

**ON APPEAL FROM**

**EAT Case Nos: EA-2023-000927-AT**

**THE EMPLOYMENT APPEAL TRIBUNAL**

**EA-000928-AT, EA-2024-001071-AT**

**His Honour Judge Tayler [2025] EAT 45**

**The Honourable Mrs Justice Stacey DBE [2025] EAT 112**

**B E T W E E N :**

**TESCO STORES LIMITED**

**Appellant/Respondent**

**-and-**

**Ms K ELEMENT & others**

**Respondents/Claimants**

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**HARCUS CLAIMANTS' (RESPONDENTS') SKELETON ARGUMENT**

(with Supplementary Bundle and Authorities Bundle references added)

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*For a combined appeal hearing commencing on Tuesday 3 March 2026*

**INTRODUCTION**

1. This is the skeleton argument<sup>1</sup> of one of the two groups of respondents to the appeals, the Claimants in the Employment Tribunal ('ET') represented by Harcus Parker Employment (the '**Harcus Claimants**'). There is another group of Claimants who are represented by Leigh Day Solicitors (the '**LD Claimants**').
2. These are appeals by Tesco about the way in which the EAT determined Tesco's appeals against the ET's 'Stage 2' fact-finding judgment in mass equal pay litigation. There are two appeals to the CA:

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<sup>1</sup> The Harcus Claimants acknowledge that this skeleton is longer than the 'normal' envisaged by CPR PD52C, but hope that the Court will accept this, and find it helpful, given the complex history of this litigation (which is summarised below) and that there are two appeals being heard together.

- a. the ‘**Scope Appeal**’ (CA-2025-000486) – this is an appeal against the decision of HHJ Tayler [2025] EAT 45 (the ‘**Scope Judgment**’) about the scope of Tesco’s appeal to the EAT [CB/78-85]; and
  - b. the ‘**Stage 2 Appeal**’ (CA-2025-002063) – this is an appeal against the decision of Stacey J [2025] EAT 112 (the ‘**Substantive Judgment**’) about the merits of Tesco’s appeal to the EAT [CB/86-159].
3. The Scope Appeal raises a single narrow and simple point: is a party who appeals against the decision of an ET at Stage 2 of equal value equal pay proceedings required to identify the parts (and all the parts) of the decision which it says are wrong? The answer should be an uncontroversial yes. Tesco’s position – that the determinations which are challenged on appeal need only be identified after the appeal has been determined – is nonsensical and should be dismissed.
  4. The Stage 2 Appeal raises several related points about the way in which the ET determined the facts about the ‘work’ of claimants and their comparators at the Stage 2 hearing in this litigation. This is a second appeal against a first instance fact-finding judgment. There is little, if any, dispute between the parties as to the applicable law. The EAT has already reviewed the first instance decision and upheld some, but not all, of Tesco’s grounds of appeal against the first instance findings. The EAT upheld some of Tesco’s grounds of appeal against specific factual findings but rejected Tesco’s grounds of appeal about alleged fundamental errors of principle, some of which are repeated in this appeal to the CA. The EAT was right to reject them; the CA should do likewise for the reasons set out below.

#### **DOCUMENTS AND REFERENCING**

5. The Court should have, in addition to the parties’ skeleton arguments:
  - a. an electronic **Core Bundle** (‘**CB**’) of **1044** pages including an Index;
  - b. an electronic **Core Supplementary Bundle** (‘**CSB**’) of **161** pages including an Index;
  - c. an electronic **Supplementary Bundle** (‘**SB**’) (also referred to as a Reference Supplementary Bundle of **1269** pages including an Index;
  - d. an electronic **Authorities Bundle** (‘**Auth**’).<sup>2</sup>

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<sup>2</sup> References to the Authorities Bundle were added to this Skeleton Argument on 18 February 2026 following the Authorities Bundle being filed on 17 February 2026.

6. References in this skeleton argument to page / paragraph numbers in the various bundles are to pages in the form **[bundle/page/¶paragraph]**.
7. A **Table of Contents** for this skeleton argument is immediately below. Each section is bookmarked and hyperlinked.

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## BACKGROUND – THE PROCEEDINGS AND THE STAGE 2 JUDGMENTS

### The proceedings

8. Around 55,000 Claimants have presented equal pay claims against Tesco. The first claims were commenced in 2018. No claims have been determined yet. On the current directions there is no prospect of a final judicial determination of any claim being made before at least summer 2027 (a final hearing for some of the claims has been listed from 1 February 2027 to 26 March 2027).
9. The claims have been divided into three ‘tranches’ according to ‘job role’. The first tranche (**‘Tranche 1’**) consists of three claimant job roles. From each of those three job roles, two Claimants (**‘Sample Claimants’**) have been selected. Their equal value claims in comparison with a number of named comparators progressed to a Stage 2 hearing (the **‘Stage 2 Hearing’**) within the meaning of the **EV Rules**<sup>3</sup> which took place over approximately seven weeks from 6 March 2023 (see ¶¶50 to 55 below for an explanation of ‘Stage 2 Hearings’).

### The Stage 2 Hearing and judgments

10. At the Stage 2 Hearing, the ET was required to make findings in relation to 14 jobholders (6 Sample Claimants and 8 comparators).
11. In advance of that Stage 2 Hearing, the parties prepared lists of the disputes to be determined at the Stage 2 Hearing (the **‘Records of Dispute’**). Those Records of Dispute contained disputes as to the facts and as to the relevance of disputed facts, and set out the parties’ respective positions in relation to each dispute.
12. On 12 July 2023, following the Stage 2 Hearing, the ET sent to the parties a document entitled *‘Unanimous Reserved Judgment’* (the **‘First Judgment’**) [CB/207-261]. In it, the ET: (i) made a number of ‘high level’ findings about the approach which it was

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<sup>3</sup> The applicable rules at the time of the relevant decisions were those in the Schedules to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (as amended) (the **‘ET Rules 2013’**), including Schedule 3, the Employment Tribunals (Equal Value) Rules of Procedure (the **‘EV Rules’**). Those have subsequently been replaced by the Employment Tribunal Procedure Rules 2024 (the **‘ET Rules 2024’**) which include Schedule 2, Procedure in equal value claims. Schedule 2 to the ET Rules 2024 is materially identical to the EV Rules, save that it does not contain the ‘Indicative Timetable’ which was annexed by r.2(2) of the EV Rules.

intending to take to determining the factual disputes; and (ii) proposed making further directions to require the parties to reformulate the disputes.

13. There was a further hearing on 20 July 2023 at which the parties and the Tribunal discussed the First Judgment and the Tribunal's proposed directions. The Tribunal then sent to the parties a Case Management Summary and Case Management Orders dated 26 July 2023 (the '**July CMO**') [CB/262-279].
14. Following this, the Tribunal determined the factual disputes during a period of deliberation of almost 10 months and recorded them in a judgment entitled '*Unanimous Reserved Judgment on the factual issues arising at the Stage 2 Hearing which occurred on the above dates*', dated 4 July 2024 (the '**Second Judgment**') [CB/280-898]. That Second Judgment is 619 pages long and also refers back to the findings in the First Judgment (see [CB/281-282/¶¶1-2]). It consists of a 'main' section and eight appendices (explained at [CB/301-302/¶¶56-61]).
15. In recognition of the particular circumstances and manner in which the ET had produced its Second Judgment, the ET reminded the parties of their right to apply for a reconsideration (and that the independent experts ('**IEs**') could apply for clarification under r.6(3) of the EV Rules) and also stated that, '*especially given the length and complexity of the appendices (which resulted from the length and complexity of the EVJDs and the parties' disputes about the content of those EVJDs), if any of the parties or the IEs seek clarification of any aspect of the appendices (including what appears to be an omission or a textual error which requires correction) then we will, through EJ Hyams, be willing (if the parties request it) to provide such clarification without the party or the IE having to use either of those formal routes or, as the case may be, correct the text and issue a certificate of correction*' (Second Judgment [CB/300/¶55]).
16. In October 2024, in response to that invitation and pursuant to a further email from the ET dated 23 July 2024 (the '**July Email**') [SB/746], each of the parties applied for clarification and/or reconsideration of various points in the Second Judgment. Tesco's application was 88 pages long ('**Tesco's First Reconsideration Application**').<sup>4</sup> The

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<sup>4</sup> An extract is at [SB/975-977].

Claimants' were significantly shorter.<sup>5</sup> The parties were given the opportunity to make submissions in response to each other's applications.

#### Tesco's appeals to the EAT – Appeals 1 and 2

17. Tesco was dissatisfied with some of the Stage 2 determinations and so appealed to the EAT. Tesco's appeals were made in two stages. The staging and timing of the appeals is significant.
18. On 22 August 2023, following the First Judgment and the July CMO, but before the ET had promulgated its detailed factual determinations in the Second Judgment, Tesco filed its first appeal – '**Appeal 1**' or '**A1**' [CB/182-186].<sup>6</sup> Appeal 1 did not identify any factual determinations which are alleged to have been decided erroneously, since the ET had not yet determined any of the Stage 2 factual disputes. The Claimants argued that Appeal 1 was premature (see, eg, [SB/1044/¶13]). Following an EAT Preliminary Hearing ('PH') before HHJ Auerbach on 29 February 2024, Appeal 1 was effectively stayed pending the ET's determination of the factual disputes.<sup>7</sup>
19. The ET then produced its judgment on the specific factual disputes; the Second Judgment dated 4 July 2024.
20. Notwithstanding that Appeal 1 had been stayed pending the ET's factual determinations, Tesco made no attempt to amend Appeal 1 to identify any factual determinations which it alleged had been decided in error of law.

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<sup>5</sup> The Harcus Claimants' application seeks clarification and/or reconsideration of only three issues and the LD Claimants' application seeks clarification and/or reconsideration in respect of a small number of issues and is only 15 pages long.

<sup>6</sup> Appeal Numbers EA-2023-00927-AT and EA-2023-00928-AT. There are two appeal numbers because two ET decisions were challenged, but the EAT and the parties have broadly treated these two appeal numbers throughout as a single appeal.

<sup>7</sup> Grounds 1-7 were stayed without a decision being taken on whether they would proceed to a full hearing. Ground 8 was permitted to proceed to a full hearing but with no further directions pending the ET's determination of the factual disputes. Tesco also sought to amend the grounds of Appeal 1 at this point. The Claimants did not object. Some grounds of appeal were dismissed upon withdrawal by Tesco, and the amendment application was otherwise left to be determined after the stay was lifted and was ultimately permitted.

21. Instead, on 15 August 2024 (after filing Tesco’s First Reconsideration Application but before that application had been determined), Tesco filed a different appeal – ‘**Appeal 2**’ or ‘**A2**’ [CB/189-206]. Again, some of the grounds in Appeal 2 still did not identify any allegedly erroneous factual determinations but, unlike Appeal 1, some grounds in Appeal 2 did identify some factual determinations which are alleged to have been decided in error of law. However, Tesco asserted that the factual determinations which were challenged in Appeal 2 were provided merely as ‘examples’ of the determinations which Tesco alleged were wrong. In addition, Tesco continued to pursue Appeal 1.

### The Scope Appeal – background and appeal

#### *The EAT Scope Judgment*

22. On 25 November 2024, in advance of an EAT PH for Appeals 1 and 2, HHJ Tayler ordered Tesco to ‘*produce a simple table setting out for all grounds of appeal that are maintained [...] [the] Order that Tesco would seek in respect of the ground if permitted to proceed and successful*’ [SB/762]. That order should have resulted in Tesco identifying the specific factual determinations which needed to be remitted or substituted.
23. On 26 November 2024, Tesco purported to comply with that direction [SB/765], [SB/767-771]. However, its table setting out the disposal order sought in relation to each ground (the ‘**Disposal Table**’) merely referred vaguely, for each ground, to ‘*Remission to the same Tribunal for redetermination of the factual findings in its judgment in light of the EAT’s determinations of law*’ [SB/767] and similar phrases. Tesco did not specifically identify any factual determinations which it asserted should be remitted or substituted.
24. Following an EAT PH on 27 November 2024, HHJ Tayler promulgated the EAT Scope Judgment. In it, he permitted all grounds of appeal in both Appeal 1 and Appeal 2 (as then amended) to proceed to a full hearing and (correctly) set out the limits of what Tesco had and had not appealed. HHJ Tayler held that [CB/82/¶21]:<sup>8</sup>

*[...] where it is asserted that an error of law resulted in erroneous factual determinations it is important that particularity of the errors are set out. Tesco has the resources to provide the required full details and is to be limited to the specific challenges advanced in the grounds of appeal, absent any successful application to amend.’*

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<sup>8</sup> All emphasis, here and elsewhere, is added unless stated otherwise.

