back herself. If an item was heavy, she used a trolley.

2019. Mrs Fearn regularly helped her Kiosk colleagues to bring boxes of tobacco products behind the counter. We are not told their weight, but Mrs Fearn's job description says that they were large and there was not much room to move them about.

Section Leader

2020. Section Leader spent one third of her time in the office. Most of the rest of the time she spent walking around the shop floor.

Service Host

2021. Ms Billings spent her shift standing and walking. She had less bending, stretching, pushing and pulling than her replenishment colleagues. She assisted customers by finding products for them, up to "several times" per hour. We take the weight profile of those items to be the same as at Ms Hills' Brighton store. Sometimes she helped customers to pack their shopping.

2022. Ms Billings regularly collected baskets through the shift. Each day she collected trolleys, pushing up to six trolleys at a time. When doing the change run (at least once a day), it took physical effort for her to push the Cash Trolley around the checkout area of the store.

2023. When working on the checkout, Ms Billings had to put in the same level of physical effort that Ms Ashton did.

2024. Once per month, Ms Billings collected empty SodaStream cylinders from the checkouts, put them into a trolley, and took them to the relevant area of the warehouse for processing.

Opelt

2025. Mr Opelt worked three 8-hour shifts per week on Large Case Pick and Manual Store Pick.

2026. The productivity target for Large Case Pick ranged from 83.3 to 168.4 cases per hour. (The target varied over time and also varied according to the floor on which Mr Opelt worked.) The median case weight was 13 kg. This meant that, during the

course of a shift, Mr Opelt carried a cumulative weight of between 8,121 and 16,419 kg per shift.

2027. On Manual Store Pick, the productivity targets were set within a much smaller range – 153.7 to 163 cases per hour. The cumulative weight Mr Opelt handled was between 14,985 and 15,892 kg per shift.

2028. On average, therefore, across the two picking activities, Mr Opelt moved a cumulative weight of approximately 41,400kg per week.

2029. In order to move these cases, Mr Opelt sometimes reached down to approximately knee height. the lowest racking shelf if the pallet from which he was picking was nearly empty. If a case was towards the back of the pick slot, Mr Opelt had to reach in to pick it up. He also had to bend when stacking his empty pallet at the start of a pick, and stretch upwards as his pallet stack neared full height.

2030. Some cases were on the second-level pick slot, which was over a metre from the ground. To gain access to the top cases from that slot, Mr Opelt climbed onto his LLOP and hoisted himself up using the cow horns.

2031. Once Mr Opelt had the case in his hands, he carried it to the container into which he was picking. Depending on where Mr Opelt parked in the aisle, and the precise location of the pick slot, Mr Opelt had to carry each case for up to a few metres.

2032. In between pick slots, Mr Opelt stepped onto his LLOP and drove. The LLOP did not have a seat.

2033. To close down his pick, Mr Opelt had to shrink-wrap it. The physical movements involved in shrink-wrapping were, essentially, walking around the pallet and passing layers of plastic film around the stack from bottom to top. To wrap the bottom of the pallet, Mr Opelt had to stoop. To wrap the top, he had to reach upwards.

2034. On Large Case Pick, Mr Opelt had the additional task of erecting roll cages before he started to pick into them.

Welch and Hore

2035. Mr Welch and Mr Hore worked on Stock Pick for 4 or 5 shifts per week, each of 8 hours. Their other activities, such as Pick By Line, were done so infrequently that the fairest assessment of their physical demands is to assume that they actually worked on Stock Pick for 5 shifts per week.

2036. They lifted one case at a time. Sometimes these were 16 cm off the ground, requiring them to bend. Other cases were up to 180cm from the ground, requiring them to stretch.

2037. Mr Welch's and Mr Hore's productivity targets was 162.5 cases per hour, rising to 208 in 2012. Although depot workers at Skelmersdale failed, in general, to meet their targets, we know that Mr Welch in fact consistently managed to achieve his target.

2038. Mr Hore's job description refers to him "constantly lifting and moving heavy cases".

2039. The mean weight of a case at Skelmersdale was 5 kg. For a typical shift, therefore, Mr Welch and Mr Hore each moved a combined weight of 6,500 to

7,800kg. We have taken the mean of 7,150 kg. At 5 shifts per week, that makes a weekly total of 35,750 kg.

Matthews

2040. Mr Matthews spent almost all of his working week on Goods In. Until mid-2012, he did a mixture of four different Goods In activities throughout a shift. One of these was Breaking Down. From mid-2012, Mr Matthews spent about half his working week doing a mix of Breaking Down and Receiving.

2041. Breaking Down involved bending (when the donor or receptacle container was nearly empty) and reaching upwards (when it was nearly full).

2042. On each Breaking Down shift, Mr Matthews would have lifted a total of between 19,200 and 24,210 kg, had he carried on this activity for the whole shift. This calculation is based on an average weight of a case of 6kg and an hourly productivity target of 400 cases per hour. In fact, after mid-2012, Mr Matthews spent only half the shift breaking down, with the other half of the shift spent Receiving, which mainly consisted of checking and scanning. Before 2012, Mr Matthews spent about a quarter of each shift Breaking Down.

2043. On average, during the course of a week (averaged across the whole of the Relevant Period), Mr Matthews lifted approximately 26,800 kg.

2044. Between one and four shifts per month (depending on precisely when during the Relevant Period we are looking at), Mr Matthews worked on Pick By Line. As with other picking activities, Mr Matthews had to reach down to as low as 16 cm from the ground, or as high as 180 cm. The average loads handled on Pick By Line increased over the Relevant Period, commensurate with increases in productivity targets. The average daily lift went from 8,260 to 12,060 kg. We take an average of 10,000 kg per shift.

2045. When not physically moving cases, Mr Matthews manoeuvred his container around the Pick By Line grids. If it was a roll cage, it could weigh up to 450kg, although the weight would decrease as Mr Matthews distributed the contents around the grid. Likewise, a fully-laden pallet on a hand-pump truck could start weigh up to 1,250 kg.

Prescott

2046. Mr Prescott's activities varied over time, but the following summary will suffice. For one shift per week, Mr Prescott worked on Tipping. He worked one Pick By Line shift per week. For 3 shifts per week, he split his time between Receiving (which was not strenuous) and Breaking Down (which was). For approximately the final third of the Relevant Period, Mr Prescott's split was nearer to 50% Pick By Line and 50% combined Breaking Down and Receiving.

2047. Taking the same averages as Mr Matthews for Breaking Down, Mr Prescott moved between 19,200 and 24,210 kg per shift. This was for approximately 1.5 shifts per week (reducing to 1.25 shifts later in the Relevant Period), making somewhere between 27,125 and 32,550 kg manually handled per week, just on Breaking Down.

2048. In addition, Mr Prescott lifted 10,000 kg per week on Pick By Line, rising to nearer 25,000 kg per week.

McDonough and Morris

2049. Mr McDonough and Mr Morris mainly drove HRTs during the week. They did between one and three shifts per week of Stock Picking. Using the same figures as for Mr Welch and Mr Hore, we calculate that Mr McDonough and Mr Morris each manually lifted between 7,150 and 21,450 kg per week.

Haigh

2050. Mr Haigh's Iteration (c) covers the period from August 2008 to early 2010, ignoring his attribute of being a supervisor. For three shifts per week during that period, Mr Haigh worked on Goods In – Yard, sitting down on a CBT. For one to two shifts per week, Mr Haigh did one of seven different activities. Of these, two of them involved heavy manual picking. These were Large Case Pick and Manual Store Pick. His job description says that he did these two activities "slightly more often" than the others, but that they were "in roughly equal proportions".

2051. On average, therefore, Mr Haigh worked approximately one picking shift per fortnight. On Mr Opelt's figures, his weekly cumulative lifting was about 6,900 kg.

2052. In iterations (b) and (d), Mr Haigh lifted roughly double that amount.

Han

2053. The first two months of the Relevant Period have been identified by the Asda experts as Iteration (a). During this time, Mr Han's most strenuous activities were Manual Store Pick and Large Case Pick. Mr Han worked on those activities with the same frequency as Mr Opelt, and lifted broadly the same weekly aggregate load.

2054. Between October 2008 and April 2013, Mr Han did a profile of activities that was regarded by the Asda experts as meriting a separate iteration. They called this "Iteration (b)" or "Han (b)".

2055. During the period of Iteration (b), Mr Han reduced his work on Large Case Pick and Manual Store Pick slightly for approximately half each working week.

2056. The rest of his week was taken up with a mixture of eight different activities, which he did in roughly equal proportion. Three of these activities involved mainly operating manual handling equipment with minimal lifting. Four involved picking. One of them was Small Case Decant, which Mr Han did roughly once every 5 or 6 weeks. This involved lifting a cumulative weight of approximately 11,000 kg over the course of a shift.

2057. The remaining activity, which Mr Han did about once per fortnight, was Handballing.

2058. Some goods arrived at the Lutterworth depot in shipping containers. To save space, these containers could be stacked floor to ceiling with individual loose cases of stock, with no pallet on which to move them. This meant that the trailer could not be tipped using mechanised equipment. Rather, Mr Han and a colleague physically removed the cases by hand and then built them up into pallets.

2059. Once a pallet was fully stacked, Mr Han or his teammate shrinkwrapped it and used mechanised handling equipment to move it to a Goods In location for scanning.

2060. The weight of a single case could vary hugely. On a good day, they weighed less than a kilogram, but they could weigh up to 25 kg. Mr Han did not have an individual productivity target, but cleared 2 or 3 trailers per shift.
2061. At first, there was not enough room inside the trailer to build the pallet there, so Mr Han had to carry each case out of the trailer. Once there was room, Mr Han and his teammate built the pallet up inside the trailer, to cut down on carrying distances.
2062. Each pallet weighed approximately 28 kg. Mr Han or his teammate would physically lift the pallet into position.
2063. Mr Han's job description does not say how many cases there were in each trailer. It makes an assumption that Mr Han and his teammate lifted an average of 5,000 cases per shift between them. According to the job description, the median case weight was 13 kg, being in the middle of the range 1-25 kg. Based on that assumption, Mr Han's job description states that he stacked an average of 32,500 kg "per trailer". This must be a mistake – it was plainly meant to read "per shift".
2064. The job description also states that Mr Han was engaged in Handballing "for 1-2 x 8 hour shifts per week", but it is clear from the breakdown of his activities that Handballing only came around about once per fortnight.
2065. Adding the Handballing effort to Mr Han's weekly picking activities, his weekly cumulative lifting exceeded 50,000 kg.

Uchanski

2066. In Iteration (a), Mr Uchanski worked on four shifts per week of heavy picking. Each shift he lifted what Mr Opelt lifted, but he worked four shifts per week whereas Mr Opelt only worked three. Mr Uchanski's weekly physical demands was the equivalent of lifting 55,000 kg.
2067. In Iteration (b), Mr Uchanski spent more of his time driving a HRT. He still worked three picking shifts. His combined lifting during that period was 41,400 kg.

Dolan

2068. Mr Dolan worked 3 shifts per week on Putaways. For most of the time, he was sitting down at the controls of a HRT. Occasionally, during a HRT shift, Mr Dolan would assist for up to two hours on De-Kit, which involved standing.
2069. On the other two shifts he did picking activities, of which 90% was Stock Pick.
2070. Mr Dolan's productivity target was 220 cases per hour, meaning he lifted 1,650 cases across a shift, at an average weight of 6.16 kg per case. His daily cumulative lift was therefore 10,164 kg.
2071. Trunk pick, which Mr Dolan did much less frequently, involved lifting between 3,059 and 8,088kg of cumulative weight.
2072. Per week, therefore, Mr Dolan lifted a little under 20,000 kg.

Ballard

2073. The parts of Mr Ballard's role that are most familiar to us involved him driving a CBT. That was for one shift per week, rising to three shifts per week by the end of the relevant period. This was essentially sitting-down work.

2074. For most of the rest of his shifts, Mr Ballard did heavy manual activities. He worked on Stock Pick, Flow Pick, Trunk Pick or Pick By Line for at least two shifts per week. As we saw with Mr Dolan, Stock Picking at Didcot meant lifting about 10,164 kg per shift.

2075. For most of the Relevant Period, Mr Ballard did three Handballing shifts per month. Handballing at Didcot worked in a similar way as at Lutterworth. A trailer could contain between 3,000 and 7,000 individual cases. Mr Ballard's job description takes an average of 5,000 per trailer. Each case weighed between 5 and 15 kg. For the purposes of calculating physical effort, Mr Ballard's job description assumes that all the cases were at the lighter end of that range. This results in a calculation of 25,000 kg that Mr Ballard and his teammate lifted between them. We do not know how many trailers they handballed per shift.

