

IN THE COURT OF APPEAL

Appeal Nos: CA-2025-000486  
& CA-2025-002063

ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL  
EA-2023-000927-AT, EA-2023-000928-AT & EA-2024-001071-AT

BETWEEN

TESCO STORES LIMITED

Appellant / Respondent

and

MS K ELEMENT and others

Respondents / Claimants

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LEIGH DAY CLAIMANTS' RESPONDENTS' REPLACEMENT SKELETON ARGUMENT  
FOR APPEAL HEARING ON 3-5 MARCH 2026

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## INTRODUCTION

1. These two appeals arise out of Tesco Stores Ltd's ("**Tesco**") appeals to the EAT against judgments and orders of the Employment Tribunal sitting in Watford promulgated following a Stage 2 Equal Value Hearing conducted between 6 March and 31 May 2023. Tesco appeals against (1) a preliminary decision of HHJ James Tayler dated 5 February 2025 regarding the scope of Tesco's permission to appeal to the EAT ("**the First Appeal**") [CB/73 & 78] and (2) Stacey J's substantive appeal decision dated 31 July 2025 ("**the Second Appeal**") [CB/76 & 86]. The First Appeal comprises one ground ("**CA1**") and the Second Appeal five grounds ("**CA2/1**" to "**CA2/5**").
2. This is the skeleton argument of the claimants represented by Leigh Day (the "**Leigh Day Claimants**"). The claimants represented by Marcus Parker Employment are referred to as the "**Harcus Claimants**". In summary, the Leigh Day Claimants say:
  - 2.1. In relation to the First Appeal, it is uncontroversial that permission to appeal may only be granted in respect of grounds of appeal set out in an appellant's notice of appeal, and not in respect of unspecified wider challenges. There was no error in HHJ Tayler's approach. Tesco's proposed approach would have a chaotic effect.

2.2. In relation to the Second Appeal, there was no dispute between the parties at the EAT (or indeed at first instance) regarding the legal principles that apply at a Stage 2 hearing. Stacey J correctly applied those principles when carefully reviewing the lengthy first instance decisions through the lens of Tesco's numerous appeal grounds, including the grounds relevant to this onward appeal. There is no identifiable legal error in her approach (and therefore no error in those parts of the Tribunal's decision upheld by her). Further, Tesco seeks to resurrect arguments which are neither necessary nor proportionate to pursue in light of subsequent developments in the litigation.

## **BACKGROUND**

3. The claimants are employees in Tesco stores. Store-based employees are predominantly female, and those working in Tesco distribution centres are predominantly male. The claimants say they do work of equal value with the work done by comparators in distribution centres, who benefit from more favourable terms.
4. Pursuant to r.6 Employment Tribunals (Equal Value) Rules ("**the EV Rules**"), a Stage 2 equal value hearing was conducted by the Tribunal. The task of the Tribunal at a Stage 2 hearing is to determine the facts - to the extent that the parties have not been able to agree them - which "*relate to the question*". The question is: "*is the claimants' work of equal value to the comparators' work?*" (r.6(1)(a) EV Rules and s.65 Equality Act 2010). There is no 'winner' or 'loser' at Stage 2 – rather, the Tribunal makes a series of factual determinations about the work done by the claimants and comparators.
5. The Tribunal promulgated a preliminary judgment on 12 July 2023 ("**the First Judgment**") [CB/67], a case management order on 20 July 2023 ("**the July CMO**"), and a full Stage 2 judgment containing its determinations of job facts on 5 July 2024 ("**the Second Judgment**") [CB/140]. Tesco appealed the First Judgment and the July CMO (hence two appeal numbers were allocated) on 22 August 2023 [CB/180] and the Second Judgment on 15 August 2024 [CB/187]. The EAT consolidated the appeals. Grounds 1 to 8 in the appeal against the First Judgment and July CMO were abbreviated in the EAT as "**A1G1**" to "**A1G8**" and grounds 1 to 11 in the appeal against the Second Judgment are abbreviated as "**A2G1**" to "**A2G11**". A2G1 comprised two limbs with various sub-grounds. Grounds A1G3 and A2G4 were later withdrawn.