25. Tesco asserted in its Scope Appeal Skeleton for a final hearing of the Scope Appeal which was subsequently adjourned [CB/1004] (at ¶¶17-18) that:
  - a. it is ‘*not entirely clear what HHJ Tayler meant*’; and
  - b. this decision – ie that the appeals are limited to challenging the specific determinations challenged in the grounds – applies only to grounds A2/G1, A1/G5, A2/G4, A2/G5, A2/G6, A2/G7, A2/G8, A2/G9, A2/G10, A2/G11.
26. Both of those assertions are wrong. The Scope Judgment is clear; all of Tesco’s grounds of appeal are limited to the specific allegedly erroneous factual determinations identified by Tesco in its grounds of appeal. The EAT reiterated this in a further judgment refusing a subsequent application to amend – see ¶29 below.

*Tesco’s Amendment Application*

27. On 4 March 2025, following the EAT Scope Judgment, Tesco applied to re-amend its appeals, including to amend Appeal 2 to include a (still non-exhaustive) schedule (the ‘**Annex**’) of additional specific factual determinations which Tesco alleged were decided in error of law (the ‘**Amendment Application**’) [SB/982-1006]. (The Amendment Application also applied to make some other small amendments which were granted.)
28. HHJ Tayler refused the application to include additional purportedly specific factual determinations ([2025] EAT 43; the ‘**Amendment Judgment**’) [SB/644-653], including because:
  - a. *‘Paragraph 52 [of the proposed amendment] refers to the Annex that lists 146 passages that are said to include “factual determinations, facts, examples and matters on which the Respondent relies”. It is hard to imagine a more vaguely pleaded assertion. While the schedule sets out which ground (and in some cases sub-ground) the passages are said to be relevant to; the “factual determinations” and/or “facts” (it is not clear what if any distinction there is between the two); “examples” and “matters” (it is unclear what this term means) are not expanded upon. This raises very serious concerns about how the EAT would be able to understand the appeal or how, if the relevant grounds are successful, the Employment Tribunal would deal with remission’* [SB/650/¶25] [CSB/6/¶25];
  - b. *‘the application to amend is made extremely late’* [SB/651/¶30] [CSB/7/¶30]; and
  - c. *‘the prejudice [to Tesco] is essentially of Tesco’s own making. Tesco could have set out the full extent of their challenges to the facts that make up the stage 2 equal value judgment when they submitted the appeal or applied for amendment at a*

*much earlier stage. Even now the proposed amendment is extremely vague and risks enormous further delay*’ [SB/652-653/¶37] [CSB/8-9/¶37].

29. In the Amendment Judgment, HHJ Tayler reiterated his decision in relation to the scope of Tesco’s appeals (without limiting his comments to only some of the grounds of appeal):
- a. *‘Tesco’s analysis fails to take account of the particular nature of a judgment after a stage 2 equal value hearing in which a huge number of facts are determined. The challenge in the appeal must be to specific facts or groups of linked facts determined in the judgment*’ [SB/650/¶26] [CSB/6/¶26];
  - b. *‘[...] an appeal lies against a judgment, and [...] the judgment in a stage 2 equal value [sic] constitutes the findings made by the Employment Tribunal on the disputed facts*’ [SB/651/¶29] [CSB/7/¶29];
  - c. *‘[Tesco’s] appeal seeks to challenge specific findings of fact made at the stage 2 equal value hearing*’ [SB/648/¶19] [CSB/4/¶19];
  - d. *‘The decision [by Tesco] only to give examples of the asserted errors in the factual determinations that made up the judgment was in error*’ [SB/651/¶30] [CSB/7/¶30].

#### *Tesco’s ‘Scope Appeal’ to the Court of Appeal*

30. Tesco appeals to this Court against the decision in the EAT Scope Judgment that Tesco’s Appeals 1 and 2 are limited to challenging the factual determinations which Tesco had identified in its grounds of appeal and did not encompass challenges to other factual determinations which Tesco had not identified. This appeal is the ‘**Scope Appeal**’ or ‘**CA1**’ (CA-2025-000486). The grounds are at [CB/15]. The Harcus Claimants address it at ¶¶46 to 83 below.
31. Tesco has not appealed against the Amendment Judgment.

#### The Stage 2 Appeal – background and appeal

##### *The EAT Substantive Judgment*

32. Following the EAT Scope Judgment, Appeals 1 and 2 were heard together by Stacey J on 18-19 June 2025 (the ‘**EAT Substantive Hearing**’). By this point, Appeal 1 consisted of seven live grounds of appeal contained in amended grounds dated 19 May 2025

[CB/183-186]<sup>9</sup> and Appeal 2 consisted of eleven grounds of appeal contained in amended grounds dated 4 March 2025 [CB/189-206].<sup>10</sup>

33. On 1 August 2025, Stacey J’s judgment on Appeals 1 and 2 was handed down ([2025] EAT 112; the ‘**EAT Substantive Judgment**’) [CB/86-159]. The appeals were upheld in part only – see order dated 31 July 2025 (the ‘**EAT Substantive Order**’) at [CB/77/¶¶1-2]. Disposal was adjourned to a further EAT hearing in October 2025 (the ‘**Disposal Hearing**’).
34. In the EAT Substantive Judgment, Stacey J did not, contrary to Tesco’s assertions, find that the ET ‘*went seriously wrong*’ (see Tesco’s Permission skeleton for the Stage 2 Appeal [CB/46/¶4]). Rather, Stacey J:
  - a. dismissed most but not all of Tesco’s grounds of appeal;
  - b. dismissed all of Tesco’s grounds of appeal about alleged fundamental errors of principle;
  - c. upheld small parts of the appeals in relation to ‘*some specific instances [in which] the tribunal had erred in part in failing to determine some disputed facts*’ and some ‘*specific factual challenges*’ which Stacey J described as ‘*nitpicking*’, many of which were perversity challenges to factual determinations [CB/87];
  - d. stated expressly that ‘*the wholesale challenge on the basis of a totally flawed or fundamentally wrong understanding of the meaning of “work” for equal pay purposes that undermines all aspects of the tribunal’s findings and reasons in the First Judgment, the CMO and the Second Judgment fails*’ [CB/119/¶95].
35. The EAT found, amongst other things, that:
  - a. The ET ‘*correctly understood the meaning of “work” (s.65(6) Equality Act 2010) and followed well-established case law*’ [CB/87] notwithstanding that the ET ‘*thought it might have come up with a novel approach*’ because ‘*in fact it did no such thing*’ – ‘*the tribunal and the parties were both considering the same question, correctly. No matter that they seemed, at times, to consider that they were not in agreement: in fact they were, even if there was a surprising unwillingness to acknowledge it*’ [CB/119/¶95].
  - b. The ET ‘*did not approach their fact finding task on the basis of generic jobs, but on what the claimants and their comparators were required to do in practice by*

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<sup>9</sup> Appeal Numbers EA-2023-00927-AT and EA-2023-00928-AT.

<sup>10</sup> Appeal Number EA-2024-001071-AT.

*their employer’ [CB/87] and the ET ‘was focussed on what the individual claimants and their comparators did’ and ‘made reference to the particular evidence and facts of each of them’ [CB/121/¶98];*

- c. *The ET ‘was entitled to conclude, as a fact, that the employer’s detailed and prescriptive training materials that the claimants and their comparators were required to follow was important evidence as to the work that they did’ [CB/87]; – the ET ‘engaged with and analysed the evidence of the very highly regulated and controlled environment, and the desire of the very large respondent employer to achieve uniformity across all its stores and DCs’ and it is ‘classically for a fact finding tribunal such as this one to decide what weight to attach to the various forms of evidence it had before it, which is what this tribunal did’ [CB/122-123/¶¶106-107].*
- d. *There ‘was no serious procedural irregularity vitiating the tribunal’s decisions’ in relation to the approach which the ET took to training document evidence [CB/87]. The ET ‘had identified early on that they were interested in the documents of in-person training given to the claimants and the comparators and also the documents that they were required to read and apply’ [CB/122/¶102].*
- e. *It ‘was open to [the ET] in principle to decide not to accept agreed facts where there were grounds for doing so’ [CB/87]. The ET ‘was entitled to look carefully at the agreed as well as the disputed facts and exercise its judgment’ [CB/131-132/¶140].*

### *The Disposal Hearing*

36. *The Disposal Hearing to determine the implications of even the very limited success of Tesco’s appeals was complex. It took two days (14-15 October 2025) and required a reserved decision ([2025] EAT 159, the ‘Disposal Judgment’) [CB/168-179]. The EAT’s disposal orders were contained in an order dated 23 October 2025 (the ‘Disposal Order’) [CB/160-167].*
37. *Broadly, the Disposal Order (for the reasons in the EAT Substantive Judgment and the Disposal Judgment) does three things:*
  - a. *First, at [CB/160-165/¶¶1-12], it sets out detailed and specific lists of factual determinations which are to be substituted or remitted to the ET by reference to paragraphs of the EVJDs. The identification of which specific EVJD paragraphs were affected by the (partial) success of the appeals was a laborious and time-consuming process. It involved protracted written and oral discussion and*

- submissions, both inside and outside the hearing room. Ultimately, the EAT was required to determine disputes between the parties as to which EVJD paragraphs were and were not affected (Disposal Judgment [CB/176-179/¶¶27-36]).
- b. Second, at [CB/165/¶¶13-14], it stays the work of the ET and IEs in relation to Stage 2 (but not in relation to other aspects of the litigation – see ¶45 below) pending the outcome of these appeals to the Court of Appeal.
  - c. Third, at [CB/165-167/¶¶15-22], it orders, and sets out a process for, the parties to reformat and reorganise the ET’s Stage 2 findings (the ‘**Reorganisation Directions**’). The Reorganisation Directions were proposed and broadly agreed by the LD Claimants and Tesco. The Reorganisation Directions order the parties to produce revised comprehensive records of dispute / EVJDs which record, in a single document for each jobholder, the parties’ understanding of the ET’s decisions about the work of each jobholder. The EAT’s reasons for ordering this Reorganisation are set out in the Disposal Judgment at [CB/173-176/¶¶14-26], especially at [CB/174-175/¶19]. The Reorganisation Directions are intended by the EAT, amongst other things, to *‘Identify and isolate the specific points of dispute where the approach of the Tribunal of incorporating training documents into the decision has led to confusion and disagreement so that the Tribunal can set out what it had decided’* [CB/175/¶19(d)].

#### *Tesco’s ‘Stage 2 Appeal’ to the Court of Appeal*

38. Tesco appeals to this Court against parts of the EAT Substantive Order (criticising parts of the EAT Substantive Judgment), effectively seeking to reargue some but not all of the points which Tesco pursued before Stacey J. This appeal is the ‘**Stage 2 Appeal**’ or ‘**CA2**’ (CA-2025-002063). The grounds are at [CB/29-34]. The Harcus Claimants address it at ¶¶84 to 160 below.
39. Tesco has not appealed against the Disposal Order, including the Reorganisation Directions.

#### Additional procedural history

##### *Further reconsideration*

40. On 30 May 2025 (ie after the filing of Appeals 1 and 2, after the EAT Scope Judgment and after the Amendment Judgment, but before the EAT Substantive Hearing), following reconsideration undertaken partly of its own volition and partly in response to reconsideration applications from the parties about specific factual determinations, the

ET promulgated a *‘Unanimous Judgment on Reconsideration’* (the **‘Reconsidered Judgment’**) [SB/294-600]. The ET explained that it had *‘stat[ed] precisely what was the work of each sample claimant and each comparator’* [SB/318/¶53] [CSB/25/¶53] and had now restructured the determinations into 14 appendices (one per jobholder). The Reconsidered Judgment is 307 pages long and expressly incorporates significant amounts of other documents, including of the Second Judgment.