Beaumont

2076. In Iteration (a), Mr Beaumont worked three or four shifts per week of Stock Picking. He lifted between 30,492 and 40,656 kg per week. His work became less strenuous in Iterations (b) and (c), when he worked one Trunk Pick shift per week and one Stock Pick shift per fortnight. For those iterations, Mr Beaumont was lifting approximately 10,000 kg per week.

Devenney

2077. Mr Devenney lifted 10,064 kg per shift when working on Stock Pick and 8,180 kg on Pick By Line. One of his picking shifts was Flow Pick, which involved lifting approximately 4,000 kg per shift. Together, these picking activities accounted for about 40% of his working time. He worked sporadic Handballing shifts, but only during peak periods such as Christmas and Easter.

Makin

2078. During Iteration (b), Mr Makin was unusual amongst depot workers, in that he was not given regular picking activities for most of the Relevant Period. This is because (as we related under the heading of Health and Safety) Mr Makin broke his arm in September 2009. He resumed heavy manual work in January 2013, but even then, that was confined to two shifts of Breaking Down per month. Taking the five-year Iteration (b) period as a whole, Mr Makin lifted on average only 3,000 kg per week. He was still required to spend most of his shift on his feet, moving around the depot.

2079. Before he broke his arm, Mr Makin had been lifting approximately 20,000 kg per week on Pick By Line. This is separately assessed as Iteration (a).

How other schemes measure physical demand

2080. There is only so much to be gained by looking at other material for this factor. Most of the other equal value assessment schemes and job evaluation schemes have attempted to measure jobs that require less physical effort than the Asda jobs.

2081. Some points are nonetheless worth noting:

- 2081.1. The AON *JobLink Evaluators' Guide* measures physical demands in a matrix. On one side of the matrix is the proportion of working time spent

at a given effort level. The scheme attempts to arrive at a general percentage. There are four different levels of effort, ranging from “Little or no physical demand” to “Continuously lifting/moving heavy weight material.”

2081.2. The NJC JES creates five levels of physical demand. There are two level steps from work “undertaken mainly in a sedentary position” up to a role that involves “ongoing considerable physical effort (for example, regular lifting or carrying, pushing or pulling items of moderate weight). There are a further two level steps up from that role to one in which “involves ongoing very high physical effort (for example, frequent lifting and carrying...items of heavy or very heavy weight, or manual digging).”

2081.3. The NHS Job Evaluation Handbook places roles into levels according to the frequency and duration of physical effort, as well as the degree of effort required. “Moderate” physical effort includes lifting objects between 6 and 15 kg. Where strenuous shifts happen occasionally, the demand is considered to be less than where such shifts happen frequently. There are three levels of demand for roles involving “light physical effort”, with the highest level of demand reserved for roles with ongoing moderate physical effort, or occasional requirements for intense physical effort for “several long periods during a shift”.

2082. What these schemes show us is that:

2082.1. Differences in intensity of effort are properly reflected in levels of demand. The NJC draw a broad equivalence between (a) the step from a sedentary job to one that involves regular pushing and pulling and (b) the onward step to a role that involves very high physical effort. The NHS Handbook envisages at least one further step in demand from constant light physical effort to sustained intense physical effort.

2082.2. Other schemes do not favour the “most demanding shift” approach. This does not make it wrong to consider the demand of a particularly strenuous shift. It does, in our view, call for a sense check. The less demanding shifts ought to be taken into account to gauge how much opportunity they give the worker to rest and recover from the more arduous work.

The IEs’ scheme for Physical Demands

2083. The IEs’ scheme for Physical Demands looked like this:

Considers the demands on the individual to exert themselves physically in discharging their duties.	
Moderated (+ or -) for combination of awkwardness/fixedness and degree of effort.	
LEVEL	LEVEL DESCRIPTION
A	In addition to B below, the job cannot be performed without the constant application of physical effort such as digging, lifting, pulling or moving heavy equipment, materials.
B	The job involves frequent but not constant lifting, pulling, pushing of heavy objects and equipment as above. Alternatively, the job holder will be required to stand/walk for long periods equating to over 80% of their shift or will be obliged to maintain a more or less fixed posture in order to carry out the majority of tasks associated with the job.
C	There is a regular but not frequent need to push, lift or manoeuvre objects, equipment, materials which may be heavy. Alternatively the job holder will be required to stand/walk for over 50% but less than 80% of their shift or will be obliged to maintain a fixed posture for regular periods in order to carry out specific tasks associated with the job.
D	In the context of other non - arduous physical activities there may be an occasional requirement to lift or move objects or materials some of which may be heavy. Alternatively, the job holder will be required to stand/walk for over 20% but less than 50% of their shift or there will be a limited need to adopt a fixed posture for some tasks.
E	Physical effort is an occasional requirement of the role for example helping to unload a regular weekly delivery of goods or materials.

2084. The definition for Level B drew a transparent equivalence. Standing or walking for over 80% of a shift was considered to be an equivalent demand to “frequent but not constant lifting, pulling, pushing of heavy objects and equipment.” The IEs assessed almost everyone into this level. This included Mrs Fearn, who handled up to 30 single items per day on the Customer Service Desk. It also included Section Leader, who worked a third of her time in the office.

2085. The only exception was Checkout, who was at Level C. The IEs explained the choice of level in their rationale:

“At least once a week the JH handled large bags of pet food with a weight range of 2kg to 17kg. Up to thirty times per shift she handled multipack bottled or canned drinks, soft drinks or boxes of beer up to 10kg. The jobholder worked at the checkout, seated, for the entirety of each shift.”

Not B because,

“The jobholder did not lift heavy items on a constant basis.”

2086. Mr Holt accepted that “constant” was a loose use of language. According to Mr Holt, what the IEs meant to say was that Ms Ashton did not lift heavy items on a “frequent” basis. If that is what they meant, it was wrong. “Frequent” was one of the frequency descriptors defined in the IEs’ schematic. According to the schematic, “frequent” meant daily, or in the course of a shift. As the IEs recognised in their own rationale, Ms Ashton was handling 10kg multipacks much more frequently than that.
2087. In order to achieve Level A under the IEs’ scheme, a role would have to involve “constant application of physical effort”. Mr Cooper explored with Mr Holt what “constant” meant. In Mr Holt’s view, Mr Han was not constantly applying physical effort when handballing. This was because the time he spent shrink-wrapping a pallet counted as a break.
2088. The IEs recognised that there were some differences of physical effort within the roles at Level B. They reflected those differences by using the modifier. Thus, the depot workers were assessed at B+ and almost all the store workers were assessed at B=. This separation was worth 5 points, or a third of one level step.

The Leigh Day experts’ assessments of Physical Demands

2089. The Leigh Day experts initially compressed the roles even more tightly than the IEs. Roles such as Chilled and Home & Leisure were assessed at B+. This was exactly the same scoring point as the comparators.
2090. Having carried out their test assessments, the Leigh Day experts proposed some amendments to the IEs’ factor plan. For the most part, the changes were to the formatting. The amendments made it easier to see the alternative gateways into each level. There was one change of substance to Level A. The word, “constant” was replaced with “ongoing”. This reflected the reality that just about any role would have some moments when the role holder was not pushing, pulling or lifting.
2091. The changes to the wording of the scheme did not cause the Leigh Day experts to alter any of their assessments. None of the roles achieved Level A. Just about all of them were in B= or B+.
2092. The Leigh Day experts maintained this stance during the joint meeting. In their joint report, they stated,
- “The demands in Level A were ‘in addition to B...’ and therefore represented a very high level of physical demand. No job in the sample assessed by the Leigh Day experts met the Level A criteria because no job (allowing for breaks) undertook ‘constant’ or continuous application of the effort described...”
2093. During the course of the hearing, the Leigh Day experts uprated almost all the comparator assessments to Level A. This meant that there were 10 points of difference between them and Chilled, and a single level step separating them from Service Host.
2094. Ms Branney told us why the Leigh Day experts had revised their assessments. According to Ms Branney, they had made a mistake in not doing so earlier. When they amended the Level A definition from “constant” to “ongoing”, they failed to revisit their assessments to see if any of the roles could now get into

their redefined Level A. Ms Branney told us that the Leigh Day experts had realised their mistake about a week prior to the date on which the experts were due to give evidence about physical demands.

2095. We took Ms Branney's explanation at face value. Nevertheless, the Leigh Day experts' U-turn casts very real doubt on the reliability of their expert opinions about this factor. On their own version of the procedural history, they consistently closed their minds to what they now recognise as clear differences in demand. In particular:

- 2095.1. The Leigh Day experts knew that there were significant differences in the amount of physical exertion required amongst the roles. Ms Branney's evidence is not that the Leigh Day experts changed their minds about what the demands were, or how much lifting the depot workers had to do. Rather, Ms Branney's explanation is that they overlooked to revisit the assessments once they had amended the level definition.
- 2095.2. By the time they completed their report, the Leigh Day experts had thought about how easy or difficult it was for any of the roles to get into Level A. Otherwise, they would not have proposed a change to the Level A definition.
- 2095.3. The Leigh Day experts demonstrated deference to the IEs' assessments, at the expense of their own independent consideration of whether the level definitions were satisfied. Mr Hore was assessed at B+. His rationale states, "Note [paragraph] 6.6 of the job description, 'he was constantly lifting and moving heavy cases...' but [Level] A was not used by the IEs – constantly in the job description may not be same as constantly in level definition".
- 2095.4. The Leigh Day experts shut their eyes against the differences in demand, even after the joint meeting. This is so, even though the respondent's experts specifically pointed out that the Leigh Day experts had not revisited their assessments in the light of the amended level definitions.

The Physical Demands modifier

2096. We have seen that the IEs used the modifier to differentiate (broadly) between stores and depots within Level B. The Leigh Day experts used the modifier not just for that purpose, but also to shade differences between the claimant roles.
2097. It was not always easy to know what justified the application of the modifier. Ms Ohlsson was given a B+, putting her on the same level as most of the depot workers. Looking at the Leigh Day experts' rationale, it appears that the thing that merited the "plus" modifier was Ms Ohlsson manoeuvring milk roll-in units. These weighed less than a full roll cage, which Ms Ohlsson also had to push. So did her replenishment colleagues in other aisles. They were assessed at B=.

The Asda experts' scheme for Physical Effort

2098. The Asda experts designed their own factor plan to measure Physical Demands. They named their factor, "Physical Effort".
2099. The structure of the scheme was based on two Elements: one for Effort and the other for Movement.

2100. The level definitions were as follows:

Level	E	D	C	B	A
Effort	Limited or infrequent demands to handle small quantities of small to moderate weights without assistance. Limited or infrequent demands to push or pull loads without assistance.	Frequent or sustained demands to handle small to moderate weights without assistance. May handle some heavier weights. The cumulative weight lifted is relatively small. And / or Frequent or sustained demands to push or pull light loads.	Sustained demands to handle mainly moderate weights without assistance. May handle some heavier weights. The cumulative weight lifted is moderate. And / or Sustained demands to push or pull moderate loads without assistance.	Sustained demands to handle moderate to heavy weights without assistance. The cumulative weight lifted is substantial.	Sustained demands to handle moderate to heavy weights without assistance. The cumulative weight lifted is very substantial.
Movement	Work is mainly sedentary, or relatively static, and has only an infrequent requirement for bending, stretching, kneeling or climbing. Not required to stand or walk for long periods. Not, or infrequently, required to adopt an awkward posture and only ever briefly.	Frequently required to bend, stretch, kneel, or climb as a standard part of the job. And / or Required to stand or walk for long periods throughout the working shift. And / or May occasionally be required to adopt an awkward posture for a few minutes at a time.	Required to bend, stretch, kneel, or climb for sustained periods. And / or Required to adopt an awkward posture, frequently / extensively throughout the day or shift.		

2101. The level definitions were supplemented by detailed conventions. It is not necessary to set them out in full. They contained guides to the size of loads that had to be pushed and pulled. These corresponded to the commonly found containers in stores and depots: pallets, roll-cages, trolleys and bulk display

units. Descriptors of weights were tied to examples, such as individual items of stock or cases.

2102. Demands were assessed on the basis of the most demanding shift, provided it was done at least a few times per month:

“Where a jobholder performs different amounts of physical activity on different shifts depending on the activity to which they are allocated or other circumstances, we make an overall assessment by taking account of the most demanding activity they perform within the context of their overall mix in order to assess whether the amount of the most demanding activity is sufficient to increase the overall level of demand in the role. As a rough rule of thumb, a significantly more demanding activity that is performed several times a month would be sufficient to increase the overall demand.”

2103. The Asda experts did not assess the beneficial impact of rest during the lighter shifts.

2104. Ms Waller informed us at the start of her evidence that the Asda experts had reassessed Counters to Level C. Otherwise, their assessments were unchanged.

Physical Demands - Discussion

Measure of demand

2105. We found the cumulative weights lifted to be a useful objective differentiator of demand at the higher levels.

2106. For the most part, this does not involve making a value judgement about the demands of lifting compared to the demands of standing and walking. Almost all the depot workers were on their feet for the whole of time. They had to walk, bend and stretch, just as the replenishment workers did in the stores. The cumulative weights they had to lift were an indicator of the *additional* effort they had to put in, over and above the standing and walking that just about everyone had to do.

2107. There were a few assessments that did involve making comparisons of the relative demands of standing versus lifting. These were:

2107.1. Checkout, which was almost all seated, but which involved sliding and turning up to 5,000 kg of loose items over a full shift; and

2107.2. HRT and CBT driving activities, which gave an opportunity for rest between more demanding picking shifts.

2108. These comparisons were more difficult, because they risked introducing biases about the relative demands of lifting, compared to standing and walking.

2109. In our view, a useful check against such biases is the comparison with other schemes. As we have observed, they recognise sustained intense physical effort as creating at least one additional level of demand beyond the ongoing lighter effort of being on one's feet.

2110. We agree with the Asda experts that the ongoing demands of moving single items of stock by hand through a checkout are broadly the same as the demands of standing at a Customer Service Desk with occasional carrying of loose items.

Period over which demand should be measured

2111. We also agree with the Asda experts that it is appropriate to consider the demands of the most demanding shift. We agree with Mr Cooper's analogy of running a marathon. Some depot activities – Breaking Down and Handballing – required so much effort over the course of a shift that the workers who did them reached a higher level of demand. This was so even if they had less demanding shifts, (such as CBT driving in Mr Ballard's case) in which to recover, such that their weekly average lifting was less than that of a colleague who did four shifts of picking.

2112. We have not reached this decision uncritically. As a sense check, we calculated the cumulative weights that each role holder lifted per week, as well as on their most strenuous activity. With the exception of Mr Haigh, and the injured Mr Makin, they all lifted large cumulative loads each week, even when the exceptionally arduous activities were left out of account. Even those (such as Mr Ballard) who worked some shifts sitting down lifted so much during the rest of the week that their overall physical demands remained high.

Choice of scheme

2113. We prefer the Asda experts' scheme for measuring physical demands.

2114. The Asda experts' conventions were transparent and tailored to the actual demands of the jobs in question. In our view, their assessments captured the relative demands fairly. We agree that there are four levels of demand amongst the jobs under comparison.

2115. We could not work with the IEs' scheme, because of its reliance on the modifier to separate what were actually significant differences in demand between the roles. The weight to be attached to the Leigh Day experts' opinion was significantly undermined by their insistence on putting almost all the roles at the same level, until their last-minute U-turn. It is further weakened by the use of the modifier. We could not understand how it had been applied.

Scores for Physical Demands

2116. This was the only factor under which we were able to choose one set of assessments virtually wholesale in preference to those of the other experts. In our view, Haigh (a) and (c) belong in Level C along with Makin (b). Otherwise, we adopt the Asda experts' assessments and score them accordingly.

Level	Store roles	Depot roles	Points
A		Ballard (a) and (b), Han (b), Matthews, Prescott	50
B		Beaumont (a), (b) and (c), Dennis (a), (b), (c) and (d), Devenney, Dolan (a) and (b), Haigh (b) and (d), Han (a), Hore, Makin (a), McDonough, Morris (a) and (b), Opelt, Sayeed (a) and (b), Uchanski (a) and (b), Welch	40

C	Chilled, Counters, Edible Grocery, Personal Shopper, Produce, Warehouse	Haigh (a) and (c), Makin (b)	30
D	Bakery, Checkout, Customer Service Desk, George, Home & Leisure (a) and (b), Process, Section Leader, Service Host (a) and (b)		20

Chapter Fourteen - Working Conditions

2117. The final factor in the IEs' scheme was Working Conditions.

Issues relating to Working Conditions

2118. There is no dispute about having a separate factor to assess working conditions.

2119. The demand arises from features of the working environment that are unpleasant, uncomfortable or hazardous. These may be physical features, such as noise, fumes and temperature, or the presence of potentially dangerous machinery. The features may also arise from the presence of other people in the workplace.

2120. Mr Walls, we think, spoke for all the experts when he described the demand as being the "impact" that these features are likely to have on the jobholder. As ever, the personal perception of the jobholder must be ignored.

2121. The party-instructed experts agree that different levels of demand may be distinguished by examining:

- 2121.1. The degree of discomfort, or unpleasantness, or magnitude of the risk caused by a particular feature of the workplace; and
- 2121.2. The duration and frequency with which the jobholder is exposed to that feature.

2122. The main disputes of principle are, by now, familiar:

- 2122.1. Should levels be defined by way of objective indicators, such as the existence of policies and procedures, and the requirement for personal protective equipment? Or should they be defined directly by words which require a further exercise of judgement when making the assessment?
- 2122.2. Should the smaller differences in demand be recognised by way of a modifier?

The relevance of personal protective equipment

2123. Everyone agrees that working conditions must be evaluated on the basis that the jobholders wear the personal protective equipment (PPE) issued to them. This means allowing for their beneficial effects, but also the adverse effects. Workers in the Frozen Chamber at Skelmersdale, for example, wore heavy clothing which

protected them against the extreme cold, but they also had to put up with the discomfort of having to work in those clothes.

2124. Generally speaking, where PPE is compulsory, the hazard level is likely to be higher. This is because the employer has considered the level of risk to be too high to leave it to the worker to decide whether to wear the PPE or not.

Relevance of other measures to control risk

2125. There was also a subsidiary issue about whether the beneficial effects of other types of control measures must also be taken into account when assessing the impact of hazards. Should it be assumed, for example, that a worker on Stock Picking activities will follow all the rules of the road when driving a LLOP? Should it be assumed that his colleagues will also obey those rules?

Relevance of customer behaviour

2126. The party-instructed experts agree on the approach to assessing the risks that arise from the presence of customers in the workplace.

2127. All experts acknowledge that customers' behaviour is less predictable and less easily controlled by workplace policies and procedures.

2128. Examples of the impact of customers that the party-instructed experts assessed under working conditions included:

2128.1. customers leaving items such as used tissues and half-eaten food that were unpleasant to pick up;

2128.2. customers spilling liquids or breaking goods in stores, causing a risk to the jobholder of slipping or cutting themselves; and

2128.3. the risk that a customer might physically assault a jobholder.

2129. It was agreed that the extent to which a jobholder was exposed to rude, aggressive or abusive behaviour was relevant when assessing the magnitude of the risk of a physical assault. Otherwise, the impact of such behaviour was irrelevant. For example, this factor did not take account of the likelihood of a jobholder feeling upset by being spoken to rudely or aggressively. This is because both sets of party-instructed experts assessed those impacts by means of the Emotional Demands factor.

Relativities

2130. There was some agreement between the experts on where some roles sat in relation to others, but only at the most general level.

2131. Roles based predominantly at Skelmersdale CDC were acknowledged by all experts to have the most demanding working conditions. At this top end, the Asda experts stood alone in thinking that the working conditions for people who worked in the Chilled Chambers were as demanding as the working conditions in the Frozen Chamber.

2132. All the experts agreed that the lowest levels of demand were to be found the shop floor of the stores. Where store-based roles had additional features, such as regular work in chilled areas or near to ovens, the experts disagreed about the extent to which they should be recognised by placing them in different levels of demand.

2133. The experts were all able to get behind the idea that the working conditions at the Didcot and Lutterworth depots were generally less demanding than those in Skelmersdale (although the Leigh Day experts thought that working mainly outdoors was on a par with Skelmersdale). Didcot and Lutterworth were recognised by the party-instructed experts as being more demanding working environments than all areas of the stores. Unlike the Leigh Day experts, the Asda experts thought that even Ms Hutcheson's warehouse was a less demanding workplace than those depots.
2134. The main dispute was about how many levels truly reflected the differences in demand. Was it three, as the Leigh Day experts thought? Or nearly four, as in the IEs' scheme? Or were the Asda experts right in saying was it five?

Facts relevant to Working Conditions

General working environment in stores

2135. Asda's stores were designed to be pleasant and welcoming to customers. All parts of the front of house were well lit. With the exception of the chilled aisles, they were all kept at a warm temperature all year round.
2136. During the day, there was a constant stream of noise from customers on the shop floor. The noise levels were higher during school holidays than during term time. It was never so loud that any of the shop floor assistants had to shout to be heard. At night, when Ms Forrester was on shift, the store was considerably quieter. Hers is the only job description that does not mention constant noise.
2137. Workers with replenishment roles were responsible for keeping their aisles clean and tidy, following the Clean As You Go policy. The litter they encountered included unpleasant items, such as used tissues and half-eaten food.

General hazards in stores

2138. In common with all employers, Asda had a statutory duty to assess the risks to employees from their work. They accordingly risk-assessed the work of Shop Floor Assistants at each store. Most of the risks were assessed in the same way for all the roles. Some risks were bespoke to the particular role (for example, Bakery).
2139. The risk assessments were written for the purpose of risk management, as opposed to litigation. They are a useful contemporaneous record of what Asda really thought the risks were.
2140. None of the risk assessments specified the store at which the role holder worked. There were no facts that suggested that any one store was a more hazardous place to work in than any other store.
2141. It is sufficient to summarise the generic risks.
- 2141.1. When moving pallets and roll cages, there was a daily risk of a Shop Floor Assistant sustaining a manual handling injury, or an "unlikely" risk of slipping or tripping injury, each with the potential to last over 7 days;
 - 2141.2. A Shop Floor Assistant could be hit by falling stock, causing a "major injury". This was regarded as "unlikely". A daily "possible" risk was that she might collide with a piece of equipment, or trap her fingers, causing a minor injury.

- 2141.3. When walking around a store, or car park, there was an ever-present risk (assessed as “possible”) of her slipping or falling, with the potential for an injury lasting over 7 days.
- 2141.4. Work in the car park was assessed as involving an “unlikely” risk of collision with a car, causing “incapacity or death”.
- 2141.5. There was a daily risk of “possible” physical assault from a customer, assessed as having the potential to cause a “major injury”.
2142. Each store worker’s job description contains a paragraph that accompanies the risk assessment table. It states,
- “Paragraphs [x] onwards deal with working conditions that applied to the jobholder personally”.
2143. The paragraphs referred to there set out the individual working conditions. The risk assessment table and the individual narrative complement each other. Mr Cooper put to Ms Branney that the individual description of working conditions contained “the most important features of the working environment”. She agreed. To the extent that this statement of opinion creates a hierarchy of facts related to the equal value question, we disagree with it. The assessed risks were as much a part of the store workers’ environment as the verbal description of how noisy or hot or cold it was.

Personal Shopper

2144. Ms Hills spent most of her time on the shop floor. She went to the back-ups about 30 times per shift, but spent less than 10% of her total working time in that area. She had to wear a high-visibility vest at all times when in the warehouse. She had to keep to designated pathways.

Checkout

2145. As we have seen, Ms Ohlsson cleaned minor spillages. She did not encounter used tissues and discarded food as the replenishment colleagues did. The daily risk of possible physical assault was listed as one of the specific risks of the checkout area.

Customer Service Desk

2146. Mrs Fearn spent most of her time separated from customers by a physical desk. As we saw, she was exposed to the most confrontational behaviour. She had very little risk of manual handling or slipping injuries.

Section Leader

2147. Miss Gibbins spent approximately 30 minutes per day in the warehouse area. About a third of her working time was in the office.
2148. When on the shop floor, Miss Gibbins faced the broadly the same level of threat as members of her team whose job it was to deal with dissatisfied customers. The only difference in Miss Gibbins’ case is that there was a specific occasion when that threat was real enough for her to act upon it. We have mentioned that incident before: Miss Gibbins had to be escorted by Security.

Chilled

2149. When Ms Ohlsson was doing her main task of replenishing, she was in the chilled aisles, which were colder than the ambient store temperature. She was issued with a padded gilet.

2150. She entered the walk-in fridges in the backups approximately every 20 minutes. This was to ensure compliance with Challenge 20. The temperature in fridge was set to between 3 and 5 degrees Celsius.

2151. Ms Ohlsson entered the warehouse area regularly in order to use the compactor.

Edible Grocery

2152. As mentioned above, Ms Forrester was the only claimant whose job description does not say that she was exposed to noise from a constant stream of customers. She worked only at night. On one out of every three of her shifts, there were no customers at all.

2153. Ms Forrester encountered minor spillages several times per week. Occasionally, she found a major spillage. About once per month, Ms Forrester dealt with broken glass.

2154. When breaking down deliveries on a pallet, Ms Forrester had to be careful to avoid cases of stock falling from a pallet as she cut the shrink wrapping. Stock fell from a pallet about once per fortnight.