41. No party has appealed the Reconsidered Judgment. However, Tesco filed a 46-page application dated 11 July 2025 for reconsideration of the Reconsidered Judgment (**‘Tesco’s Second Reconsideration Application’**). Tesco’s Second Reconsideration Application:
  - a. made additional or repeated submissions about factual determinations;
  - b. appended a new witness statement from one of Tesco’s witnesses who had been cross-examined during the Stage 2 Hearing; and
  - c. appended an 11-page schedule of analysis, submissions and mathematical calculations about documents and data which sought to revisit and reopen disputes which had been disposed of by the ET’s previous decisions.
42. The LD Claimants also filed a short reconsideration application.
43. The ET determined the Second Reconsideration Applications in a decision dated 24 July 2025 (the **‘Second Reconsideration Decision’**) [SB/601-626]. The ET dismissed the vast majority of the reconsideration requests, save for making a small number of specific factual changes and commenting that it would or might permit Tesco to pursue some of its reconsideration requests at the ‘final hearing’ listed for February 2027 (‘final hearing’ is explained in the EAT Substantive Judgment at [CB/89/¶5]).
44. All of the parties have appealed the ET’s decision to consider some of Tesco’s Second Reconsideration Application at the final hearing; the parties agree that the ET has erred in law. Those appeals are listed for a final appeal hearing in the EAT on 3-4 February 2026 (ie before this CA hearing).

#### *MFD hearing*

45. Separately from the Stage 2 and final hearing issues, a ‘material factor defence’ (**‘MFD’**) hearing has been listed from 1 May to 10 June 2026 before a different Employment Tribunal (EJ Anstis sitting in the Reading Employment Tribunal) to determine Tesco’s defences on the assumption that the Sample Claimants establish ‘equal work’.

## SUBMISSIONS – THE SCOPE APPEAL (CA1)

### Summary

46. Tesco asserts that it was an error of law for the EAT in the Scope Judgment to decide that Tesco’s appeal to the EAT was limited to challenging the decisions of the ET which Tesco had identified in its grounds of appeal, rather than deciding that Tesco’s appeal also encompassed challenges to other decisions of the ET which Tesco had not identified.
47. That (sole) ground of appeal should be dismissed. It is settled law that appeals do not lie against errors of law or reasoning *per se*, but only against decisions or results of the court (or ET).
48. Stage 2 of equal value equal pay proceedings is a pure ‘fact-finding’ process. There is no ‘result’ of a Stage 2 judgment other than the ET’s factual determinations. Consequently, in the context of Stage 2, the decisions or results which must be appealed are the factual determinations.
49. Tesco’s position – that Stage 2 factual determinations can be challenged on appeal without identifying the factual determinations which are challenged – is obviously wrong. It is illogical, contrary to binding authority, breaches the EAT Practice Direction, and would result in unworkable practical consequences.

### Context – what is a Stage 2 Judgment?

50. Understanding the purpose and nature of a judgment following a Stage 2 equal value hearing (a ‘**Stage 2 Judgment**’) is key to this appeal.
51. Pursuant to Chapter 3 of the Equality Act 2010 (‘**EqA**’) [**Auth/73-77**], employees are entitled to equal pay with relevant comparators of the opposite sex (subject to a valid defence by their employer) if they are performing ‘work’ which is ‘equal’ to that of the comparator. There are three ways of establishing equal work; one way is to prove that the claimant’s work is ‘*of equal value*’ to that of the comparator. Work is ‘*of equal value*’ if (amongst other things) it is ‘*equal to [the comparator’s] work in terms of the demands made on [the claimant] by reference to factors such as effort, skill and decision-making*’ (s.65(6)(b) EqA) [**Auth/76**].
52. Equal value claims are governed by the EV Rules [**Auth/91-96**]. The EV Rules set out a staged process by which equal value claims are case managed and determined. One of those stages is referred to as ‘Stage 2’ – see EV Rules 3, 6 and 7 [**Auth/91-93**].

53. Stage 2 is a pure fact-finding stage. The task of the ET at Stage 2 is to determine ‘*the facts relating to the question*’ (EV Rule 6);<sup>11</sup> the ‘*aim of this stage of the proceedings is to produce a factual statement of each individual’s work to be used [for] assessment of the question whether they are of equal value*’ (*Beal v Avery Homes (Nelson) Limited* [2019] EWHC 1415 (QB) (‘*Beal*’), per Lavender J at ¶23 [Auth/383]). Some of those facts will have been presented to the ET as agreed between the parties and other facts are presented to the ET as disputes which the ET is asked to determine.
54. Consequently, the decisions or results contained in the ET’s Stage 2 Judgment are the factual determinations. There is no overall unsuccessful party in relation to the Stage 2 Judgment as a whole, but there is an unsuccessful party in relation to each factual determination.
55. A Stage 2 Judgment consists only of:
- a. the ET’s factual determinations (ie determinations about facts and their relevance<sup>12</sup>);
  - b. the ET’s reasons for making those factual determinations; and
  - c. additional case management decisions (such as requiring an IE to prepare a report on the question on the basis only of the facts relating to the question as determined by the ET – see EV Rule 7 [Auth/93]).

#### Why Tesco’s position on the Scope Appeal is wrong in law

##### *The EAT’s jurisdiction*

56. The EAT’s jurisdiction is limited to the determination of appeals against specific judgments, orders or other decisions of the ET; the EAT has no jurisdiction to consider criticism of the ET or its reasoning unless it led to an adverse determination against the appellant which is being appealed.

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<sup>11</sup> ‘[T]he question’ is defined by EV Rule 1 [Auth/91]: “‘the question’ means whether the claimant’s work is of equal value to that of the comparator’.

<sup>12</sup> The relevant wording in the EV Rule 6 [Auth/93] is facts ‘relating to the question’. Tesco argued, in its EAT ground A1/G8 [CB/185-186/¶9], that ‘relating to’ means something broader than ‘relevant to’. That ground of appeal was dismissed in the EAT Substantive Judgment, with Stacey J observing that ‘[a]s well as failing on principles of interpretation’ [CB/134/¶150], Tesco’s interpretation ‘risked achieving an absurd result’ [CB/134/¶149]. Tesco has not appealed that decision.

57. It is a generally applicable principle that appellate jurisdiction does not extend to errors of law *per se*:
- a. *‘the general rule in civil proceedings has always been that appeals are against orders, not reasoned judgments’ (Wolfe v North Middlesex University Hospital NHS Trust [2015] ICR 960, EAT (‘Wolfe’), per Judge Serota QC at ¶92 [Auth/372] (and see ¶¶90-100)).*
  - b. *‘It is clear that the statutory jurisdiction of the Court of Appeal is to hear appeals from a “judgment or order” of the High Court [s.16 Supreme Court Act 1981] or a “determination” of the county court [s.77 County Courts Act 1984]. It has long been axiomatic that these words refer to the result of the hearing rather than to the reasons given by the judge for reaching the result’ (Cie Noga SA v Australia and New Zealand Banking Group [2022] EWCA Civ 1142, [2023] 1 WLR 37 (‘Cie Noga’), per Hale LJ at ¶53 [Auth/277]).*
  - c. *‘Appeals are against orders, not reasoned judgments.*  
*[52.0.6] In a number of cases it has been stated that the function of an appeal court, in particular the Court of Appeal, is to deal with “judgments”, “orders” or “determinations”, that is to say, to deal with the “result” or “outcome” (to use non-technical terms) of the hearing in the lower court, and not with “findings” or “reasons” given in the judgment [...].’ (White Book 2025 [52.0.6] [Auth/156])*
58. The EAT’s jurisdiction is derived from s.21 Employment Tribunals Act 1996 (‘ETA’) **[Auth/34-35]**:
- ‘An appeal lies to the Appeal Tribunal on any question of law arising from any decision of, or arising in any proceedings before, an employment tribunal under or by virtue of [various statutes including the EqA].’*
59. Tesco has submitted in this appeal (see its Scope Appeal Skeleton for the adjourned final appeal hearing at ¶¶41-45 **[CB/1010-1012]**) that the general rule – that appeals do not lie against errors of law *per se* – does not apply to appeals to the EAT because the wording of s.21 ETA is not as *‘narrowly expressed’* as the statutes governing appeals to the Court of Appeal.
60. However, that submission flies in the face of the authorities – both Court of Appeal and EAT. It is settled law that, although the wording of (what is now) s.21 ETA might be

argued to be wide enough to permit appeals to the EAT on points of law *per se*, such an interpretation of s.21 ETA is wrong.

- a. The point is dealt with squarely in *Harrod v Ministry of Defence* [1981] ICR 8 (*'Harrod'*), per May J at 11E-12B [Auth/182-183]:

*'Upon a first reading of the words of section 136(1) [Employment Protection (Consolidation) Act 1978 [Auth/22], which is materially identical to s.21 ETA [Auth/34-35]], we can see that there might be some force in the argument and that appeals under that subsection could lie to this appeal tribunal on points of law decided by an industrial tribunal in the course of proceedings before them, even though the appellant was not seeking to challenge the ultimate result. [...] Having considered the matter carefully, however, we have come to the conclusion that it is inherent in any appeal that the appellant must be seeking to set aside the decision, judgment or order, whatever it may have been of the tribunal below [...]. We have come to the conclusion that, notwithstanding that the wording of section 136(1) is arguably open to a wider construction, the proper view is that it comprehends only appeals which attempt to disturb the order of the industrial tribunal.'*

- b. *Harrod* has been cited by the Court of Appeal with approval in *Riniker v University College London* [2001] EWCA Civ 597 (*'Riniker'*), per Schiemann LJ at ¶25 [Auth/231-232], and was followed recently by the EAT in *Durey v South Central Ambulance Service NHS Foundation Trust* [2024] EAT 173 (*'Durey'*), per HHJ Auerbach at ¶¶123-132 [Auth/542-545].
- c. The proper interpretation of s.21 ETA is that criticisms cannot *'be entertained as a question of law unless [the criticised matter] led to an adverse determination against the Appellant which is appealed'* (*Waterman v AIT Group* UKEAT/0358/05/DM, unreported 4 November 2005 (*'Waterman'*), per HHJ McMullen QC at ¶6 [Auth/295]).

61. Tesco has previously relied on *Mackie v John Holt Vintners Ltd* [1982] ICR 146 (*'Mackie'*) [Auth/184-186] for the proposition that *'a party could appeal against a mere 'indication of opinion' expressed by an ET in a pre-hearing assessment'* and so there is no requirement that an appeal to the EAT must challenge an adverse determination or

result (Tesco’s Scope Appeal Skeleton [CB/1010/¶41]). Tesco’s reliance upon *Mackie* is misplaced.

- a. First, the EAT’s decision in *Mackie* was that it was not possible to appeal in the circumstances of that case against the ET’s ‘*indication of opinion*’ (at p.148D [Auth/186]).
- b. Second, although the EAT did opine that it might be possible to appeal the ‘*indication of opinion*’ in different circumstances, it was ‘*in the highest degree improbable*’ that such circumstances would arise (at p.148C [Auth/186]), and that opinion is necessarily *obiter* because it related to circumstances other than those before the EAT.
- c. Third, in any event, the use of the phrase ‘*indication of opinion*’ in *Mackie* is merely a feature of the then wording of the relevant rules governing pre-hearing assessments (set out at p.146F-H [Auth/184]). The ET in *Mackie* was considering the question of whether the claimant’s claim was ‘*unlikely to succeed*’. The ET determined that the claim was unlikely to succeed. That was an adverse result for the claimant, with adverse consequences because it triggered different costs rules. It so happens that the relevant rule (Rule 6(2) of Schedule 1 to the Industrial Tribunals (Rules of Procedure) Regulations 1980 [Auth/26-27]) referred to the making of such a decision as the ET giving an ‘*indication of opinion*’. *Mackie* is not an example of a case in which the EAT was considering an appeal about something which was an error of law *per se* – even if the EAT had had jurisdiction to hear it, it would have been an appeal against a determination which was an adverse result for the appellant.

### *The EAT Rules*

62. Appeals to the EAT must also comply with the requirements of the EAT Practice Direction.<sup>13</sup>

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<sup>13</sup> The version of the EAT Practice Direction in force at the time of Appeal 1 was the EAT Practice Direction 2018 (‘**EAT PD 2018**’) [Auth/99]. The version in force at the time of Appeal 2 was the EAT Practice Direction 2023 (‘**EAT PD 2023**’) [Auth/102]. The version currently in force is the EAT Practice Direction 2024 (‘**EAT PD 2024**’) [Auth/115].