2155. Ms Forrester experienced back, shoulder and wrist pain from repeated manual lifting, bending and stretching.

2156. Ms Forrester took waste packaging to the warehouse to be compacted. When in the warehouse, Ms Forrester wore a high-visibility vest and kept to marked walkways. She took recyclable cardboard and plastic into the yard.

2157. Ms Forrester worked in proximity to other replenishment colleagues who were moving roll cages, pallets and dollies around her. There was a risk of these pieces of equipment hitting her and injuring her if she was not careful.

Home & Leisure

2158. Ms Darville worked on the shop floor for most of her shift. Up to 10 times per shift, she went into the warehouse to do stock picking and reverse picking. The Home & Leisure backup was closest to the shop floor. There was no need for her to wear a high-visibility jacket, or to venture into the area of the warehouse where the forklift trucks were operating. She stayed on designated walkways where there was minimal risk of her coming into contact with any mechanised equipment. Every 2-3 weeks she went outside to fetch a helium cylinder. About once or twice per week, she went outside to use the compactor. This happened during the winter months as well as the rest of the year.

2159. The Home and Leisure Department sold fireworks in the run-up to Bonfire Night and New Year's Eve, Ms Darville went outdoors. During the days before each festival, Ms Darville went outside up to six times per shift. Asda assessed an unlikely risk of being hit by a vehicle in the car park, with injuries being potentially fatal. The weather, of course, was autumnal. When she could, she wore a padded high-visibility jacket to protect her from the weather, but it was not always available.

Ms Darville handled fireworks, which were a recognised hazard. They were locked in a cupboard when unattended.

2160. Ms Darville experienced noise due to the constant stream of customers. She did not have to raise her voice when speaking to customers, but would generally move to a quieter part of the store to discuss a refund.

2161. Ms Darville encountered spillages once or twice per week. In the event of a minor spillage, Ms Darville cleared it up herself. She alerted an Asda Ace colleague to deal with any major spillages. Every few days, Ms Darville encountered rubbish and packaging, which could include the unpleasant items we have summarised.

2162. Ms Darville experienced back, shoulder and wrist pain as a result of manual lifting and frequent bending and stretching. On one occasion, Ms Darville tripped over some shrink wrapping that had been left on the floor. She did not herself suffer any injuries from her equipment, such as roll cages, but she knew colleagues who had experienced such injuries.

2163. Ms Darville was not actually assaulted during the Relevant Period. The risk of a physical confrontation was at its highest when she refused a sale. Parents could be abusive if Ms Darville refused to sell an age-restricted game to their child.

Bakery

2164. The bakery was a small, confined space in close proximity to the ovens. Mrs Gardner spent some of her time there and some time replenishing on the shop floor which was more spacious.

2165. As we saw under the heading of Physical Demands, Mrs Gardner had to retrieve bakery ingredients and products from the bakery freezer and chiller. She spent up to 5 minutes in the chiller at a time. Her visits to the freezer were limited to 2 minutes.

2166. Mrs Gardner was exposed to flour dust in the bakery. This was mitigated by air quality testing and health assessments. The samples taken at the Hamilton store showed that the air concentration of flour was below the permitted maximum.

2167. The temperature inside the bakery area could reach “warm” levels, due to the operation of ovens and hot surfaces. We have quoted the word, “warm” from her job description. In its context, it must mean uncomfortably warm. The alternative would mean that the bakery was not comfortably warm when the ovens were turned off.

2168. There was a risk of burn injuries from the heated L-sealer wires. Mrs Gardner also had to be careful to avoid burning herself when removing hot trays from the ovens. Mrs Gardner suffered minor burns on a number of occasions. We do not know whether her burns came from the L-sealer or the ovens.

Warehouse

2169. Ms Hutcheson spent most of her working week in the warehouse. It had stone walls and floors. According to her job descriptions, the area “could be poorly insulated”. This is a curious phrase, since the warehouse was either well insulated or it was not. We take the job description to mean that the standard of insulation was inferior to the more comfortable front-of-house environment. To protect

against the cold, she was given a gilet and fleece, gloves, thermal leggings and a padded coat. This was in addition to the high-visibility jacket which we mentioned at the very start of our reasons.

2170. She was exposed to alarms, shouts and horn blasts. These happened less frequently than in depots, because there were far fewer colleagues working in the store warehouse. When someone did shout, or sound a horn, it was likely to be closer to Ms Hutcheson because of the relatively small space in which they operated. Likewise, Ms Hutcheson had less cause than a depot worker to worry about what other people were doing. There were fewer people moving heavy equipment around.

2171. Ms Hutcheson frequently assisted delivery drivers from inside the warehouse. She was exposed to the risk of a wagon reversing into her if she was not aware of her surroundings.

2172. Ms Hutcheson went out into the yard, for example, to speak to drivers waiting to unload their trailers. During those times she was exposed to the elements.

2173. Machinery such as the scissor lift and FLT presented risks of injury broadly equivalent to those experienced on a CBT.

2174. Bad odours regularly permeated the warehouse, owing to spillages of milk, eggs and other dairy products. Ms Hutcheson would attempt to clear up each spillage herself, but called on an Asda Ace to deal with large spillages.

2175. The bay doors of the warehouse were frequently open to the elements, all year round.

2176. Twice per week, Ms Hutcheson went into the walk-in fridges in the back-ups and spent about 10-15 minutes there.

2177. Ms Hutcheson, along with other colleagues in the warehouse, was jointly responsible for cleaning the waste compactor and ensuring that the area around it was kept free of slip and trip hazards. The area around the compactor was regularly pressure-washed to minimise infestations of bacteria, mould and vermin.

2178. On skip changeover days, Ms Hutcheson took turns with her colleagues to clean underneath the compactor. This involved using a shovel to clear residual physical waste and waste liquid. The task took a few minutes. She did it once every one or two months.

2179. Ms Hutcheson worked in proximity to the high bay racking in the warehouse. She was exposed to the risk of cases of stock falling onto her from height. The magnitude of that risk was broadly the same as for the depot workers.

Counters

2180. Mrs Webster's working environment was similar to that of an industrial kitchen.

2181. Once or twice per week, Mrs Webster worked on rotisserie chicken production. She prepared fish on every shift when she was not working on the rotisserie. For about two or three shifts per week, she made pizzas.

2182. Mrs Webster drained rotisserie fat from cooked meats into a fat barrel which held a capacity of 60 litres. The fat barrel was mounted on a wheeled platform. When it was full, she and another Counters colleague had to push it on out of the counters area and through the warehouse. They then lifted it together into a cage.

This operation was done every 2 to 3 days. The rotisserie waste is described as “foul smelling”.

2183. From 2008 to 2010, the rotisserie contained a skewer oven, similar to a spit roast. Chicken fat dripped into a receptacle at the base of the oven. Mrs Webster used a hose to suck the liquid fat into a fat bucket. Frequently, chicken fat and grease would drip onto the floor as Mrs Webster removed the chicken from the skewer oven. This caused a slipping hazard.
2184. Chicken that was not skewer-roasted was cooked inside cooking bags. Steam built up inside the bags. When draining the fat, Mrs Webster had to keep her face away from the steam to avoid a scalding injury. She was given rubber gloves, long-handled tongs and forks to help her handle the chicken at a distance.
2185. Mrs Webster was exposed to the risk of burns or scalds from ovens, heat sealers and pizza cappers. She was issued with elbow-length gauntlets to protect her from burns. Nevertheless, she burned herself when removing trays from the oven on many occasions.
2186. The rotisserie area contained an industrial dishwasher. This created background noise when it was being used, which was several times per day.
2187. When preparing fish, Mrs Webster dealt with fat, gristle and carcasses of hand-filleted fish. They smelled unpleasant. Some of the fish (for example, sardines and mackerel) bled as she prepared them. She sorted loose contaminated rubbish such as blood-soaked packaging into a separate receptacle from other waste. There was a high chance of ice or water spilling onto the floor from the ice bath. This created a further slipping hazard, which Asda mitigated with a slip mat.

Risks in depots

2188. We were not shown the risk assessments for the work in the depots. Instead, the magnitude and severity of health and safety hazards is inferred from the accident statistics that each depot collated. We have set out the recorded injuries at the Didcot depot in some detail. The accident profile for the other two depots was not materially different.

Devenney

2189. The Didcot depot had a concrete floor. The ceiling was high enough to accommodate racking shelving over 10 metres in height. The bay doors were wide and frequently open to the elements outside. This occasionally led to exaggerated temperatures inside the depot during periods of hot or cold weather.
2190. At any given time in the Didcot depot, there were about 69 workers using mechanised handling equipment. Mr Devenney had to be aware of their presence as he worked. He was exposed to the risk of being struck by mechanised handling equipment that was being operated by a colleague. Control mechanisms such as the Two Bay Rule were in place to reduce this risk very considerably. Unlike customers in a store, everyone working in the depot had been trained in health and safety procedures. As we have seen under Health and Safety, however, the risk was not eliminated. Batteries could fail. LLOPs could stop suddenly and unpredictably. During the period from August 2008 to December 2013, there were a total of 102 recorded accidents involving mechanised handling equipment. In 28 of these, a depot worker was hit by a moving vehicle.

2191. Mr Devenney was exposed to vibration as he operated his mechanised handling equipment. We do not know anything about the intensity of the vibration. His job description mentions manual handling injuries, but no recorded incidents of ill health caused by exposure to vibration.
2192. Activities at Didcot were rotated in order to reduce the risks of wear and tear injuries from excessive manual handling. Nevertheless, during the period from August 2008 to December 2013, there were 148 recorded manual handling accidents or incidents. During the same period, there were 31 recorded injuries from slipping, tripping and falling.
2193. Whilst working in the Didcot depot, Mr Devenney regularly heard the noises that one might expect in an industrial warehouse. These included alarms, although we do not know how frequent they were. Regularly the air would be filled with the sound of LLOP horns as the drivers turned a blind corner or emerged from a trailer. We do not know the volume of these horns. The volume was plainly calibrated to be heard at a distance of several metres over other ambient industrial noise. Mr Devenney also heard shouts from other Warehouse Colleagues. This does not mean that Mr Devenney and his workmates had to shout to be heard. The size of the depot meant that people were separated from each other by large distances. Speaking in a raised voice would be a convenient way of communicating across a large workspace. There were no customers present who might be discomfited by the sounds of workers shouting to each other.
2194. Some parts of the depot were exposed to noise from machinery. The inverter is an example of one of the noisier machines. The engines of goods vehicles made a loud noise as they reversed towards the Goods In and Goods Out bays. Mechanised handling equipment such Power Pallet Trucks made a loud noise as they drove over a dock leveller. Mr Devenney did not usually work in close proximity to any of these things. Occasionally, Mr Devenney worked a Handballing shift in the Goods In area. (We have seen that this was during the peak Christmas and Easter periods.) Otherwise, he was in the main aisles of racking shelving or the Pick By Line grids.
2195. The noise levels were not sufficient to give rise to any significant risk of harm to health. There was no assessed risk of hearing loss, at any rate, no risk of sufficient magnitude to warrant any ear protection. Mr Devenney was never issued with ear defenders or told to wear them. None of his colleagues were either.

Opelt

2196. The Lutterworth IDC, where Mr Opelt worked, was the depot with the largest amount of automated machinery. Noise emanated from conveyors and lifts that were not present in the other depots. If totes or other containers became stuck, an alarm would go off. These noises added to the industrial soundscape that was otherwise similar to Mr Devenney's environment in Didcot.
2197. Mr Opelt's Talkman was fitted with a volume control. The ambient noise in the depot was such that Asda envisaged that he might have to turn up the volume in order to hear his instructions clearly.
2198. Mr Opelt worked around colleagues who were operating LLOPs and HRTs. He picked from racking shelving where cases could fall from height.

2199. When Mr Opelt needed a new battery for his LLOP, he went to the Battery Bay. Entry was restricted to one Warehouse Colleague at a time, because of the risk of exposure to harmful chemicals.
2200. We have seen under Health and Safety that Mr Opelt encountered spillages about once per day. He handled wooden pallets that were rough and could give him a splinter.
2201. As discussed under the heading of Physical Demands, Mr Opelt spent approximately half his working time on Manual Store Pick. He did his Manual Store Picking in a section of the depot called the "MSP Chambers". Two of the three chambers were specially designed to house flammable, hazardous and oversized product lines that were unsuitable for storage in the automated racking shelving. Examples included aerosols, cleaning products, and sparking candles. Each of these two MSP Chambers was climate-controlled at 18 degrees and was capable of being hermetically sealed in the event of a leak or a fire. Mr Opelt's job description does not identify any hazards that the MSP items presented to Mr Opelt personally.

Hore

2202. Mr Hore worked at Skelmersdale. He was in the Frozen Chamber for 95% of his working time. At the start of the Relevant Period, the temperature in the Frozen Chamber was set at minus 25 degrees. During the Relevant Period, Asda warmed the chamber up to minus 20.
2203. The Frozen Chamber was prone to ice and frost build-up in areas near the Loading or Receiving Bays, as moisture was introduced to the frozen environment. About once or twice a week, there would be an effect similar to snow falling from the ceiling.
2204. Mr Hore was required to wear special clothing to protect him against the cold. This included a fleece jacket and trousers, bump cap, high-visibility vest and woollen gloves. This clothing was required for the Chilled Chambers and for the yard during winter weather. For working in the Frozen Chamber, Mr Hore was issued with additional protective headwear, freezer boots, freezer jacket, freezer trousers, a balaclava, freezer leggings and freezer gloves.
2205. Some activities required Mr Hore to move between chambers. If his work in the warmer chamber required physical exertion, he could sweat. The sweat would then freeze when he moved into the colder chamber. A similar effect occurred when Mr Hore worked on De-Kit in the yard. If it was raining, he could be wet when he re-entered the Chilled Chamber, and experience the added chill.
2206. When working in the Frozen Chamber, Mr Hore was given the option of taking a 10-minute break each hour. A "warm room" (which is to say an ambient-temperature room) was made available for the break. It was not compulsory either to take the break or to go to the warm room during break times. Nobody checked to see if Mr Hore actually took the break or not. His productivity targets incentivised him to work through his break, although we do not know whether he actually did so.
2207. Every three years, Mr Hore underwent a medical assessment to check that the frozen environment was not having an adverse effect on his health.

2208. Mr Hore recalls that a colleague was injured whilst working inside a trailer. He could not leave the trailer, because he was pinned by a piece of equipment. He tried to attract the attention of warehouse colleagues by shouting. Nobody heard him, so he used his mobile phone to contact reception.
2209. Mr Cooper submits that this is an indicator of the levels of ambient noise in the depots generally. We could not reliably draw any conclusions about general noise levels from this one incident. All the depots were huge buildings. Mr Hore's job description does not say where the nearest person was at the time of the incident. The fact that nobody came to the injured colleague's assistance may be due to the fact that no-one was working nearby, or to the fact that he was inside an insulated trailer.
2210. Even if some conclusion could be drawn from Mr Hore's job description about the noise levels at Skelmersdale, it would not follow that the other depots were equally noisy. The Skelmersdale depot was divided into chambers, which were cooled by overhead fans. We are told by the job descriptions that these fans contributed to the ambient noise.

Welch, McDonough, Morris

2211. Messrs Welch, McDonough and Morris all worked in the Frozen Chamber for over 90% of their time. Their working conditions were broadly the same as those experienced by Mr Hore.

Matthews and Prescott

2212. Mr Matthews and Mr Prescott worked in the Chilled Chambers. There were three Chilled Chambers. The coldest of these was Chilled Chamber 1. It was used for storing meat. It closed in 2010. Of the two others, by far the larger was Chilled Chamber 2. This was kept at a temperature of between 1 and 5 degrees Celsius. The temperature in Chilled Chamber 3 – the much smaller chamber – varied between 11 and 15 degrees.
2213. When Mr Matthews and Mr Prescott worked on picking activities, their physical exertion kept them warm. Some shifts required much less physical effort, and during these activities, they were more likely to feel the cold. One of these relatively lightweight activities was Goods In – Receiving. The main task in Receiving was scanning containers of stock as they arrived. Mr Matthews sometimes had to key in data manually. For this task he had to remove his gloves.
2214. During the course of a Receiving shift, Mr Matthews' internal body temperature was lowered and his heart rate slowed down. We do not know by how much, or how physically uncomfortable that would make him feel.
2215. Some of Mr Matthews' and Mr Prescott's activities involved driving mechanised handling equipment. His job description says that he was exposed to wind chill whilst operating that equipment. The severity of the wind chill depended on how fast he was driving. Mr Matthews' equipment was generally limited to a LLOP and a Power Pallet Truck. The maximum speed of these vehicles was 10.5 km per hour.
2216. Lighting conditions in the Chilled Chambers were different from the ambient depots and the stores. The lighting was more subdued. This did not impair

visibility. Mr Matthews was not given any lighting equipment to improve his ability to see, or the ability of others to see him.

2217. The conditions in all the temperature-controlled chambers at Skelmersdale were risk-assessed for their effect on the health of the workers there. A risk was identified that the temperatures might “exacerbate pre-existing respiratory or circulatory conditions and potentially causing hypothermia and frostbite.” There was no evidence that this risk was any more than a theoretical possibility. The risk was certainly not considered so great as to make it important to monitor whether Mr Matthews actually had any respiratory or circulatory conditions. He did not have any medical checks.

2218. The risk assessment at Skelmersdale also highlighted the risk of electrical fires, caused by keeping electrical wiring in low-temperature conditions. There was a risk of ammonia leaking from the cooling system, although there is no evidence that this ever happened. Had it occurred, an alarm would have sounded and the Chamber would have been evacuated.

Ballard

2219. Mr Ballard did two CBT-driving activities per week, rising to three in mid-2011. Each activity was based in the yard for most of the shift. Taking the Relevant Period as a whole, and the duration of each shift as a whole, Mr Ballard spent a little less than half his working time outdoors.

2220. Sometimes the weather was rainy, snowy or icy. These conditions could be hazardous as well as unpleasant, because the surface of the yard could be slippery. Mr Ballard had to take care when driving his CBT in those conditions.

2221. The yard was busy with goods vehicles moving in and out of the area.

2222. The Goods In side of the depot had a canopy that extended out into the yard. Most often, Mr Ballard did Side or Rear Tipping under that canopy. When working on a Yard shift, Mr Ballard drove out from under the canopy to collect stacks of pallets for loading onto trailers.

2223. The CBT had a roof, and a front windscreen, but was open at the sides and rear. Curtain attachments protected the sides, but they tended to steam up. If it was raining, and Mr Ballard was out on the open yard, he either had to put up with the reduced visibility or get wet.

Sayeed (2)

2224. We have seen that Mr Sayeed worked in the Battery Bay during the period covered by the IEs' Iteration 2. During this time, he worked one or two shifts per week. Sometimes he did a split shift, working part of his shift in the Battery Bay and the rest on another activity such as Large Case Pick.

2225. The Battery Bay contained hazardous chemicals. Mr Sayeed sometimes had to send people away owing to the risk of exposure.

Makin

2226. Between August 2008 and September 2009, Mr Makin worked principally on Pick By Line and on Goods Out. Pick By Line accounted for about 40% of his working time. It was based in the Chilled Chambers. Goods Out and De-Kit

accounted for most of the remaining 60% of his time. It was split between the Frozen and Chilled Chambers. The percentage split on Goods Out was roughly 25% Frozen to 75% Chilled.

2227. This period was assessed by the Asda experts as Iteration (a).

2228. From September 2009, almost all of Mr Makin's working week was spent on Goods Out and De-Kit. (This period has become familiar as the time when Mr Makin was recovering from his broken arm. It was assessed as Iteration (b).)

2229. Overall, therefore, Mr Makin spent about 15% of his time in the Frozen Chamber during Iteration (a), and 25% of his time in the Frozen Chamber during Iteration (b).

How working conditions are measured in other schemes

2230. The AON *JobLink* has a bespoke factor to measure the demands of working conditions. It separates out four levels of demand. The baseline is "work is largely sedentary, no unusual health hazards, requires no special precautions, probability of injury is remote". It looks to capture a typical office. The highest level of demand is for "extremely disagreeable or hazardous working conditions", "exposure to any number of elements on a continual basis" and "safety of self and others depends on correct action by incumbents".

2231. This scheme is informative. Four levels of demand are sufficient to capture the full range of working environments from an office to one that is extremely disagreeable or hazardous. The Physical Activity factor helps us to calibrate those steps. As we saw, four level steps also encompass the full range of physical demands from sedentary work up to continuous heavy lifting.

2232. The NJC *JES* envisages five different levels for working conditions. At the highest level of demand, situations are "very disagreeable, unpleasant or hazardous". Examples of such situations are "excessive heat or cold; in freezing conditions; working with pneumatic drills; working on scaffolding; when subject to excessive threats of assault". The second-lowest level of demand involves "some exposure to disagreeable, unpleasant or hazardous environmental working conditions or people-related behaviour". The guidance states that such conditions would be "other than normal office conditions, where temperature, light, dirt, odour, noise or safety conform with Health and Safety standards".

2233. The NJC, then, considers that four levels of demand would cover the range of jobs – other than office jobs – that include working in freezing conditions.

The IEs' scheme for Working Conditions

2234. The IEs sought to measure the demands the environment in which each jobholder carried out their work, "with particular reference to unpleasant, hazardous or otherwise challenging working environments". They also took into account "the statutory requirement to mitigate exposure by the use of appropriate PPE [personal protective equipment]". Owing to a formatting error, the sentence about PPE was truncated. Mr Walls confirmed that, in general, compulsory personal protective equipment was an indicator of a more challenging work environment than optional equipment.

2235. As with the other factors, there were five levels in the IEs' scheme, supplemented by a modifier. They were defined as follows.

Consideration of the environment(s) in which work is carried out with particular reference to unpleasant, hazardous or otherwise challenging work elements. Account is taken of the statutory requirement to mitigate exposure by the use of appropriate PPE a [truncated].	
Moderated (+ or -) for the proportion of working time exposed to the maximum demand of the factor.	
LEVEL	LEVEL DESCRIPTION
A	Work is carried out in a difficult environment featuring extremes of some or all of the following; temperature, extremely high noise levels, smells/fumes, other hazardous materials. These will be experienced over 50% of the jobholder's work, over a 6 month period. There is a recognised risk of injury or to health and there are set procedures including PPE in place to protect the jobholder which must be observed.
B	Work is carried out in a difficult environment featuring extremes of some or all of the following; temperature, extremely high noise levels, smells/fumes, other hazardous materials. These will be experienced for less than 50 % of the jobholder's work, over a 6 month period. There is a recognised risk of injury or to health and there are set procedures including PPE in place to protect the jobholder which must be observed.
C	Work is carried out in environments which are noisy and/or busy, or which expose the jobholder to unpleasant features such as spillages or hazardous materials. For shorter periods, jobholders may be exposed to more undesirable elements such as inclement weather, extremes of temperature, very high noise levels and/or proximity of machinery or equipment. During these periods, there may be a recognised risk of injury or to health and there are set procedures including PPE in place to protect the jobholder which must be observed.
D	Work is carried out in indoor environments which can sometimes be noisy and/or busy, or which expose the jobholder to unpleasant features such as spillages or hazardous materials requiring the use of PPE (which may be optional).
E	Work is carried out in an environment such as an office with only minimal exposure to unpleasant elements or physical risk.

The IEs' Level D

2236. The Level E definition was straightforward. It was intended to describe an office environment, where none of the Asda jobs actually worked.

2237. Most of the store-based roles were assessed at Level C.

2238. Mr Cooper asked Mr Walls for an example of a workplace that would be assessed at Level D. Mr Walls struggled to imagine one, except perhaps for a waiting room. It is not at all surprising that Mr Walls found it difficult to think imaginatively in a courtroom setting. Plenty of time has, however, elapsed since

then. There has been time for the IEs, or other experts, to think about whether Level D would capture any real life work environments. Nobody has come up with any suggestions. This is an indicator to us that the IEs' Levels C to E may not actually capture three real levels of demand.

Level B – “extremes”

2239. On the face of the Level B definition, a job would only qualify for that level if it involved “extremes” of some unpleasant environmental feature, such as temperature or noise, or hazardous materials.

2240. In fact, the IEs regarded a combination of less extreme features as also meeting the criteria for Level B. An example was Mr Devenney's working environment in Didcot. Mr Devenney was assessed at Level B=. None of the ambient features of his working environment were considered by Mr Walls to be “extreme”. The only exception was at those moments where, for example, an alarm went off, a horn sounded, and a colleague shouted all at the same time. Otherwise, it was the combination of more moderate environmental challenges at that added up to make Didcot a Level B working environment. Mr Walls had in mind the exaggerated temperatures (in summer and winter), the occasional exposure to extremes of noise, and the constant hazard level.

The step from B to A

2241. The definitions for Levels B and A were almost identical. Both levels involved risk of harm to health, compulsory PPE, a difficult working environment and extremes of noise, temperature, or exposure to harmful chemicals. What made the difference between the levels was the proportion of working time during which the jobholder was exposed to this environment. The watershed was 50%. If extreme exposure was over 50% of working time, the job was in Level A. If it was under 50%, the job was in Level B.