63. In relation to all types of appeal, EAT PD 2023 ¶3.8<sup>14</sup> [Auth/108-110] provided (amongst other things) that: ‘*The grounds of appeal are very important. The grounds of appeal must set out clearly and briefly the error(s) of law that you say the Employment Tribunal made. An error of law should be easy to identify in a few words. [...]*’.
64. In relation to grounds of appeal alleging perversity and procedural impropriety, EAT PD 2023 ¶3.9 and ¶3.10<sup>15</sup> (respectively) [Auth/110-112] provided for additional requirements, including that ‘*full details*’ must be set out.
65. Grounds of appeal must clearly identify the appellant’s position in relation to disposal of the appeal, reiterating that the appeal must necessarily be concerned with challenging some or all of the result in the ET.
- a. This is a requirement of EAT PD 2023 at ¶3.8.6<sup>16</sup> [Auth/110]: ‘*In the grounds of appeal you must state the order that you will ask the EAT to make if you win [...]*’.
  - b. Any remission sought should be clearly delineated. It is important that ‘*the scope of remission*’ to the ET ‘*should be clarified*’ and that there should not be ‘*any real possibility of misunderstanding of what has been said by a Judge as to the scope of remission*’ (see *LTRS Estates Ltd t/a Orwells v Hamilton* UKEAT/23/12, unreported 21 February 2013 (‘*Hamilton*’), per Langstaff J at ¶31 [Auth/350]).

*Applying the law and the EAT Rules to an appeal against a Stage 2 Judgment*

66. Applying those uncontroversial legal principles and rules to an appeal against a Stage 2 Judgment is straightforward:
- a. the appeal must challenge specific judgments, orders or other decisions of the ET – see ¶¶56 to 61 above;
  - b. in a Stage 2 Judgment, the ‘judgments, orders or decisions’ are the specific factual determinations, and everything else is reasoning<sup>17</sup> – see ¶¶53 to 55 above;

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<sup>14</sup> Similar requirements were in the EAT PD 2018 at ¶3.5 and ¶3.7 [Auth/100-101] and are in the EAT PD 2024 at ¶3.8 [Auth/122-124].

<sup>15</sup> Similar requirements were in the EAT PD 2018 at ¶3.7.4 and ¶3.10 (re perversity) [Auth/101] and are in the EAT PD 2024 at ¶¶3.9-3.10 [Auth/124-125].

<sup>16</sup> Similar requirements were in the EAT PD 2018 at ¶3.5 [Auth/100] and are in the EAT PD 2024 at ¶¶3.8.6 [Auth/123].

<sup>17</sup> Or case management.

- c. the appeal must identify the order which should be made on remission with no possibility of misunderstanding – see ¶65 above;
  - d. in a Stage 2 Judgment, the only remission orders which could make any difference to the outcome (and thus the only orders which could sensibly be made) are orders to remake the determination of particular facts (those being the only things requiring determination at all at Stage 2) – see ¶¶53 to 55 above.
67. Consequently, HHJ Tayler was correct in the Scope Judgment to recognise that (all of) Tesco’s appeals were limited to challenging the specific factual determinations which Tesco had particularised in its grounds of appeal.
68. This applies to Appeal 1 as well as to Appeal 2. Tesco’s Appeal 1, prior to the ET making specific factual determinations, was premature (see ¶18 above). Further, to the extent that Tesco was not in a position to identify the specific factual determinations it wished to challenge until after the Second Judgment, Tesco ought (as the EAT observed [SB/652-653/¶37] [CSB/8-9/¶37]) to have done that in good time following the Second Judgment, either by a fresh appeal or by prompt amendment, including when ordered by the EAT to identify the specific disposal orders sought. Tesco could and should have identified the specific factual findings (and all of them) which it contended required re-determination, but it did not do so.
69. For completeness, the Harcus Claimants note that Tesco has suggested that the requirement in EAT PD 2023 at ¶3.8.4(a) [Auth/109] that grounds of appeal should ‘*be short and focussed*’ somehow positively prohibited Tesco from identifying what it was challenging in its grounds (Tesco’s Scope Appeal Skeleton [CB/1006] at ¶¶23-24). That argument has no merit. The EAT PD does not, and does not purport to, prevent a party from identifying the decisions which it is challenging. If a party wishes to appeal against over 100 determinations, which is what Tesco has most recently said is the number of its desired challenges, then the grounds of appeal will necessarily be correspondingly longer. They can (and should) still remain ‘*short and focussed*’ in the context of there being effectively over 100 different appeals.

#### The unworkable practical consequences of Tesco’s arguments on the Scope Appeal

70. There are insurmountable practical problems with Tesco’s arguments on this appeal.

71. Even Tesco seems unsure how its position could be made to work practically. At various times Tesco has said contradictory things about how the factual findings affected by a successful ground of appeal or ‘example’ could or would be identified.
- a. At first, Tesco was silent as to how the affected factual findings would be identified. Tesco’s EAT grounds of appeal did not deal with disposal at all. Then Tesco’s Disposal Table (prepared at the direction of the EAT) referred to remittal of factual findings, but did not say which findings would be remitted (see ¶23 above).
  - b. Tesco’s next position (to the EAT) was that it would be the role of the ET on remission to work out which factual determinations have been overturned by the EAT (Tesco’s letter to the EAT 14 March 2025 [SB/799]): *‘The Employment Appeal Tribunal does not need to consider each example in order to reach a determination on each alleged error of law. If the Appeals are successful, the process of considering each example would be a matter for the Employment Tribunal upon remission’*.
  - c. However, now, in the Court of Appeal, Tesco seems to have abandoned that proposal. Tesco now seems to accept that it is the role of the EAT to work out which factual determinations are wrong, but Tesco proposes that the EAT should do that only when considering the correct order for disposal – ie after determining the merits of the appeals (Tesco’s Scope Appeal Skeleton [CB/1005] at ¶19): *‘The extent to which any error of law affected the individual findings made in the judgment would be a matter to be considered when determining relief’*.
72. The fact that even Tesco itself cannot decide how its proposal could be made to work in practice highlights the insurmountable problems with their arguments on this appeal.
73. Tesco’s first proposal (that the EAT should not work out what factual determinations it has overturned and should, instead, leave it to the ET) is wrong in principle. It would involve the EAT deciding that the ET had (or might have?) made errors without identifying what the errors are. Instead of complying with the exhortations in *Hamilton* (see ¶65.b above) to ensure that there should not be *‘any real possibility of misunderstanding of what has been said by a Judge as to the scope of remission’*, the EAT would be giving carte blanche. In addition, it would be unworkable in practice and illogical for the same reasons as apply to Tesco’s second proposal, and there would be a likelihood (if not inevitability) of further disputes.

74. Tesco's second proposal (that the EAT should work out what factual determinations it is overturning, but only at disposal) is logically impossible and practically unworkable.
75. Tesco's repeated '*glib*' assertion (to use HHJ Tayler's word) that the EAT '*does not need to consider each example in order to reach a determination on each alleged error of law*' (see [SB/650/¶25] [CSB/6/¶25]) is wrong in principle and wrong in practice.
76. First, it is wrong as a matter of principle and logic. It suggests that everything boils down to a mere disagreement over timing – should the challenges be identified before or after the merits of the challenges are determined? But that analysis is obviously wrong. It is not possible for the EAT (or any court) to decide whether or not a decision has been made in error of law without knowing what specific decision is being challenged.
77. Second, it is wrong in practice. Whether or not Tesco was correct that Stage 2 factual findings were arrived at in error of law depended upon what the findings are and how, if at all, the findings link to the criticisms of the reasoning which Tesco makes in its grounds of appeal. For example, when responding to Tesco's Amendment Application, it transpired that there were multiple instances in the list of factual determinations which Tesco sought to challenge which did not correspond to the alleged error of law under which they were listed (see examples at [SB/1014-1015/¶21]).
78. The practical problems with Tesco's position are not theoretical – they were illustrated by the challenges of the Disposal Hearing and the Disposal Order. Significant time and difficulty was involved in identifying even the very small number (tens, rather than hundreds or thousands) of factual determinations affected by even the very limited success of the appeals (see ¶37.a above), even in circumstances where the EAT accepted that '*remittal back shall only be on the specific examples cited in the respondent's grounds of appeal that were successful, unless the challenge is self-evidently to a matter of principle that has application across the board without the need for further argument and encompasses a wider point*' (Disposal Judgment [CB/177/¶29]).
79. In addition, Tesco's position leaves the parties and the ET in a position of near complete uncertainty. There is no way of knowing, on Tesco's position, how much of the first instance judgment is 'under threat' from the appeal. That hampers case management and case preparation and prevents any meaningful attempts to agree or narrow issues.
80. It is common ground that, at some point, someone (or some court or tribunal) is going to have to work out which decisions are being challenged by Tesco's appeal. Tesco is going to have to say what its position is at some point. Notably, even now, Tesco has still not

limited the number of determinations or ‘*examples*’ which it would assert have been determined in error of law if its Scope Appeal succeeds (notwithstanding the implication of footnote 2 to ¶49 of Tesco’s Scope Appeal Skeleton [CB/1013]). In its skeleton argument for the EAT full hearing of the appeals on 18-19 June 2025, Tesco included a ‘Disposal’ section which envisaged remission of an unspecified number of the ‘*issues of fact*’, up to and including all of them, to a fresh ET [SB/1142-1144/¶23]. In its CA Permission skeleton for the Stage 2 Appeal, Tesco still refers to the specific factual determinations which it challenges as mere ‘*examples*’ [CB/58-59/¶65] and ‘*illustrations*’ [CB/61/¶73].

81. Tesco’s position is that it is acceptable (or necessary – see submissions on Tesco’s argument based on EAT PD 2023 ¶3.8.4 at ¶69 above) to ‘kick that can down the road’. At absolute best for Tesco, that is pointless. In reality, it is much worse than pointless; it makes the appeals logically impossible to determine properly and very difficult to case manage. Even more problematically for Tesco, it is contrary to clear and binding authority.
82. For the reasons set out above, this Court should have no hesitation in dismissing Tesco’s Scope Appeal.
83. Tesco asserts that the result of dismissing its appeal would be that it ‘*risks leaving findings [...] in a judgment simply because there had not been compendious iteration of all of them on the notice of appeal*’ (Tesco’s Scope Appeal Skeleton [CB/1013/¶50]). There is nothing unsatisfactory about findings which have not been appealed remaining in a judgment. In any event, it is not something which is caused by the dismissal of this appeal; it is, as HHJ Tayler observed correctly (at [SB/652-653/¶37] [CSB/8-9/¶37]), caused by Tesco having failed properly to draft (and/or amend) its grounds of appeal. Even if that results in problems for Tesco, it is not a good reason for this Court to depart from settled, sensible legal principles.

## **SUBMISSIONS – THE STAGE 2 APPEAL (CA2)**

### Summary

84. Tesco’s Stage 2 Appeal concerns the ET’s approach to the meaning of ‘*work*’ in the context of EV claims, and a very small number of challenges to specific granular first-instance factual determinations.

## The scope of the Stage 2 Appeal

85. In the Stage 2 Appeal, Tesco has failed to particularise any allegedly erroneous specific factual determinations which were made by the ET, beyond those which it identified in its Appeals 1 and 2 to the EAT.
86. The CA grounds of appeal are thus drafted presumptuously on the basis that the Scope Appeal will succeed. In the event that the CA dismisses the Scope Appeal (which it should – see above), Tesco’s Stage 2 Appeal can relate only to the specific factual determinations identified by Tesco in the corresponding EAT grounds of appeal. In the event that the CA upholds Tesco’s Scope Appeal, it is still not clear which factual determinations Tesco says are wrong.

## The applicable law

### *The meaning of ‘work’*

87. At a Stage 2 Hearing in an equal value equal pay claim, the ET ‘shall’ (subject to any contrary order) ‘make a determination of facts on which the parties cannot agree which relate to the question’ (EV Rule 6(1)(a)) [Auth/93].
88. ‘[T]he question’ is ‘whether the claimant’s work is of equal value to that of the comparator’ (EV Rule 1(2)) [Auth/91]. The ET must, therefore, make findings of fact only about the relevant ‘work’ of the Claimants and comparators.
89. ‘[W]ork’ is not defined in the EV Rules (or in the main body of the ET Rules 2013 or 2024) or in the EqA.
90. The following principles apply, and are agreed in their entirety by Tesco (see EAT Substantive Judgment at [CB/113-115/¶¶80-82]), and were provided to the ET (and the EAT) in the ‘Claimants’ Joint Note on the Law’:
- a. At stage 2, the ET will determine disputes (of fact and relevance) to establish the ‘facts relating to the question’ of whether the claimants’ ‘work’ is of equal value to that of the comparators (s.65(1)(c) and s.65(6) EqA [Auth/75-76]; r.1(2) and r.6(1)(a) EV Rules [Auth/91-93]).
  - b. The facts that need to be determined in order to go on, at stage 3, to answer ‘the question’, are those that relate to what ‘work’ the individual claimants and comparators did (s.65(1)(c) and s.65(6) EqA [Auth/75-76]; r.1(2), r.6(2), r.6(3), r.7(1)(b) EV Rules [Auth/91-93]).

- c. The starting point is ‘*what is done in practice*’ by the claimants and comparators (the jobholders) – ie the jobholders’ ‘*observed activities not their notional paper obligations*’ (*Shields v E Coomes (Holdings) Ltd* [1978] 1 WLR 1408 (‘*Shields*’), per Lord Bridge at p.1427E-G<sup>18</sup>). The ET must ‘*look at what the employee actually did, not simply at the documents (such as [...] work manuals)*’ (*Beal v Avery Homes (Nelson) Ltd* [2019] EWHC 1415 (‘*Beal*’), per Lavender J at ¶30<sup>19</sup>).
- d. All three of the following different categories of things constitute (part of) the ‘*work*’ of a jobholder (*Beal*, per Lavender J at ¶32<sup>20</sup>):
  - i. things that the jobholder is instructed, requested or encouraged to do (even if those things are only done very infrequently or did not actually occur during the Evaluation Period);
  - ii. things that the jobholder does as a matter of practice which are simply a way of doing something which is part of their work (regardless of whether their managers know what they are doing); and
  - iii. things which are done with the knowledge and explicit or implicit acquiescence of their managers.
- e. Whether or not something is a ‘*requirement or expectation*’ of a particular role is a relevant consideration but is not a necessary condition in order for that thing to form part of the jobholder’s ‘*work*’ (*Beal*, per Lavender J at ¶¶31-32<sup>21</sup>).
- f. Documents such as ‘*work manuals*’ are ‘*relevant, but not necessarily determinative*’ of what constitutes the ‘*work*’ of a jobholder (*Beal*, per Lavender J at ¶30<sup>22</sup>).
- g. Training requirements and working conditions are also potentially relevant matters regarding which the ET may make factual findings (*Brunnhofer v Bank der Österreichischen Postsparkasse AG* [2001] 3 CMLR 9 (‘*Brunnhofer*’) at ¶48<sup>23</sup>).

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<sup>18</sup> [Auth/176].

<sup>19</sup> [Auth/385].

<sup>20</sup> [Auth/385-386].

<sup>21</sup> [Auth/385-386].

<sup>22</sup> [Auth/385].

<sup>23</sup> [Auth/250].

- h. In relation to the matters at (a) to (g) above, the ET is entitled to determine the level of detail which is relevant to ‘the question’ and to establish only such facts as it considers to be relevant to ‘the question’ (r.4(1)(d)(ii) and r.6(1)(a) EV Rules<sup>24</sup>).

*How to determine ‘work’*

91. Neither the agreed principles set out at ¶90 above, nor any other principles of substantive law which Tesco may seek to advance, do (or could) determine:
- a. how the ET should go about the task of assessing the factual evidence;
  - b. the probative value to be ascribed by the ET to different types of evidence; or
  - c. the order in which the ET should consider the evidence.
92. Those are all matters for the ET to determine for itself as part of its case management and fact-finding jurisdiction applying the usual and uncontroversial principles.
93. In reaching its Stage 2 Judgment – ie making make decisions about what constitutes ‘work’ – the ET was subject to r.42 ET Rules 2013 [Auth/89] (as recorded correctly in the First Judgment at [CB/248/¶59]) which provides that:

*‘The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts’*

94. The rules governing the scope and content of Stage 2 Judgments are set out at ¶¶50 to 55 above.

*Approach to appeals*

95. In the EAT Substantive Judgment at [CB/112-113/¶¶74-79], Stacey J correctly set out the approach which appellate courts should take to appeals in these circumstances, including:
- a. *‘The case law has repeatedly stressed the importance of not taking an unduly legalistic and analytical approach to employment tribunal reasons when*

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<sup>24</sup> [Auth/92-93].

*considering whether they disclose an error of law: Union of Construction, Allied Trades and Technicians v Brain [1981] IRLR 22, [1981] ICR 542, per Donaldson LJ:*

“I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought upon any such analysis. [...]”

- b. *‘Twenty years later Sedley LJ made the same point in Anya [ie Anya v University of Oxford [2001] ICR 847 (‘Anya’), at ¶26]:*

“26. ... The courts have repeatedly told appellants that it is not acceptable to comb through a set of reasons for hints of error and fragments of mistake, and to try to assemble these into a case for oversetting the decision. No more is it acceptable to comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons. Just as the courts will not interfere with a decision, whatever its incidental flaws, which has covered the correct ground and answered the right questions, so they should not uphold a decision which has failed in this basic task, whatever its other virtues”

- c. *‘Perversity is a high bar and “ought only to succeed where an overwhelming case is made out that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached” (Crofton v Yeboah [2002] IRLR 634 (EAT) Mummery LJ).’*

GROUND CA2/1: The meaning and determination of ‘work’ (EAT Substantive Judgment ¶¶80-109, esp. ¶95)

96. This CA ground [CB/29-30] corresponds to EAT grounds A1/G1 [CB/183], A1/G2 [CB/183] and A2/G2 [CB/193]. None of those EAT grounds identified any alleged erroneous specific factual determinations.

97. Tesco asserts that the ET erred in its approach to determining the ‘work’ of the Sample Claimants and comparators in three specific ways in three specific paragraphs / subparagraphs of the ET Stage 2 judgments [CB/29-30/¶1(a)-(c)]. The three errors alleged are:

- a. at ¶2 of the First Judgment [CB/208], focussing on *‘generic jobs’* rather than *‘the work of the individual jobholders’*;
- b. at ¶3 of the First Judgment [CB/208], considering what the employer *‘required’*, rather than considering only what the jobholders in fact did; and

- c. at ¶2 of the First Judgment [CB/208], holding that training documents were ‘key documents’ and, at ¶14.2 of the Second Judgment [CB/286], that the ET would depart from these documents only if ‘*there was cogent evidence [...] to show that one or more aspects of those training documents was not (or was no longer) determinative*’.

98. Each of those criticisms is wrong and is discussed further below.

*Ground CA2/1(a): Focus on generic jobs rather than the work of the individual jobholders (First Judgment ¶2)*

99. The first part of Tesco’s criticism of the ET’s approach to ‘work’ takes issue with ¶2 of the First Judgment [CB/208] (which is set out in full at ¶102.a below).
100. Tesco argues that this paragraph shows that ‘*The ET decided that the question was what the employer required “persons doing the jobs” of the jobholders to do: its focus was on generic jobs rather than the work of the individual jobholders*’ (CA2/1(a) [CB/29/¶1(a)]).
101. Tesco’s criticism is unjustified because, as set out in more detail below, that is not what the ET decided. The ET did (correctly) make decisions about the 14 individual jobholders, rather than decisions about ‘generic’ persons. That is clear from the words of ¶2 of the First Judgment, and from the rest of the ET’s decisions.
102. Even considering ¶2 of the First Judgment in isolation, the ET did not decide that ‘work’ must be assessed by reference to generic persons, rather than by reference to the individual jobholders.

- a. ¶2 of the First Judgment is as follows:

*‘2. The respondent had disclosed some (but possibly not all) of what the tribunal has concluded are the key documents. Those key documents are those (1) which are the best evidence of in-person training given to persons doing the jobs of the sample claimants or their comparators during the relevant period, or (2) which in themselves constituted the training in that they were to be read and applied by persons doing the jobs of the sample claimants and their comparators during the relevant period.’*

- b. The words ‘*persons doing the jobs of the sample claimants or their comparators*’ in this paragraph are used merely as a description of the evidence to which the ET was referring. That description was accurate: the training documents were

produced by Tesco for the purposes of giving training to all employees performing particular tasks / roles, not specifically to particular named individual employees.<sup>25</sup>

That documentary evidence was, in that sense, ‘*generic*’, but that is neither surprising nor problematic.

- c. The ET did not say in ¶2 that it was going to use that evidence to make findings about ‘*generic*’ / hypothetical jobholders, rather than about the specific Sample Claimants and comparators.

103. In any event, ¶2 of the First Judgment cannot be read in isolation; it must be read in context and with the other decision documents.

104. The context is that, in the First Judgment, the ET was not making any specific decisions about what was or was not part of the ‘*work*’ of the jobholders. The (provisional) decision which the ET was making was whether to make certain disclosure orders and orders for redrafting the Records of Dispute (set out at [CB/209/¶¶6-7]).

105. In any event, looking at the ET’s decisions as a whole (see ¶¶106 to 108 below), it is clear that the ET did not decide that ‘*work*’ must be assessed by reference to ‘*generic*’ persons, rather than by reference to the individual jobholders.

106. First, the ET was clear, prior to making its specific factual determinations in the Second Judgment, that it had in mind the correct principles, including the need to consider what the individual jobholders did in practice. For example:

- a. Elsewhere in the First Judgment, the ET stated [CB252/¶75]:

*‘in determining whether work was “equal work” within the meaning of section 65(1) of the EqA 2010, the question is what was the job of each person: not what was it that they did minute by minute when they were at work. That which they did which went beyond their employer’s express written requirements might (given what was said in paragraph 32 of the judgment of Lavender J in Beal [...] and what Bridge LJ said in Shields [...]) have become part of their job for the purposes of an equal pay claim, but that did not in any way detract from the proposition that the best way to see what*

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<sup>25</sup> An example of the sort of ‘training document’ to which the ET was referring is at [SB/168] (‘*Know Your Stuff for Everyone: Working Safely – Preventing Slips and Trips*’, trial bundle document C7/142/14). Further examples are at [SB/7-257].

*was an employee's job for those purposes was to see how the employer required the employee to work.'*

- b. In the July CMO (promulgated after the First Judgment and prior to the Second Judgment and which the ET stated *'should be read with [the First Judgment]'* [CB/262-263/¶1]), the ET stated [CB/265-266/¶11]:<sup>26</sup>
- i. *'how important it was in general to focus on what work the employer in practice required persons who were in the role of the comparator to do, rather than on the way in which that comparator actually worked';*
  - ii. *'if the comparator worked otherwise than in accordance with the employer's requirements, then the question would arise whether that different way of working was at least condoned by the employer';*
  - iii. *'what is in issue when determining the work within the meaning of section 65(6) of a comparator is primarily [nb not 'exclusively'] what were the employer's requirements of the job-holder in that job, and not how the job-holder in practice did that job'.*

107. Second, in the Second Judgment (where the ET made its specific factual determinations) the ET was obviously and expressly making decisions about the specific individual jobholders, not about generic jobs.

- a. The ET made clear in the Second Judgment that:
- i. *'What was<sup>[27]</sup> going to need to be decided by us was what were the tasks which the sample claimants and their comparators were required to do by their employer'* [CB/286/¶13.3]; and
  - ii. the ET accepted, and found *'to be of particular value'*, ¶¶27-30 of *Beal* [Auth/384-385] [CB/288-290/¶¶20-24] which provide, amongst other things, that *'Likewise, what the employee actually did is an important consideration, but is not necessarily determinative'* (see *Beal*, per Lavender J at ¶30).
- b. The ET's approach was to determine *'work'* by focussing on the tasks which are *'required to be performed'* and then considering the extent to which, if at all, the job holder's tasks differed from those requirements. That is consistent with the approach set out in the authorities cited (correctly) by the ET, including the

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<sup>26</sup> This paragraph of the July CMO was the paragraph challenged by Tesco in the EAT in ground A1/G1 [CB/183/¶1].

<sup>27</sup> Emphasis original.

comments of the EAT in *Potter* at ¶7 of the Appendix [Auth/319], cited in *Beal* at ¶28 [Auth/385] (see Second Judgment [CB/288-289/¶23]). Those were authorities upon which Tesco relied before the ET and upon which Tesco continues to rely or, at least, which it continues to agree (see ¶90 above).