2242. This was not how the IEs differentiated the roles in practice. Mr Walls told us that, to achieve Level A, the feature had to be more extreme, rather than just being present for over 50% of the time. This approach was clear from the assessments themselves. Mr Matthews and Mr Prescott, who worked 100% of their time in the Chilled Chambers at Skelmersdale, were placed into Level B. The temperature conditions were the most demanding feature of their working environment. Mr Matthews and Mr Prescott were exposed to them for the whole of every shift. The reason why they did not get into Level A was because the chilled temperature conditions were not considered extreme enough. Thus, their colleagues who worked in the Frozen Chamber were assessed at Level A.

The Working Conditions Modifier

2243. The criterion for the modifier was “the proportion of working time exposed to the maximum demand of the factor”. It is immediately apparent that this is the same criterion that the IEs said they had used to differentiate between Level B and Level A.

2244. Mr Walls was asked about what “the maximum demand of the factor” meant. He readily accepted that it did not literally mean “the maximum demand of the *factor*”, because that would mean the modifier could only be used within Level A. Nor did it mean the maximum conceivable demand within the *level*. If that had

been the meaning, it would have begged the question of how demanding a working environment could be before it became so demanding that it qualified for the level above.

2245. The most natural meaning of “maximum demand” was the most demanding feature of the jobholder’s work. But this approach did not fit with the actual assessments. For example:

- 2245.1. Ms Forrester’s Edible Grocery role was assessed at C-, whereas other replenishment roles (such as Home and Leisure) were assessed at C+. The noticeable difference between Ms Forrester’s and Ms Darville’s working environments was that Ms Forrester worked at night, when the store was quieter. If that was what explained the differential application of the modifier, it would follow that the “maximum demand” of the two roles was the noise on the shop floor. But there was nothing in Ms Forrester’s job description to suggest that she was ever exposed to a noisy working environment. If noise was the most demanding feature of Ms Forrester’s work environment, it is hard to see how she reached Level C in the first place.
- 2245.2. Mr Sayeed was assessed at B= generally and at B+ for his Battery Bay iteration. The “plus” modifier was evidently awarded for the additional risks of working in the Battery Bay. If the Battery Bay was considered to be more inhospitable than the rest of the depot, one would have thought that his Battery Bay shifts would be working at the “maximum demand” for the purpose of the modifier. But Mr Sayeed only worked 1-2 shifts per week in the Battery Bay for Iteration 2. When this was put to Mr Walls, his answer was that Mr Sayeed’s Battery Bay activities were not considered in isolation. Rather, the Battery Bay “raised the watermark” for his whole job, such that the overall environment was more hazardous across his activity profile as a whole. But if that was right, then the modifier had not been applied for proportion of working time at the maximum level of demand. It had been applied because Mr Sayeed’s overall working environment was a bit more hazardous.

The Leigh Day experts’ assessments of Working Conditions

Level B – What is “extreme”?

2246. Like the IEs, the Leigh Day experts found themselves departing from the literal wording of the level definitions in order to try to place roles at a sensible level. The same word (“extreme”) was given two different meanings depending on the level in which it was used. Temperatures in the Chilled Chambers that were expressly considered “extreme” for the purpose of Level B were not sufficiently extreme to reach Level A. Commenting on Mr Matthews, for example, the Leigh Day experts noted that “wearing of cold conditions PPE all day suggests ‘extreme’, and whether it was extreme or not might depend on how much of the time Mr Matthews spent handling meat. He was assessed at B+. Mr Matthews worked 100% of his time in the Chilled Chambers. Ms Branney told us that at the time of writing Mr Matthews’ rationale, the Leigh Day experts had mistakenly believed that Mr Matthews did some of his work in the Frozen Chamber. There was nothing in the rationale to suggest that they ever had this belief. If they had thought Mr Matthews worked in the Frozen Chamber, the temperature would have been extreme and there would

have been no room for debate. Moreover, it would not have been important to establish how much of Mr Matthews' time was spent handling meat. This only made a difference in the Chilled Chambers.

2247. Mr Opelt was assessed at Level B. The rationale for his assessment did not identify any "extremes" at all. Instead, it listed a combination of noise, cold and hazards which together appeared to make his working environment more demanding than those at Level C. Ms Branney explained that the Leigh Day experts had adopted a "best fit" approach.

2248. At one point, Ms Branney suggested that the "exaggerated temperatures" in the Lutterworth Depot in summer and winter might be "extreme", so as to explain why Mr Opelt was in Level B. This is hard to accept, for three reasons:

- 2248.1. First, it does not make sense. the seasonal variations in indoor temperature were obviously not extreme when compared to the conditions of outdoor working in winter, or in the Frozen Chamber.
- 2248.2. Second, if the Leigh Day experts thought seasonal variations in working conditions amounted to "extremes", they did not apply that concept symmetrically. Had they done so, the noise in stores in school holidays would have to have been extreme as well.
- 2248.3. Third, it does not appear to be what the Leigh Day experts themselves thought at the time of conducting their test assessments. Had they considered that it was the seasonal variation in temperature was the "extreme" phenomenon that got Mr Opelt into Level B, we would have expected to concentrate on that aspect of his working environment when considering how to apply the modifier, as this would be the "maximum demand" to which he was exposed. As it was, the Leigh Day experts concentrated on Mr Opelt's exposure to potentially flammable materials when working in the MSP Chambers. (That was not extreme either: there was no evidence that these presented any risk to Mr Opelt's personal health or safety.)

The Working Conditions Modifier

2249. The Leigh Day experts gave a "plus" modifier to every role in Level C. This was based on their understanding of what "maximum demand of the factor" meant in the IEs' scheme:

- 2249.1. They recognised that it could not literally mean "maximum demand of the factor", for the reason we identified when discussing the IEs' scheme.
- 2249.2. Nor did they think it meant the maximum demand of the level. For example, the Leigh Day experts understood that there were increased noise levels in store during school holidays, but those noise levels were still encompassed within Level C. That meant that term-time working was below the maximum demand for the level. Term time was the majority of all the Shop Floor Assistants' working time. That did not get in the way of a "plus" modifier, in the Leigh Day experts' view.
- 2249.3. They considered "maximum demand" to mean the limb of the Level C definition that mainly applied to the job. In Ms Branney's opinion, "noisiness and busyness was the maximum demand in relation to the store jobs." Since the noise in stores was "constant" for just about all the

in-store roles, they qualified for a “plus” modifier for having the same feature that got them into Level C.

2250. Curiously, Edible Grocery was given a “plus” modifier, too. This was despite the lack of any evidence that the Ashton store was noisy or busy at night. The Leigh Day experts realised that there was “no obvious case for a modifier”. Nevertheless, when they revisited the role as part of their consistency check, they decided to assess her role at C+. Their rationale stated that this was to reflect “% of working time experiencing demanding conditions”. Ms Branney described this as “an exception to the rule”. Here, they regarded the modifier as being justified by the “combination of working conditions”, rather than the limb of the definition that mainly applied to her job.

The Asda experts’ scheme for Working Conditions

2251. The Asda experts’ scheme rebuilt the factor scheme from scratch. They identified two Elements to represent what in their view were the key drivers of demand. These were:

2251.1. Environment; and

2251.2. Hazards

2252. According to the Asda experts,

In defining levels key distinguishing features in practice in these particular jobs are:

- In relation to the Environment element – Frequency, duration and degree of exposure.
- In relation to the Hazards element – Frequency, duration and degree of risk.

2253. These distinguishing features were expressed in the following level definitions:

Level	E	D	C	B	A
Environment	Works in a normally heated, illuminated, and ventilated environment, with no or very limited variation outside this.	Works mainly in a normally heated, illuminated, and ventilated environment, but has some variation outside this.	Works mainly in an environment with some unpleasant or difficult features, such as a greater variation of temperature outside of the norm, greater noise, or poorer lighting. And / or Some exposure to very unpleasant conditions such as low temperatures.	Works in an environment with constant unpleasant or difficult features such as sustained noise or poor lighting.	Works in an environment with sustained exposure to very unpleasant conditions such as low temperatures.

Hazards	Mainly a low risk environment. Any hazards are minimal. Any injury is unlikely to be serious.	Mainly a low risk environment. Daily exposure to some hazards. Any injury is unlikely to be serious.	Mainly a moderate risk environment. Daily exposure to hazards for a substantial part of the shift. Injuries may be more serious.	Mainly a high risk environment. Sustained exposure to hazards throughout a shift. Injuries could be very serious.	Mainly a very high risk environment. Sustained exposure to serious hazards throughout a shift. Injuries could be very serious.
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2254. The level definitions were supplemented by the following conventions:

“In our opinion the general front of house store environment is one which is designed to be welcoming to the general public and represents a normally comfortable working environment. Therefore, we treat this for the purposes of these roles as a baseline normally heated, illuminated, and ventilated environment with normal noise levels and normal temperatures (except for the chilled aisle).

References to some variation outside the main environment for a role include any time spent performing a substantial activity in an environment outside that norm.”

2255. The Asda experts, therefore, expressly treated the shop floor of a store as being the least demanding environment of all the workplaces in these jobs. They also appeared to treat the noise levels in these areas as “normal”, suggesting a perceived equivalence with baseline workplaces (such as offices) that might be found in other assessment schemes.

The Environment Element

2256. To achieve Level D for the Environment Element, a role holder was required to have “some variation” away the shop floor. By their second convention, this meant performing a “substantial activity” in a place such as the bakery, warehouse, or chilled aisle.

The Hazards Element

2257. The Hazards Element analysed risks in a manner familiar to risk assessors: Risk was measured according to the probability of an adverse event occurring and the potential severity of the illness or injury. Had these two determinants of risk been set out in a matrix format, they would have looked like a risk assessment.

2258. Level D for the Hazards Element was characterised reached by “daily exposure to some hazards”, even if such hazards were unlikely to result in serious injury. When read alongside Level E, “some hazards” meant, effectively, hazards that were “more than minimal”. That is not how the Asda experts actually applied their scheme. Ms Ashton was exposed to a daily risk of physical assault whilst working at the Checkout. Her role-specific risk assessment said so. The magnitude of that risk was assessed as “possible”, which in the context of risk assessment, meant

more probable than “unlikely”. On the Asda experts’ level definitions, she plainly qualified for Level D. The Asda experts assessed her at Level E instead.

2259. At Level C, a workplace presented “daily exposure to hazards for a substantial part of the shift” and “injuries may be more serious”. Level C might therefore have been thought to be the natural home for a workplace in which jobholders were at risk every day of an injury lasting over 7 days. The risk assessments for the replenishment roles in stores identified such a risk. Yet Edible Grocery, George and Home and Leisure were assessed at Level D.

Chilled versus frozen environments

2260. The Asda experts believed that the working conditions in the Frozen Chamber were materially different from those in the Chilled Chambers. We find that this was their belief because of the reasoning in their rationales. For each of the Skelmersdale workers, the Asda experts attempted to calculate the percentage of time spent in the Frozen Chamber and the percentage spent in the Chilled Chambers. (They did not do so accurately in the case of Mr Makin, but that is beside the point.) If the Asda experts thought that the working conditions in both types of chamber were equally demanding, they could have saved themselves the bother.

Working Conditions - Discussion

Distinguishing features of demand

2261. Before embarking on a comparison of the schemes, we must ground ourselves in what drives the demand under this factor. What makes working conditions more or less demanding? Because of the large measure of agreement in principle, we have few such decisions to make.

2262. The only real dispute relates to hazards. Should we assume that everyone works safely all the time? As with Responsibility for Health and Safety, we assume that each jobholder does their job with reasonable care. What we cannot assume, however, is that everybody else would do the same. That is an unrealistic assumption to make. We know that workers in depots suffered injuries through no fault of their own. Sometimes a collision happened because of something outside either jobholder’s control, such as a LLOP coming to a sudden halt with a flat battery. At other times, it was the fault of one LLOP driver, but not the other. Sometimes it was the fault of a third person, such as a lorry driver moving their trailer whilst depot workers were moving in and out.

2263. For the purpose of assessing the demands of working conditions, therefore, we accepted that all the jobholders were exposed to risk of injury through the fault of a colleague.

How many levels?

2264. In our view, the demands of working environment should be spread across four levels.

2265. When considering how many level steps of demand there were amongst these roles, we bore in mind that every role involved exposure to an environment that was substantially more challenging and hazardous than a typical office job. The temperature and lighting were optimised for a pleasant customer experience, but

this only goes part-way towards answering the point. Asda could control the climate, but they could not control the customers. They could not stop children shouting, or customers spilling liquids or leaving litter. Mr Walls summarised the customer-facing areas of the stores as “noisy, busy, bustling, unpredictable”. This is a broad summary, which of course permits further nuance, such as variations between school holidays and term-times, day-time and night-time. It is nonetheless a fair description.

2266. The existence of substantially more amenable working environments outside Asda was not determinative, of course. There could still theoretically be a large variation in demand within the Asda jobs, provided that the top end was sufficiently extreme. Nor would it be inappropriate to take the least demanding environment for the Asda jobs as the baseline, simply because an office or library would be more comfortable. But it was not a promising starting point for Asda’s argument that there were five different levels of demand.