- c. The ET did not (contrary to Tesco's assertion in the EAT) make decisions about what Tesco '*generally expected or required*' of a hypothetical individual (Tesco's EAT ground A2/G2 [CB/193/¶22]; Tesco EAT Appeal Skeleton [SB/1087/¶6.7]). The ET said in terms that it was making decisions about what Tesco required of '*the sample claimants and their comparators*' in particular [CB/286/¶13.3].
- d. The ET did not decide to ignore the question of whether or not a particular jobholder did their job differently from the way in which that job was generally required to be done. For example, the ET stated expressly that '*if the comparator worked otherwise than in accordance with the employer's requirements, then the question would arise whether that different way of working was at least condoned by the employer*' (First Judgment [CB/265-266/¶11]).
- e. The disputes which the ET determined in the Second Judgment were disputes in relation to the Sample Claimants and the comparators. The ET made findings in relation to the work of the Sample Claimants and comparators and it took into account the context and circumstances in which the work was done.
- f. In the EAT (as part of ground A1/G1), Tesco took issue with the ET's comment in the Second Judgment that '*the claims in this case are made by thousands of employees doing the job of customer assistant*' and it '*would be very surprising if the value of the work of those thousands of employees could be said to differ according to which employee did it (so that it was affected by how well or otherwise the employee did it) [...]*' [CB/287/¶18]. Tesco argued that this demonstrated that the ET was not considering the specific jobholders. Stacey J considered and rejected this argument: '*As to the criticism of [18] Second Judgment this was also misplaced: here the tribunal was reminding itself of a long-established equal pay principle that the fact that some employees are better at the job than others is not part of the equation*' [CB/121/¶98]. Stacey J was correct to reject Tesco's criticism for the reasons which she gave. The distinction the ET drew was between: (i) what the jobholder was required to do; and (ii) how well the jobholder complied with those requirements.

108. Third, the ET's approach following the Second Judgment reiterates that the ET was making decisions about specific individual jobholders. The Tribunal's Reconsidered

Judgment makes clear that the Tribunal was making decisions about the work of the 14 jobholders. This is reflected in:

- a. what the Tribunal said in the Reconsidered Judgment – the ET explained that in the Reconsidered Judgment it had ‘*stat[ed] precisely what was the work of each sample claimant and each comparator*’ [SB/318/¶53] [CSB/25/¶53];
- b. what the Tribunal did and how it structured its decision – the 14 individual appendices (one appendix per jobholder); and
- c. the references in the Reconsidered Judgment to the specific circumstances of, and evidence about, the particular individual jobholders.

109. Moreover, the ET’s focus on the specific individual jobholders was reiterated by the Reorganisation Directions which were made by Stacey J (see ¶37.c above). That process – for which Tesco advocated in the EAT – will involve the parties setting out their understandings of how the ET’s decisions apply to the specific jobholders using the clear, personalised ‘job description’ format used by all of the parties in submissions and which has been adopted by the tribunals in all similar cases. If and to the extent that there is any current lack of clarity or disagreement about precisely what the ET decided about specific jobholders, that will be resolved through this process when the ET completes the relevant parts of the ordered tables (see Disposal Order [CB/166-167/¶20]).

110. Finally, the Harcus Claimants observe that it was both legitimate and important for the ET (and now for this Court) to keep in mind that it was determining these issues in the context of mass equal pay litigation. It would be contrary to the interests of justice for decisions about issues of fact and relevance in these combined proceedings to be recorded in such a way, or decided at such a level of personalised granular detail, that they can be of no use for resolving the claims of the tens of thousands of other Claimants, many of whom are in the same or similar job roles to those of the Sample Claimants. Such an approach would run counter to any sensible case management of these mass claims. If and to the extent that that is what Tesco is seeking to achieve, that would be another ‘*recipe for delay*’ (which was how Kerr J, in a different appeal by Tesco, described another of Tesco’s previous case management proposals)<sup>28</sup> and this Court should be very slow to facilitate that.

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<sup>28</sup> *Tesco Stores Ltd v Element* [2024] EAT 83, [2024] ICR 1098, per Kerr J at ¶70 [Auth/563].

*Ground CA2/1(b): Considering what the employer required, rather than considering only what the jobholders in fact did (First Judgment ¶3)*

111. Tesco’s next criticism of the ET’s approach to ‘work’ challenges the ET’s comments at ¶3 of the First Judgment [CB/208]. Tesco asserts that the ET erred by considering, and/or limiting its understanding of ‘work’ to, ‘*what the employer “required [jobholders] to do as their jobs”*’ (CA2/1(b) [CB/30/¶1(b)]).

112. This criticism bears no scrutiny because, as set out in more detail below:

- a. Tesco (now, at least) agrees that it is correct to consider what an employer requires of jobholders; and
- b. the ET did not decide that ‘work’ is limited to what is “*required*”.

113. The first part of Tesco’s criticism is that the ET, when determining ‘work’, erred by considering ‘*what the employer [Tesco] “required [jobholders] to do as their jobs”*’ (CA2/1(b) [CB/30/¶1(b)]). However, Tesco accepts (as part of its acceptance of the principles in the Claimants’ Joint Note on the Law) that:

- a. ‘*things that the jobholder is instructed, requested or encouraged to do (even if those things are only done very infrequently or did not actually occur during the Evaluation Period)*’ do ‘constitute (part of) the “work” of a jobholder’ (see ¶90.d.i above); and
- b. ‘*Whether or not something is a “requirement or expectation” of a particular role is a relevant consideration but is not a necessary condition for that thing to form part of the jobholder’s “work”*’ (see ¶90.e above).

114. Therefore, this first part of Tesco’s criticism in this ground of appeal is wholly misconceived; Tesco agrees that this aspect of the ET’s approach is correct as a matter of law.

115. The second part of Tesco’s criticism in this ground of appeal is that, in ¶3 of the First Judgment (at [CB/208/¶3]), the ET held ‘*that it was wrong to consider what jobholders “in fact did on a day-to-day basis”*’ and that ‘*a jobholder’s work [...] is limited to what is “required”*’ (CA2/1(b) [CB/30/¶1(b)]). That criticism is equally misplaced because it is not what the ET decided, either in that paragraph or elsewhere.

116. First, it is not what the ET decided in that paragraph of the First Judgment.

a. ¶3 of the First Judgment states (in full) as follows [CB/208/¶3]:

*'It was [Tesco]'s case that its training documents were relevant only if the sample claimants or their comparators had in fact received the training described in those documents. It was [Tesco]'s case that the tribunal's factual inquiry at the stage 2 hearing had to be about what the sample claimants and their comparators in fact did on a day-to-day basis, not what [Tesco] required them to do as their jobs as evidenced by the training which the respondent gave to persons doing those jobs. We have concluded that [Tesco]'s contentions in those respects were wrong.'*

b. The ET was, in that paragraph, considering Tesco's (then) argument that '*work*' did not include what Tesco '*required*'. The ET rejected that argument. What the ET in ¶3 was saying was that it would be wrong to limit '*work*' to only that which the jobholders '*in fact did on a day-to-day basis*' without considering '*what [Tesco] required them to do*'. The ET was right to reject Tesco's argument. First, that is correct on the authorities (see ¶90 above). Second, Tesco (now, at least) accepts in substance that it is correct (see ¶113 above). The correct legal position, consistent with what the ET said, is that the ET must consider both what the jobholders did in practice and what the employer required of the jobholders.

c. The ET did not (contrary to Tesco's submissions in this appeal) decide that '*work*' must be limited to only that which Tesco required, without considering what the jobholders did in practice.

117. Second, in any event, ¶3 of the First Judgment is just a single paragraph in one of several 'decision' documents produced by the ET following the Stage 2 Hearing. It must be read in context.

a. The context is that, in the First Judgment, the ET was not making any specific decisions about what was or was not part of the '*work*' of the jobholders (see ¶104 above).

b. More broadly, the ET's comments in ¶3 of the First Judgment must be read with the rest of the ET's comments in the other decision documents and with what the ET went on to do when it came to decide the specific factual disputes in the Second Judgment and subsequently (see ¶¶106 to 108 above). Looking at the ET's decisions as a whole, as the EAT did correctly, it is clear that the ET was not

limiting the meaning of *‘work’* to only that which the jobholders were required to do without considering what happened in practice.

*Ground CA2/1(c): Approach to training documents (Second Judgment ¶14.2)*

118. Tesco’s third criticism of the ET’s approach to *‘work’* challenges two aspects of the ET’s approach [CB/30/¶1(c)]:<sup>29</sup>

- a. in ¶2 of the First Judgment, the ET opining that the training documents which had been disclosed by Tesco were *‘key documents’* [CB/208/¶2]; and
- b. in ¶14.2 of the Second Judgment, the ET stating that *‘the training materials stating how that work was to be done were going to be determinative of what the respondent required the claimants to do unless there was cogent evidence before us to show that one or more aspects of those training materials was not (or was no longer) determinative’* [CB/286/¶14.2].

119. Tesco asserts that this approach by the ET was erroneous because *‘none of the parties had prepared evidence on this basis because the ET identified that it would be taking this approach only after the conclusion of the hearing’* [CB/30/¶1(c)].

120. In summary, the Harcus Claimants’ position is that:

- a. The parties were aware, before and during the Stage 2 Hearing, that the ET considered that the evidence from training documents was or might be significant – the parties made competing submissions about the significance of the training materials and the ET considered and rejected Tesco’s submissions.
- b. It was not an error of law to conclude that documents showing Tesco’s training for the tasks undertaken by the jobholders were *‘key documents’* – it is for the ET to form its own view of the weight to attach to different evidence.
- c. The ET did not set up an irrebuttable presumption that the evidence from training documents was correct or fail to consider other relevant evidence – the ET merely took a different view from Tesco about the order in which to analyse the evidence.
- d. In addition, the argument that there was some sort of procedural problem with how the ET approached the training documents evidence was disposed of by the EAT

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<sup>29</sup> In the EAT, these criticisms were contained in Tesco’s grounds A1/G2 [CB/183/¶2] and A2/G2 [CB/193/¶22].

in parts of the EAT Substantive Judgment which Tesco has not appealed (A2/G3) – it ought therefore not to form any part of Tesco’s submissions in this CA appeal.

121. Each of those submissions is developed below.
122. First: the procedural aspect of Tesco’s criticism is outside the scope of Tesco’s appeal to this Court.
123. Tesco’s criticism is an impermissible resurrection of a different unsuccessful EAT ground of appeal, A2/G3, in which Tesco alleged that there had been a ‘*serious procedural irregularity arising from the Tribunal changing its approach to the determination of issues after the Stage 2 Hearing*’ [CB/193-194/¶¶25-28]. That ground of appeal was rejected by the EAT at ¶¶110-121 of the EAT Substantive Judgment [CB/110-126] and ¶1 of the EAT Substantive Order [CB/77/¶1].
124. Since Tesco has not appealed against the EAT’s dismissal of its procedural irregularity ground (A2/G3) and, accordingly, has not challenged ¶¶110 to 121 of the EAT’s Substantive Judgment, the findings in those paragraphs of the EAT’s Substantive Judgment (amongst others) are not challenged by Tesco’s CA appeal, including the finding that:

*‘What the tribunal did, for the reasons it explained at [13.5] and [14] Second Judgment [...], was to decide that because the generic training materials were so thorough, so prescriptive in places and proscriptive in others and so uniformly given to all employees of the sample claimants’ and their comparators job titles, and they were required to follow them, that they were a reliable guide to the way in which they had done their work. The tribunal’s wording is careful and precise – it is the training documents from in-person training given to the sample claimants and comparators and the documents they were required to read and apply. This is not just any old training document that no-one is ever expected to read or follow. It was not a perverse finding of fact’* [CB/126/¶118];
125. Second: the parties were aware that the ET considered the training documents evidence to be significant.
126. In any event, the EAT was obviously correct that it was ‘*hopeless*’ [CB/125/¶117] for Tesco to suggest that the parties were not aware that the ET might conclude that the training documents evidence was significant and important evidence. The likely significance of the training materials was something discussed between the parties and

the ET on several occasions prior to, and during, the Stage 2 Hearing. For example, in January 2023 the ET ordered Tesco to provide further disclosure and information in relation to training materials in advance of the Stage 2 Hearing and, in explaining its reasons for doing so (Tesco having objected to providing the disclosure), the ET recorded that '[Counsel for the LD Claimants] *said that it might be possible to deduce from the training which the claimants were given what work they did and the skills which were required to do it. That was obviously correct, and it was helpful to point it out*' (CMO 3 January 2023 [SB/268/¶10]).