2267. Another indicator that there were fewer than five levels of demand was the conceptual difficulty that the Asda experts had in defining the difference between Level E and Level D. None of the roles faced “minimal” hazards. The Asda experts did not think so when they carried out their risk assessments.

2268. On the other hand, we cannot agree with the Leigh Day experts’ attempt to shoe-horn all these roles into three levels. As we discuss under the heading, “Relativities”, there were more than two clear level steps in demand.

2269. Our choice of four levels appears to match the equivalences in other schemes and – crucially – equivalences between factors in those schemes.

Choice of scheme

2270. It will not come as a surprise that we have retained the basic skeleton of the Asda scheme, in preference to that of the IEs and Leigh Day experts.

2271. This is because:

- 2271.1. Neither the IEs nor the Leigh Day experts could properly assess roles into the top level of demand without disregarding the level definitions;
- 2271.2. The modifier was confusing and difficult to apply; and
- 2271.3. The faults with the Asda scheme were capable of being rectified.

Relativities

Frozen v. Chilled Chambers

2272. There is a clear step in demand between roles that were based predominantly in the Frozen Chamber and roles that were based in the Chilled Chambers. On this point we prefer the opinion of the IEs and Leigh Day experts over that of the Asda experts. This is because:

- 2272.1. The Frozen Chamber was much colder;
- 2272.2. The jobholders had to wear a heavy jacket, balaclava and mittens;
- 2272.3. The compulsory health check was an indicator that Asda thought there was a greater risk to health;

- 2272.4. The warm room breaks did not make up for sustained working in a frozen environment; if Asda thought they made a material difference to health and safety risks to an individual, they would have enforced the breaks; and
- 2272.5. The Asda experts must at some time have perceived a difference in demand between the two kinds of chamber; otherwise they would not have thought it relevant to identify the percentage of the jobholder's work that was done in the Frozen Chamber.

Outdoor working v. Chilled Chambers

2273. Mr Ballard and Mr Haigh (in iterations (a) and (c)) worked for approximately half their working time outdoors, unprotected from the wind, and sometimes unprotected from the rain. They had that working pattern all year round. When not driving a CBT, their environment was essentially an ambient depot. The demands of their working conditions exceeded those of ambient depot workers and were, in our view, broadly equivalent to the demands of working in the Chilled Chambers. It is misleading simply to compare the temperatures indoors and outdoors. Conditions inside the Chilled Chambers were dry and still. Wind chill was limited to the top speed of a LLOP or Power Pallet Truck. The lighting conditions were less pleasant than outdoors, but they did not impair visibility in any way.
2274. Mr Makin's role was more difficult to place. He spent most of his time working in a chilled environment and between 15 and 25% of his role in the Frozen Chambers. In our view, he was marginally at Level A.

Warehouse v. ambient depots

2275. In our view, Ms Hutcheson's working conditions in the store warehouse were broadly equivalent to the work in an ambient depot. It was somewhat less hazardous, because there were fewer people who could hurt her. It was more unpleasant, because of her additional work cleaning around and underneath the compactor, and her work in close proximity to the open bay doors or outside in the yard, or in the chilled back-ups. Mrs Webster's industrial kitchen environment was at roughly the same level of demand. We find it to be marginally more pleasant than working in a Chilled Chamber, or outdoors for half the time.

Bakery and Chilled

2276. We saw an intermediate level of demand amongst roles that consisted largely of replenishment in a store environment, but with some additional unpleasant or hazardous features. In Ms Ohlsson's case, it was the fact that she worked next to supermarket chillers for the bulk of her shift, and frequently visited the walk-in fridges in the back-ups. For Mrs Gardner it was the risk – and reality – of burn injuries and the warm conditions in proximity to the ovens.
2277. We compared these working conditions directly with those of Mr Opelt, and the other ambient depot workers. They were less demanding, but, in our view, only marginally so.

Front-of-house environment

2278. At the lowest level of demand was the customer-facing area of the stores. For the reasons we have given, this was a high baseline, compared to a typical working environment.

2279. We would have assessed an office environment at a further level step below the front of house of a store. For this reason, we regarded Section Leader as being only marginally in Level D. A substantial part of her working time was spent in the office.

Working Conditions Scores

2280. Here are our scores for the Working Conditions Factor.

Level	Store roles	Depot roles	Points
A		Hore, McDonough, Morris (a) and (b), Welch	50
Marginal A		Makin (a) and (b)	50
B		Matthews, Prescott, Ballard (a) and (b), Haigh (a) and (c)	40
Marginal B	Counters, Warehouse	All other comparators	40
C	Bakery, Chilled, Produce		30
D	Checkout, Customer Service Desk, Edible Grocery, George, Home & Leisure (a) and (b), Personal Shopper, Process, Service Host (a) and (b)		20
Marginal D	Section Leader		20

Chapter Fifteen – The Equal Value Test

2281. Now we have determined all the disputes about which factors should be used. We have scored all the roles and iterations for all the factors we have chosen. We have identified an area of (as yet) unassessed demand.

2282. What we now need to do is to follow the route map we set for ourselves in paragraphs 296 to 302.

2283. We have listed the scores and marginality scores for all the roles. The list appears in the Appendix to these reasons.

Edible Grocery and Personal Shopper

2284. Ms Forrester and Ms Hills respectively achieved points totals of 220 and 210.

These scores were more than 20 points adrift of the lowest-scoring comparator, Mr Opelt. They do not therefore come within the margin of potential equal value.

Their work was not of equal value to any of the comparators' work.

Section Leader

2285. Miss Gibbins' total score is 440. That is greater than, or equal to, all the comparators except for one iteration of Mr Haigh's role.

2286. The exception is Haigh (a). That iteration scored 460 points – two level steps above Miss Gibbins.

2287. Miss Gibbins and Haigh (a) are therefore within the margin of potential equal value.

2288. Mr Haigh had the benefit of 4 marginal decisions, compared to Miss Gibbins' one.

2289. We now compare the unassessed demand of responsibility for customer goodwill. In our view, Miss Gibbins had a weightier responsibility for customer goodwill than Mr Haigh had. Mr Haigh was responsible for a team on Small Case Decant and End of Chutes for part of his working week. A failure of those teams to pick accurately could seriously have disrupted the supply chain. There was a risk that a customer might go to one of the ambient shelves in a store and discover that the product they were looking for was not in stock. That was still less of a responsibility than Miss Gibbins had on her shoulders. Miss Gibbins was responsible for the Services Section for the whole of her working week. She edited the rota to ensure that there were enough checkout staff to avoid queues building up at the checkouts. She worked on the Customer Service Desk, where her role was specifically to address customers' problems, some of which had been escalated by colleagues who could not deal with them. Miss Gibbins' role had a greater impact than Mr Haigh's role on the likelihood of a customer continuing to return to store and spend their money at Asda.

2290. This reinforces the conclusion that Miss Gibbins' work was of equal value to that of Mr Haigh in iteration (a).

2291. We represent these findings in the following table:

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Section Leader	440	-1	+30	+10	480	Equal Value
Haigh (a)	460	-4				

Warehouse

2292. Ms Hutcheson scored 360. This score falls more than two levels short of Haigh (a) (460), Haigh (b) (440), Morris (a) (440) and Beaumont (b) (390). Her work was not of equal value to their work.

2293. Ms Hutcheson's score is at least as high as all the other comparators, apart from Ballard (b), Morris (b), Beaumont (c), Dennis (d), Dolan (b) and Sayeed (b). These are the comparators within the margin of potential equal value.

2294. We could not identify an obvious difference between the weight of Ms Hutcheson's responsibility for customer goodwill and that of any of these comparators. Ms Hutcheson was customer-facing for only a small proportion of her working time. For the remainder of her time, the contribution she made towards customer goodwill was essentially of the same character as that of the depot workers – helping to keep prices down by moving goods efficiently, and helping to ensure that products were available on the shelves.

2295. We now take the comparators individually. We start with the two comparators against whom Ms Hutcheson is unsuccessful:

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Warehouse	360	-1	-10	0	350	Not Equal Value
Ballard (b)	380	0				
Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Warehouse	360	-1	+10	0	370	Not Equal Value
Morris (b)	380	-2				

2296. Now for the comparators against whom Ms Hutcheson succeeded.

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Warehouse	360	-1	+10	0	370	Equal Value

Beaumont (c)	370	-2				
Dennis (d)	370	-2				
Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Warehouse	360	-1	+20	0	380	Equal Value
Dolan (b)	370	-3				
Sayeed (b)	370	-3				

Customer Service Desk and Service Host (b)

2297. Mrs Fearn and Ms Billings (in iteration (b)) both received a score of 340. They both had the benefit of one marginal assessment. They had broadly the same weight of responsibility for customer goodwill, as they both worked on the customer service desk. We can take them together.

2298. Their scores matched, or exceeded, those of Mr McDonough, Mr Uchanski, Dolan (a), Haigh (d), Mr Matthews, Mr Prescott, Mr Han, Mr Hore, Mr Devenney, Mr Welch, Dennis (a) and (b), and Mr Opelt.

2299. Mrs Fearn and Ms Billings failed to come within two level steps of Haigh (a) and (b), Mr Morris, Ballard (b), Dennis (d), Dolan (b) or Sayeed (b).

2300. The comparators within the margin of potential equal value are Ballard (a), Makin (a) and (b), Dennis (c), Beaumont (a), Sayeed (a) and Haigh (c).

2301. In our view, Mrs Fearn and Ms Billings' weight of responsibility for customer goodwill exceeded that of all these comparators by at least one level step. We are aware of the potential for a loading error by Mr Makin or Mr Dennis to result in some fast-moving stock failing to reach a store in time to replenish the goods on the shelves. There was a risk that a customer might reach the shelves of eggs, for example, and find them empty. This would have a considerable effect on the willingness of that customer to come back to Asda. Nevertheless, Mrs Fearn and Ms Billings' weight of responsibility was greater. Their role was specifically to deal with the very thing about which a customer was unhappy, often where a colleague had been unable to resolve it, and try to put it right.

2302. The difference in responsibility for customer goodwill was not enough to enable Customer Service Desk or Service Host (b) to catch Mr Ballard or Mr Haigh. The following table shows our working out.

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Customer Service Desk	340	-1	-10	+10	340	Not Equal Value
Service Host (b)	340	-1	-10	+10	340	Not Equal Value
Ballard (a)	360	0				
Haigh (c)	360	0				

2303. Customer Service Desk and Service Host (b) do succeed against the other comparators:

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Customer Service Desk	340	-1	+10	+10	360	Equal Value
Service Host (b)	340	-1	+10	+10	360	Equal Value
Makin (b)	350	-2				
Dennis (c)	350	-2				

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
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Customer Service Desk	340	-1	+20	+10	370	Equal Value
Service Host (b)	340	-1	+20	+10	370	Equal Value
Sayeed (a)	360	-3				

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Customer Service Desk	340	-1	0	+10	350	Equal Value
Service Host (b)	340	-1	0	+10	350	Equal Value
Beaumont (a)	350	-1				

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Customer Service Desk	340	-1	+10	+10	360	Equal Value
Service Host (b)	340	-1	+10	+10	360	Equal Value
Makin (a)	360	-2				

Counters

2304. We next consider Mrs Webster. Her score was 330. She had the benefit of one marginal assessment.

2305. The following comparators' scores were either the same as, or lower than, Mrs Webster's score:

- 2305.1. Dolan (a) – 330
- 2305.2. Haigh (d) – 320
- 2305.3. Matthews – 320
- 2305.4. Prescott – 320
- 2305.5. Han – 310 for (b) and 300 for (a)
- 2305.6. Hore – 290
- 2305.7. Uchanski (a) – 290
- 2305.8. Devenney – 280
- 2305.9. Welch – 280
- 2305.10. Dennis (a) and (b) – 270
- 2305.11. Opelt - 260

2306. Her work was of equal value to their work.

2307. The comparators within the margin of potential equal value are Uchanski (b), McDonough, Makin (b), Dennis (c) and Beaumont (a).

2308. Of these, Mr McDonough and Beaumont (a) were still out of reach following our direct comparison:

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Counters	330	-1	-10	+10	330	Not Equal Value
McDonough	340	0				

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Counters	330	-1	0	+10	340	Not Equal Value

Beaumont (a)	350	-1				
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2309. Since Mrs Webster has lost against Messrs Beaumont and McDonough, it is not strictly necessary for us to explain why we enhanced her score for responsibility for customer goodwill as against them. We offer a brief explanation nonetheless. Mrs Webster's role involved making products for a customers. She prepared and cooked pizzas. She roasted chickens and filleted fish. She was far more directly responsible for product quality than someone whose job was merely to move it safely from one place to another and keep it at the right temperature. A customer who found bones in their fish, or raw meat in their chicken drumstick, or a burned pizza, would be more likely to try a different supermarket than a customer who found that their first-choice product was unavailable on the shelves. On top of that, Mrs Webster had face-to-face interactions with customers that the depot workers did not have. In our view, the difference in weight of responsibility for customer goodwill was obviously equivalent to at least one level step.