127. Equally, Tesco had the opportunity to, and did, make submissions to the ET during the Stage 2 Hearing about the significance of training materials and how the Tribunal ought (or ought not) to take the training material into account in its determinations (see examples set out in the Harcus Claimants' EAT Skeleton [SB/1240-1241/¶162] [CSB/154-155/¶162] and the documents referred to therein).
128. The Harcus Claimants also made submissions to the ET about how the training materials should be treated by the Tribunal, and the ET made clear during the Stage 2 Hearing that it might reach the view that training materials were good evidence of the '*work*' of the Sample Claimants and comparators (see examples set out in the Harcus Claimants' EAT Skeleton [SB/1242-1243/¶¶163-166] [CSB/156-157/¶¶163-166] and the documents referred to therein). It was and is clear that Tesco was aware at the time of the Stage 2 Hearing that the Tribunal might conclude that the '*work*' of the Sample Claimants and comparators was evidenced by the training materials.
129. The ET rejected Tesco's argument that the training materials were not good evidence of the '*work*' of the Sample Claimants and comparators, and accepted the Claimants' argument that the training materials were good evidence of that '*work*'. It is not open to Tesco to suggest that it did not have an opportunity to make submissions about the significance of the training documents or that there was some sort of procedural problem with that approach.
130. Third: there is no error in concluding that the training documents evidence were '*key documents*'.
131. There is no inherent or necessary error of law in concluding:
  - a. (as the ET did in the First Judgment) that training documents should be '*the primary focus of the tribunal's inquiry into, and determination of, the facts which*

- relate to the question [and] [o]nly if a claimant or a comparator did any aspect of his or her job in a way which differed from the manner shown by or stated in such training documents could there be a need to hear oral evidence about that aspect'* [CB/208-209/¶5] and that those documents were '*key documents*' [CB/208/¶2]; or
- b. (as the EAT did in the Second Judgment) that '*the training materials stating how that work was to be done were going to be determinative of what the respondent required the claimants to do unless there was cogent evidence before us to show that one or more aspects of those training materials was not (or was no longer) determinative*' [CB/286/¶14.2];
  - c. the ET was required to reach its own view on which evidence it considered to be most probative on any disputed issue, and that is all that the ET was doing;
  - d. the ET was clear in the First Judgment that it would address the correct issue – ie '*inquiry into, and determination of, the facts which relate to [the question]*' (First Judgment [CB/208-209/¶5]) – and was merely expressing a view on:
    - i. which evidence it considered would be most useful to it in addressing that issue; and/or
    - ii. the methodology which it would adopt to analyse all of the evidence.
132. Fourth: the ET did not set up an irrebuttable presumption or fail to consider other evidence.
133. The ET did not treat the training documents evidence as necessarily determinative of any issue. The ET did not refuse or fail to consider the other evidence.
- a. The ET was expressing a view on the '*primary focus*', not the exclusive object, of its enquiry. The ET did not say in the First Judgment, the July CMO, or the Second Judgment, that it would:
    - i. not consider evidence other than the training documents;
    - ii. necessarily or invariably give the training documents any greater weight than any other evidence;
    - iii. treat the training documents as definitive in the event of contradictory evidence;
    - iv. exclude evidence which contradicted the training documents;
    - v. not consider all of the facts which are (in the ET's view) relevant to '*the question*'.
  - b. The ET was clear that it did consider evidence other than the training materials and, in the event that that evidence was '*cogent*', that it would not conclude that the

work was done as described in the training materials. This is made expressly clear in ¶14.2 of the Second Judgment [CB/286] (which is the paragraph challenged by Tesco in this ground of appeal).

- c. The ET's comments are its description of the approach it would take to analysing the evidence before it and the order in which it would do so. The ET stated that the training materials would be a starting point for the reasons set out in the Second Judgment, but that it would depart from that starting point in the event that that is what the evidence required.
- d. It was inherent in the ET's explanation of its approach that it would consider whether or not the jobholders in fact undertook their work in the ways described by the training documents.
- e. The ET did exactly what Tesco said (in the EAT) that it ought to have done:
  - i. Tesco asserted that the ET '*should instead have taken into account as appropriate all the evidence, oral and documentary*' (A1/G2 [CB/183/¶2]). That is precisely what the ET did do;
  - ii. there is no reason to think that the ET did not '[take] *into account*' all of the evidence – Tesco just appears to take a different view from the ET as to the '*appropriate*' way to approach and analyse that evidence. That does not constitute any error of law;
  - iii. in any event, Tesco has not identified any particular erroneous factual determination in relation to this ground.

134. Tesco suggests that the ET's use of the phrase '*cogent evidence*' means that the ET imposed some improperly high evidential burden (Tesco's Permission skeleton for the Stage 2 Appeal [CB/54/¶39]). That argument has no merit. It is the ET's role to decide whether the evidence which it hears is cogent and to reject evidence which it concludes is not cogent; only cogent evidence is capable of properly forming a basis for factual determinations.

135. In effect, and albeit phrased slightly differently, some of the ET's key decisions were that:

- a. The Sample Claimants and comparators could (in the absence of specific evidence to the contrary in relation to particular tasks) be required to do the things shown in the training materials, and to do them in the ways shown in the training materials; that is hardly surprising given that Tesco had gone to the trouble to produce

extensive training materials specifically to show its employees how to do particular tasks.

- b. Things which the Sample Claimants and comparators had been trained to do and/or could be required to do in the manner provided for in the training materials were, in the circumstances (to use the language at ¶7 of the Appendix of *Potter v North Cumbria Acute Hospitals NHS Trust* [2008] ICR 910 (*'Potter'*) [Auth/319]), *'a real part of the job'* and not *'tasks which have fallen outside the scope of the job'*.
- c. If and to the extent that the Sample Claimants and comparators carried out their tasks differently from the way in which the training materials described, that variation was either at a level of detail which was not relevant or (in the absence of specific *'cogent'* evidence to the contrary in relation to particular tasks) was not *'condoned'* by the employer.

136. The ET's approach was, and is, permissible in light of the authorities and on the facts before it, including the circumstances recorded in the Second Judgment at [CB/285-287/¶¶13-18]. Moreover, the approach accords with the agreed legal principles set out at ¶90 above. In particular, amongst other things:

- a. the ET did not look *'simply'* at the training materials – in accordance with the principle recorded at ¶90.c above (citing *Beal* at ¶30 [Auth/385]);
- b. the ET did consider *'what is done in practice'* (ie using the training materials as an evidential basis for what was done in practice, and then seeing whether there was cogent evidence of the jobholder doing something different from what is described in those materials) – in accordance with ¶90.c above (citing *Beal* at ¶30 [Auth/385]);
- c. the ET did consider *'things that the jobholder is instructed, requested or encouraged to do'* (ie the things in the training materials, in the absence of evidence to the contrary) – in accordance with ¶90.d above (citing *Beal* at ¶32 [Auth/385-386]);
- d. the ET did treat the things which were a *'requirement or expectation'* (ie those things set out in the relevant training materials) as a *'relevant consideration'* – in accordance with ¶90.e above (citing *Beal* at ¶¶31-32 [Auth/385-386]);
- e. specifically, the ET did treat *'documents such as "work manuals"'* (ie the training materials) as *'relevant but not necessarily determinative'* (because the ET expressly acknowledged that the contents of the training materials had to be assessed against the overall evidence) – in accordance with ¶90.f above (citing *Beal* at ¶30 [Auth/385]);

- f. the ET did make findings at the ‘*level of detail*’ which it found to be relevant to ‘*the question*’ – in accordance with ¶90.h above.

*Ground CA2/1(d): Correct legal direction and findings consistent with correct approach*

137. For completeness, the Harcus Claimants note that ¶1(d) of CA2/1 adds nothing to Tesco’s appeal. Rather, it detracts from it; it acknowledges that it may be that ‘*the ET did on occasion express itself in terms which appeared consistent with the correct legal approach and/or made certain findings which appeared to be consistent with the correct legal approach*’ [CB/30/¶1(d)].
138. Tesco’s attempt to find problems notwithstanding the ET’s correct statements and findings is precisely the sort of objectionable combing through of a judgment in search of an error which is to be avoided – see ¶95 above.

GROUND CA2/2: Incorporating training documents (EAT Substantive Judgment ¶¶129-134)

*Summary*

139. In this ground of appeal, Tesco asserts that the ‘*EAT erred by finding that the ET had resolved all of the relevant disputes between the parties*’, incorporating training documents in place of finding facts [CB/30/¶2].
140. That suggests that ‘*all of*’ the factual disputes between the parties were before the EAT as part of Tesco’s appeal to the EAT. That is wrong. Again, it ignores the EAT Scope Judgment.
141. The relevant EAT ground was ‘*limb 1(a)*’ of A2/G1: ‘*the Tribunal indicated that it had determined a Disputed Fact but failed to specify what that determination might be, instead simply referring to numerous documents, principally the Respondent’s training documents*’ [CB/191/¶16(a)]. Only one instance of this alleged error was identified in that limb: the finding at ¶83 of the Second Judgment (at [CB/331-334]). Accordingly, applying the Scope Judgment (as Stacey J was obliged to do), that was the only matter in relation to which Stacey J was required to determine whether the incorporated training documents determined the factual dispute.
142. For the reasons set out at ¶¶144 to 145 below, Stacey J was correct to find that there was no legal error in relation to that particular factual finding.

143. In addition, and in light of Tesco's Scope Appeal, the Harcus Claimants also set out, at ¶¶146 to 149 below, why the ET's approach to the incorporation of training materials in general was not an error of law.

*The specific alleged error*

144. The passage at ¶83 of the Second Judgment [CB/331-334] deals with the way in which one of the Sample Claimants, Mrs Worthington, replenished stock. Those activities were addressed in the LD Claimants' closing submissions at [SB/891-901].

145. Stacey J considered this paragraph of the Second Judgment in the EAT Substantive Judgment at [CB/127/¶125] and [CB/129/¶¶130-134]. Stacey J found that, although the process of marrying up the disputes between the parties in the Records of Dispute and the ET's findings by reference to the training materials is 'very laborious' [CB/129/¶130], it is possible and, ultimately, the ET's approach had not been wrong in principle [CB/130/¶134]. The fact that the process is laborious does not constitute a legal error by the ET.

*Comments on the ET's incorporation of training documents*

146. Tesco makes two criticisms of the ET's incorporation of 'training documents' into its factual findings:

- a. first, Tesco asserts that the ET 'declined to make findings on all of the relevant disputes' [CB/31/¶4]; and
- b. second, Tesco asserts that the ET's approach produces a 'dysfunctional outcome' and is 'inconsistent with the legislative purpose of the EV Rules' [CB/31/¶5].

147. The Harcus Claimants' position, in summary, is that:

- a. the ET did determine all of the relevant disputes, albeit not in the way contended for by the parties; and
- b. although the format of the ET's findings was different from that which the parties proposed, the ET's approach was permissible (not legally erroneous) and such practical challenges as it may present have been cured by the EAT's Disposal Order, including the Reorganisation Directions (see ¶37 above), which Tesco has not appealed.

148. The ET did determine all of the disputes.

- a. Many of the disputes were determined expressly and separately by the ET deciding that, rather than the precise wording proposed by either party, the correct wording was what was contained in various contemporaneous documents, particularly training documents. This is a determination of the dispute, albeit not in the way contended for by Tesco (or the Claimants). It is not an error of law.
- b. The ET is not obliged to determine the facts in the format proposed by the parties. Neither is the ET obliged to merely ‘pick’ between the precise factual contentions advanced by each side.
- c. It is not an error of law for the ET not to resolve and record each factual determination separately. The ET was clear that: (i) it consciously did not record a separate ‘determination’ of each of the disputes in the order and form in which they were provided to it (ie the EVJDs); but (ii) these apparent omissions are not truly omissions. Rather, in each instance where the ET has not recorded a determination of a particular dispute in the EVJDs, that apparent ‘omission’ is for one of two reasons.
  - i. First, the ET considered each of the disputes in the EVJDs in sequence and, where the ET concluded that a dispute was ‘*(as frequently occurred) the same dispute*’ as one which had already been determined by the ET earlier in the Second Judgment, the ET did not necessarily repeat its finding but, instead, ‘*said nothing about [the duplicate dispute] on the basis that if the appendices were read in sequence then our conclusion on the point would be known*’ (Second Judgment [CB/300/¶53]).
  - ii. Second, the ET determined that some of the disputes were ‘*in our view highly unlikely to affect the view of the IEs about the demands and therefore the value of a particular task*’, or where a dispute ‘*was of no practical importance*’ because it ‘*would have been highly unlikely to affect the IEs’ view on those things*’. Where the ET reached this view, the ET deliberately ‘*did not resolve [the] dispute*’ (Second Judgment [CB/300/¶54]; see also [CB/298-300/¶¶45-52]).
- d. On the assumption that the ET has done what it says, where a dispute appears to have been ‘omitted’ in the Second Judgment, that does not mean that the dispute was not considered by the ET or that the ET did not make a determination in relation to the dispute. Rather, an apparent omission means that, either the dispute has already been determined elsewhere in the Second Judgment and the earlier finding should be read across, or the ET considered that the determination of the

fact would be unlikely to affect the value of the work, ie it is immaterial and therefore not relevant to *'the question'*.