2310. For the same reasons, we find that Mrs Webster's responsibility for customer goodwill exceeded that of Mr Dennis, Mr Makin and Mr Uchanski in all their iterations.

2311. Mrs Webster succeeds against Makin (b), Dennis (c) and Uchanski (b). The following tables show how we arrived at that final conclusion.

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Counters	330	-1	+10	+10	350	Equal Value
Makin (b)	350	-2				
Dennis (c)	350	-2				

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Counters	330	-1	0	+10	340	Equal Value
Uchanski (b)	340	-1				

Service Host (a)

2312. Iteration (a) is what is left of Ms Billings' Service Host role if we ignore the work she did on the Customer Service Desk and Kiosk. That iteration scored 310, with two marginal assessments.

2313. This score is sufficient to establish automatic equal value with Mr Han, Mr Hore, Mr Devenney, Mr Welch, Dennis (a) and (b) and Mr Opelt.

2314. Within the margin of potential equal value are Mr Dolan, who scored 330, and Messrs Prescott, Matthews and Haigh (c), each with 320. Following our head-to-head comparison, Ms Billings falls short against all of them.

2315. In case of any challenge to these conclusions, we briefly set out our finding on the unassessed demand of responsibility for customer goodwill. Ms Billings had the greater weight of responsibility. It was clearly worth at least a level step. She had to manage queues and troubleshoot sources of customer frustration such as the Self-Scan Units. She interacted with customers all day. She dealt with some queries that checkout operators could not handle. The comparators made a contribution to low prices by moving stock efficiently around the depots. The impact of their actions on product availability was moderated by the fact that they were at several removes from the outgoing lorries. There were more opportunities for errors to be discovered and corrected before a customer could reach an empty shelf.

2316. The following tables set out our working:

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Service Host (a)	310	-2	-10	+10	310	Not Equal Value
Prescott	320	-1				
Matthews	320	-1				
Haigh (d)	320	-1				

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Service Host (a)	310	-2	-10	+10	310	Not Equal Value

Dolan (a)	330	-1				
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George

2317. Mrs O'Donovan's score is 270. Two marginal assessments contributed to that score.

2318. Her points total matches Dennis (a) and (b), and exceeds Mr Opelt's score of 260.

2319. Mr Welch and Mr Devenney scored 280. Mr Hore and Uchanski (a) scored 290. These are the roles within the margin of potential equal value.

2320. We compared responsibility for customer goodwill. The difference in responsibility was clearly at least a level step. A substantial part of Mrs O'Donovan's role was replenishment. Like the depot roles, she contributed, in a small way, to keeping prices down and ensuring that products were available in stores. She handled smaller quantities than these four depot workers, but her impact was more proximate, because she was finally responsible for getting the clothes onto the display hangers. These three depot workers were removed from the Goods Out function of the depot. Added to that, Mrs O'Donovan regularly worked on the tills and handled returns. Her interaction with a customer had the potential to affect the customer experience in a way that the pickers in depots did not have.

2321. As against Messrs Welch, Hore and Uchanski, Mrs O'Donovan nevertheless loses. Her role was not of equal value, as the following tables demonstrate:

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
George	270	-2	-10	+10	270	Not Equal Value
Welch	280	-1				

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
George	270	-2	-20	+10	260	Not Equal Value
Hore	290	0				

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
George	270	-2	0	+10	280	Not Equal Value
Uchanski (a)	290	-2				

2322. By contrast, Mrs O'Donovan's work was of equal value with that of Mr Devenney, when the two roles are considered side-by-side:

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
George	270	-2	+10	+10	290	Equal Value
Devenney	280	-3				

Home & Leisure

2323. We next consider the two iterations of Ms Darville's role in Home & Leisure.

2324. Both these iterations were of equal value to Mr Opelt's role, by virtue of their aggregate scores. No further analysis was necessary as against him.

Home & Leisure (b)

2325. The Trade-ins iteration of Ms Darville's role scored 270, assisted by three marginal assessments. This is equal to Mr Dennis' points total in Iterations (a) and (b).

2326. The roles within the margin of potential equal value are the same as for George.

2327. For essentially the same reasons as we gave in respect of Mrs O'Donovan, we consider that there was a level step's worth of difference in responsibility for customer goodwill between Ms Darville and the four comparator roles.

2328. The final result is the same for Home & Leisure (b) as it was for George. Ms Darville could not succeed against Mr Welch, Mr Hore, or Uchanski (a). This is because Mrs O'Donovan failed against them, and because, with an extra marginal assessment, Ms Darville was in a worse position than Mrs O'Donovan was.

2329. Despite having the additional marginal assessment, Ms Darville nonetheless succeeded against Mr Devenney, just as Mrs O'Donovan did.

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Home & Leisure (b)	270	-3	0	+10	280	Equal Value
Devenney	280	-3				

Home & Leisure (a)

2330. In Iteration (a), Ms Darville's points total was 260, still with three marginal assessments. This meant that her role was not automatically of equal value with Mr Dennis' (a) and (b) iterations. Instead, we have to consider these iterations, along with Mr Devenney, within the margin of potential equal value.

2331. Theoretically, Mr Welch was also within that margin, but Ms Darville could not succeed against him, as her higher-scoring iteration had already failed.

2332. Iteration (a) was unsuccessful when compared with Dennis (b) and Mr Devenney.

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Home & Leisure (a)	260	-3	0	+10	270	Not Equal Value
Devenney	280	-3				

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Home & Leisure (a)	260	-3	-10	+10	260	Not Equal Value
Dennis	270	-2				

(b)						
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2333. Ms Darville's work was, however, of equal value with Mr Dennis' iteration (a):

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Home & Leisure (a)	260	-3	0	+10	270	Equal Value
Dennis (a)	270	-3				

Process

2334. The total number of points scored by Mrs Trickett was 260. All of her assessments were fully within the level. This was enough to establish equal value with Mr Opelt by comparison of the aggregate scores alone.

2335. As with Ms Darville, the roles within the margin of potential equal value for Mrs Trickett were Dennis (a) and (b), Mr Welch and Mr Devenney.

2336. We looked for indicators of a difference in responsibility for customer goodwill. The facts were not clear enough for us to find that any one role had a greater weight of responsibility than any other. At its most basic, Mrs Trickett's responsibility was to check that products were physically where they appeared to be on the Perpetual Inventory system. It had some impact on efficiency, and therefore on price. There was some impact on availability, in that if she found products missing she could replenish them, or trigger the process of ordering them in from the depots. The impact was not as direct as in a replenishment role such as George or Home & Leisure. She had some additional responsibility to interact with customers as she went about her work. Arguably, this was weightier than responsibility of the pickers to help keep prices down and avoid shortages due to inaccuracy. The difference is not, however, sufficiently obvious for us to rely on it in our assessment of equal value.

2337. Mrs Trickett was unsuccessful in her bid for equal value with Mr Welch. The following table shows our direct comparison:

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Process	260	0	+10	0	270	Not Equal

						Value
Welch	280	-1				

2338. As against Mr Devenney, and Dennis (a) and (b), Mrs Trickett fared better:

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Process	260	0	+30	0	290	Equal Value
Dennis (a)	270	-3				

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Process	260	0	+20	0	280	Equal Value
Dennis (b)	270	-2				

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Process	260	0	+30	0	290	Equal Value
Devenney	280	-3				

Bakery and Produce

2339. Both Ms Ohlsson and Mrs Wilby received exactly the same score (250) and had the benefit of one marginal assessment each. We can take them together.

2340. Neither of these roles qualify automatically for a finding of equal value. The lowest-scoring comparator, Mr Opelt, has 10 more points than they do.

2341. Alongside Mr Opelt in the margin of potential equal value are Dennis (a) and (b). Bakery and Produce succeed against all of them.

2342. In our assessment, Mrs Gardner and Mrs Wilby had a weight of responsibility for customer goodwill that was similar to that of Mrs O'Donovan and Ms Darville. It clearly exceeded Mr Opelt's and Mr Dennis' responsibilities when picking and tramming. They had the final responsibility for getting the products onto the shelves, which more than made up for the smaller quantities that they handled. Mrs Gardner had some added responsibility for product quality when preparing doughnuts and packaging hot rolls. That, when coupled with their responsibility to interact pleasantly and helpfully with customers, was enough to establish a level difference in their favour.

2343. The following tables show how we arrived at the final determination of equal value.

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Bakery	250	-1	+20	+10	280	Equal Value
Produce	250	-1	+20	+10	280	Equal Value
Dennis (a)	270	-3				

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Bakery	250	-1	+10	+10	270	Equal Value
Produce	250	-1	+10	+10	270	Equal Value
Dennis (b)	270	-2				

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
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Bakery	250	-1	+10	+10	270	Equal Value
Produce	250	-1	+10	+10	270	Equal Value
Opelt	260	-2				

Chilled

2344. Ms Ohlsson's role is tied on 250 points with Bakery and Produce, but she benefited from two marginal assessments to their one. She falls to be compared directly with the same group of comparators.

2345. We assess the relative weight of responsibility for customer goodwill in favour of Ms Ohlsson. This is for the same reasons we gave for the other replenishment roles versus their depot-picker counterparts.

2346. On a comparison with Dennis (b), Ms Ohlsson has failed to prove equal value, as this table shows:

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Chilled	250	-2	0	+10	2620	Not Equal Value
Dennis (b)	270	-2				

2347. As against, Dennis (a) and Mr Opelt, Ms Ohlsson succeeds:

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Chilled	250	-2	+10	+10	270	Equal Value
Dennis (a)	270	-3				

Role	Score	Marginality	Adjustment	Customer	Adjusted	Conclusion
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		Score	for marginality	goodwill	score	
Chilled	250	-2	0	+10	260	Equal Value
Opelt	260	-2				

Checkout

2348. This leaves just one lead claimant role – Ms Ashton on the checkout. She has a total score of 240. None of her assessments were marginal. This brings her within the margin of potential equal value with Mr Opelt. The remaining comparators are out of reach.

2349. It comes down to single one-on-one contest between Ms Ashton and Mr Opelt.

2350. As part of that contest, we must compare the unassessed demand of responsibility for customer service. Our finding is that Ms Ashton is at least one level step ahead. She interacted with customers all day long. Every interaction had the potential to make a customer's shopping experience a little more or a little less enjoyable. Mr Opelt picked cases. If he did not pick efficiently, there would be a real, but small, impact on Asda's operating costs and therefore, potentially on price. If he picked inaccurately, Goods Out would receive a case of the wrong stock, or the incorrect number of cases of the right stock. Several more things would have to go wrong before a disappointed customer stood at an empty shelf. The error would have to go undetected by Mr Opelt's supervisor. The delivery manifest would have to show that a case was on a pallet when it was not actually there. The equivalent of Ms Hutcheson in the store would have to fail to check the cases properly as they were unloaded. The stock would have to be so fast-moving that it would run out from the shelves before a new delivery could be ordered from the depot. These additional links in the chain lessened the impact of Mr Opelt's actions or inactions on a customer's willingness to continue shopping at Asda.

2351. Having made that finding, we determine the equal value question as between the two roles. As the following table shows, our conclusion is that the value of the work was equal.

Role	Score	Marginality Score	Adjustment for marginality	Customer goodwill	Adjusted score	Conclusion
Checkout	240	0	+20	+10	270	Equal Value
Opelt	260	-2				

Postscript

2352. Ms Hutcheson took off her high-visibility jacket at the end of a week's work. So did Mr Ballard, at the other end of the country. Each was almost certainly oblivious to what the other had been doing. Unknown to them, they had been doing work of equal value. It was close. If Mr Ballard's Colleague Circle responsibility was taken into account, his work was slightly, but measurably, more demanding than hers was.

2353. We have now determined the equal value question for the lead claimants and comparators. The parties must now try to use our findings as best they can. They will need to roll our findings out into the wider claimant and comparator population. This will demand a high degree of cooperation. A hearing will be listed for any residual disputes. Once these are resolved, there will be a final hearing. Asda will explain why the depot workers were paid more than the store workers whose work was equal to theirs. Having heard that explanation, the tribunal will decide whether the difference between Ms Hutcheson's pay and Mr Ballard's pay should be remedied by an equality clause. We do not know what that decision will be. We hope it will be amicable. For everyone's sake, we also hope it will be swift.

Employment Judge Horne

Approved on 31 January 2025

SENT TO THE PARTIES ON

31 January 2025

FOR THE TRIBUNAL OFFICE

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