- e. There is no reason to think that this assumption – ie the assumption that the ET has done what it says – is false.

149. The format of the ET's determinations is not legally erroneous.

- a. It is up to the first instance fact-finding tribunal to determine how best to structure its judgment, the order in which to make determinations, and facts which it considers to have been proved on the evidence put before it. Neither the parties nor previous practice of other first-instance tribunals can remove or limit that power.
- b. The ET's approach to the training documents evidence was legally permissible – see ¶¶118 to 136 above (re CA2/1), especially ¶135. Having, in many instances, reached the permissible conclusion that the true factual position was that the jobholders performed various aspects of the work as shown in the training documents, it was obviously not an error of law to refer to the training documents in the ET's decision.
- c. If and to the extent that Tesco's criticism is that there are different submissions which Tesco would have made if it had known that the ET would adopt this approach, this is not a valid criticism because:
  - i. it is up to the parties to lead whatever evidence and make whatever submissions they consider appropriate, regardless of how the tribunal goes on to analyse the evidence and record its decisions; and
  - ii. unusually in this case, the ET expressly invited the parties to make additional submissions in light of its approach to formatting and recording its decision, via reconsideration, Tesco went on to make two lengthy reconsideration applications totalling over 100 pages (see ¶¶16 and 41 above), and the ET considered the submissions which Tesco chose to make in the knowledge of the ET's approach.
- d. If and to the extent that Tesco's criticism is that the Second Judgment (and/or the Reconsidered Judgment) does not make clear precisely what factual determination the ET has made in relation to each of the numbered disputes presented by the parties, that concern is addressed fully by the EAT's Reorganisation Directions (see ¶37 above) for which Tesco advocated and which it has not appealed.

*Summary*

150. This ground concerns the EAT’s approach to facts which had been agreed between the parties. It challenges ¶¶137 to 141 of the EAT’s Substantive Judgment (at [CB/131-132/¶¶137-141]) in which the EAT rejected ‘*the second limb*’ of Tesco’s A2/G1 (entitled ‘*Agreed facts*’) (at [CB/192/¶¶19-21]).
151. For the reasons set out above in relation to the Scope Appeal, this Court ought not, and does not need, to consider Tesco’s ground of appeal in the abstract. Tesco’s appeal only ‘bites’ in relation to any specifically identified allegedly erroneous factual determinations.
152. This CA ground, like all of the CA grounds, does not identify any specific factual findings which are alleged to have been made in error. The corresponding EAT sub-ground (the ‘*second limb*’ of A2/G1) challenged (only) three places in the Second Judgment in which the ET had allegedly rejected agreed facts, all three within ‘Appendix 8’, ie the part of the Second Judgment setting out the ET’s specific factual determinations about the work of the comparators. Tesco refers to those paragraphs again in its CA Permission Skeleton, calling them ‘*illustrations*’ [CB/61/¶73]. These amount to three minor criticisms of relatively insignificant specific parts of the work of some of the comparators, and one of the criticisms has already been remedied by a successful application by Tesco for reconsideration of the point.
153. Unless this Court upholds Tesco’s Scope Appeal, this ground CA2/3 should be limited, at most, to challenging those specific factual determinations, each of which is considered below. Unless the Scope Appeal is upheld, there is no need, and no basis, for this Court to go on to consider the question of the ET’s alleged ‘approach’ to agreed facts in general (the Marcus Claimants’ submissions in relation to which are set out at ¶157 below).

*The alleged specific errors*

154. Paragraphs 283-295 of Appendix 8 [CB/737-741/¶¶283-295] (Tesco’s Permission Skeleton [CB/61/¶73.1], [CB/62/¶¶75-77])
- a. These paragraphs concern the facts at ¶¶6.232-6.235 of the EVJD for Mr Jones (at [SB/914-915] [CSB/121-122]). They concern the transfer of cages of stock from

one LLOP (a ‘low level order picking truck’) to another LLOP if the battery in the first LLOP ran out.

- b. Tesco alleges that, in these paragraphs, the ET ‘*rejected*’ ‘*agreed facts*’ (Tesco’s Permission Skeleton [CB/61/¶73.1]). However, Tesco has not identified the ‘*agreed facts*’ which, in those paragraphs, were allegedly ‘*rejected*’.
- c. The ET did not ‘*reject*’ agreed facts in those paragraphs. The ET’s determination was that the parties’ agreement was about something other than the correct legal issue, in the ET’s view, of the ‘*work*’ of the jobholder. The parties are not able, by agreement, to compel the ET to treat a fact as relevant to ‘*the question*’ when, in the ET’s judgment, it is not.
- d. The ET reconsidered these paragraphs of its own motion in the Reconsidered Judgment and reached the same conclusion as it had in the Second Judgment – ie ‘*that the assembler’s work involved paying attention to the battery charge indicator on the LLOP and that it was not part of the work of an assembler for the purposes of section 65(6) of the EqA 2010 to permit the charge to run so low that the LLOP needed to have its battery changed mid-round*’ and did not involve tilting the cages by hand [SB/329/¶100] [CSB/28/¶100].
- e. Stacey J considered these paragraphs in the EAT Substantive Judgment at [CB/131/¶¶137-138] and concluded that the ET’s conclusion in the Second Judgment was not perverse and that any procedural unfairness was remedied by the fact that the ET gave the parties the opportunity, through reconsideration, to address it on agreed facts which had been disturbed by the ET. She was correct.

155. Paragraph 898 of Appendix 8 [CB/884/¶898] (Tesco’s Permission Skeleton [CB/61/¶73.2], [CB/62/¶78]).

- a. This paragraph concerns the facts at ¶¶6.260-6.264 of the EVJD for Mr Young (at [CSB/123-124]). It concerns checking the content of multi-product pallets.
- b. Tesco alleges that, in this paragraph, the ET ‘*replaced*’ agreed facts with ‘*different determinations of its own*’ (Tesco’s Permission Skeleton [CB/61/¶73.2]). However, Tesco has not identified the ‘*agreed facts*’ which were allegedly ‘*replaced*’, or the ‘*different determinations of its own*’ which were allegedly substituted by the ET.
- c. The ET did not ‘*replace*’ the agreed facts (or any other agreed facts) referred to in ¶898. The ET merely determined that those facts should be read ‘*in conjunction with*’ other material. That decision was neither legally erroneous nor perverse. That was the Harcus Claimant’s submission in the EAT and it was accepted by

Stacey J in the EAT Substantive Judgment at [CB/131-132/¶140]. Stacey J was correct.

156. Paragraph 501 of Appendix 8 [CB/789/¶501] (Tesco's Permission Skeleton [CB/61/¶73.3] [CB/62/¶79])

- a. This paragraph concerns the facts at ¶6.218 of the EVJD for Mr Hornak (at [CSB/125]). It concerns the details of manoeuvring wheeled UODs ('units of delivery' – essentially stacks of products).
- b. Tesco alleges that, in this paragraph, the ET '*expressed opposing views*' – ie views which were different from the agreed facts (Tesco's Permission Skeleton [CB/61/¶73.3]).
- c. The view expressed by the ET in ¶501 was that the asserted facts were '*unreliable*'. It is not an error of law for a first instance fact-finding tribunal to do so.
- d. In any event, Tesco apparently considered that the ET's comment required clarification, in which case the correct course was for Tesco to seek clarification and/or reconsideration of that paragraph of the Second Judgment, as expressly invited to do by the ET (in the Second Judgment at [CB/300-301/¶55]). Tesco did so (see 'Submission 20' of Tesco's reconsideration application at [SB/976-977/¶¶250-254]). The ET determined that application and has clarified that it accepts that ¶6.218 of the EVJD for Mr Hornak '*was right*' and that that paragraph of the EVJD is '*incorporated [...] in our statement of Mr Hornak's work*' (Reconsidered Judgment [SB/335-336/¶128] [CSB/29-30/¶128]).
- e. Accordingly, ¶501 of Appendix 8 does not contain or reveal any error of law. Alternatively, to the extent that it did contain an error, that error has been remedied by the ET's clarification upon reconsideration.

*Comments on how the ET determined the facts and approached agreed facts*

157. As set out above, this Court needs (and the EAT needed) only to consider the specific factual determinations identified and challenged by Tesco. However, in case it would assist the Court, the Harcus Claimants make the following additional submissions about why Tesco's challenge is wrong in principle. In short, the ET was not obliged to 'accept' all agreed facts.

- a. As the ET observed, in any case a '*court or tribunal might, [...] and as far as we could see in appropriate cases would have to, decide whether or not any agreed fact was relevant to the issues before the court or tribunal. However, if something*

- which has been agreed to be relevant is not thought by the court or tribunal to be of central importance then it is usually simply ignored*’ (Second Judgment [CB/291/¶28]). Tesco accepts this as a matter of general principle (see CA2/3 [CB/31/¶7]) but suggests that *‘in the present context’* that principle does not apply.
- b. Tesco’s argument is that EV Rule 6 is a limiting rule which forces the ET to accept as relevant to *‘the question’* anything and everything which the parties have agreed, regardless of the ET’s own view of the law and of the evidence which has been placed before it by the parties. That is wrong.
  - c. EV Rule 6 does not (and does not purport to) limit the ET’s powers, including the ET’s general case management power (Rule 29 of the ET Rules 2013) and the requirement on the ET to *‘give effect to the overriding objective’* (Rule 2 of the ET Rules 2013). EV Rule 6 does not prevent the ET from deciding whether or not, on the correct view of the law (which is for the ET to determine) and on the evidence before it, facts (disputed or agreed) are facts relevant to the question, ie the comparative value of the *‘work’* of the relevant job holders.
  - d. The ET observed that *‘What the parties had done [in relation to such issues] was to think that rule 4(1)(b)(ii) and rule 4(d)(i) of the EV Rules [which specify how the parties are to prepare facts and disputes for the final hearing to which EV Rule 6 applies] meant that whatever the parties had agreed by way of words to be included in a “job description” had to be taken into account by us and the experts. That was incorrect: the parties cannot, by agreement, make something relevant which is, as a matter of law, irrelevant. Of course in many cases relevance is not easily determined, but it is nevertheless a question of law, and not one of fact’* (Second Judgment [CB/299/¶47]). The ET was correct in so deciding.

#### *Tesco’s criticism of the Second Reconsideration Decision*

158. In its Permission skeleton (at [CB/63/¶¶80-81]), Tesco criticises ¶4 of the Second Reconsideration Decision [SB/602] [CSB/36]. Tesco expresses a concern that *‘the IEs will be confronted with conflicting facts which they may have to take into account’* and there is no mechanism for resolving potential factual conflicts or confusions [CB/63/¶81]. This is not a matter which requires the involvement of this Court on this appeal.
- a. First, this part of the Second Reconsideration Decision is not the subject of any live appeal.

- b. Second, ¶4 of the Second Reconsideration Decision does not purport to change any part of the ET’s Reconsidered Judgment, and it is clear from ¶54 of the Reconsidered Judgment [SB/318-319] [CSB/25-26] when read as a whole that the IEs may only take into account facts agreed by the parties insofar as they have not already been referred to in any of the ET’s previous Stage 2 Judgments.
- c. Third, this concern is addressed fully by the EAT’s Reorganisation Directions (see ¶37 above) for which Tesco advocated and which Tesco has not appealed.

GROUND CA2/4: Failing to make findings on training actually received (EAT Substantive Judgment ¶¶164-171)

159. The Harcus Claimants resist this ground of appeal [CB/31-32/¶¶8-10]. They have seen the submissions of the LD Claimants in draft and intend to adopt them.

GROUND CA2/5A: Applying the Scope Judgment

160. As the Harcus Claimants understand it, this ground [CB/32/¶¶11-12] is merely a repetition of the Scope Appeal. It adds nothing to it. Tesco does not allege that Stacey J in the EAT Substantive Judgment misinterpreted or misapplied HHJ Tayler’s Scope Judgment. It was not an error of law for the EAT to apply the Scope Judgment; it had no option but to do so. In any event, the Scope Judgment was correct for the reasons set out above.

**DISPOSAL**

161. In the event that either of Tesco’s appeals is successful in whole or in part, it remains unclear, even from the wording in section 9 of each Notice of Appeal [CB/8] [CB/22] precisely what Tesco seeks by way of substituted findings and/or remission to the ET (or EAT). The Harcus Claimants will respond if and when Tesco’s desired disposal becomes clear.

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20 January 2026

23 January 2026 (date of refile with Supplementary Bundle references)

18 February 2026 (date of addition of Authorities Bundle references)

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