6. Following a preliminary hearing in the EAT on 27 November 2024, HHJ Tayler by a judgment dated 5 February 2025, gave Tesco permission to appeal on all grounds [CB/73 and 78]. However, the scope of permission was limited to those specific determinations in the Tribunal's judgments which were challenged in Tesco's Notices of Appeal.
7. The EAT appeal hearing was conducted by Stacey J on 18-19 June 2025 and her decision was promulgated on 31 July 2025 [CB/76 & 86]. Stacey J allowed the appeals on grounds A1G6, A2G1 limb 1 part (c), A2G4, A2G5, A2G6, A2G7, A2G8 (in part), A2G9, A2G10 and A2G11. She dismissed grounds A1G1, A1G2, A1G5, A1G7, A1G8, A2G1 limb 1 parts (a) and (b) and limb 2, A2G2 and A2G3 [CB/76-77]. Her overarching conclusion was that while there were errors identifiable in relation to specific determinations, and she was critical of the way the Tribunal organised its findings, there was no fundamental error of approach that would undermine the judgment as a whole.
8. Tesco's Second Appeal challenges Stacey J's conclusions in relation to:
  - 8.1. EAT grounds A1G1, A1G2 and A2G1, which collectively concerned the Tribunal's approach to the definition of 'work';
  - 8.2. A2G1 limb 1 part (a), regarding the Tribunal determining disputes (specifically, regarding one sample claimant's replenishment tasks) by cross-referring to training documents;
  - 8.3. A2G1 limb 2, regarding the Tribunal allegedly rejecting facts agreed between the parties (in three specific examples); and
  - 8.4. A1G5, regarding the Tribunal's findings about training.
9. Following a disposal hearing on 14-15 October 2025, Stacey J's disposal decision was issued on 29 October 2025 [CB/168]. In addition to remitting to the Tribunal those determinations which had been successfully challenged on appeal, Stacey J directed the Tribunal, with the assistance of the parties, to reorganise its findings into tabular form (see §§12 and 16-21 of Stacey J's disposal order at [CB/165-167]).
10. Meanwhile, the Tribunal on 30 May 2025 issued a reconsideration judgment ("**the First Reconsideration Judgment**") [RSB/294-600], and on 24 July 2025 a further reconsideration judgment ("**the Second Reconsideration Judgment**") [RSB/601-626].

Further details of the complex procedural history are set out in the Marcus Claimants' Skeleton Argument.

## **READING LIST**

11. In addition to the parties' skeleton arguments the Court is invited to pre-read:

- 11.1. Tesco's Court of Appeal Grounds of Appeal for the First Appeal [CB/15] and Second Appeal [CB/29-34];
- 11.2. The Order and Judgment under appeal in the First Appeal [CB/73-75 and 78-85] and Second Appeal [CB/76-77 and 86-159] and Stacey J's disposal order and disposal judgment [CB/160-179];
- 11.3. Tesco's EAT Amended Grounds of Appeal for its appeal against the First Judgment and July CMOs [CB/182-186] and the Second Judgment [CB/189-206];
- 11.4. The First Judgment, with reference to the particular passages: §§2-6 [CB/208-209] (relevant to the approach to 'work'), and §§75-78 and 87-88 [CB252-255, 258] (relevant to training);
- 11.5. The Second Judgment, with reference to the particular passages: §§9-25 [CB/284-290] (relevant to the approach to 'work'), §83 of appendix 1 [CB/331-334] (said to fail to determine disputes), §§283-295 [CB/737-741] §501 [CB/789] and §898 [CB/884] of appendix 8 (three alleged rejections of agreed facts), and §§212-213 of appendix 8 [CB/518] (relevant to training);
- 11.6. The following passages in the First Reconsideration Judgment: §§17-51 [CSB/11-24] (relevant to the alleged failure to determine disputes), §100 [CSB/28] (regarding an alleged rejected fact), §127-128 [CSB/29-30] and §53 of appendix 8 [CSB/33] (regarding another alleged rejected fact); §§4-7 of appendix 7 [CSB/31-32] (relevant to training);
- 11.7. The following passages in the Second Reconsideration Judgment: §4 [CSB/36] (relevant to agreed facts) and §§62-70 [CSB/37-40] (relevant to training).

## **CA1 – THE FIRST APPEAL**

### **HHJ Tayler's scope decision**

12. In a number of the A2 grounds Tesco chose to take the approach of appealing

“examples” of determinations said to be affected by errors of law and/or perversity in the Tribunal’s approach. Tesco’s idea seems to have been that the EAT would decide the examples, make a disposal order with a scope that stretched beyond the specific determinations considered and leave it to some combination of Tesco, the claimants and the Tribunal to decide which other determinations were affected.

13. On 25 November 2024, HHJ Tayler directed Tesco to specify the orders it sought should any of the appeal grounds succeed [RSB/760]. Tesco supplied tables setting out the orders sought. The tables did not identify any additional determinations in the Tribunal’s judgment that it wished to have remitted or substituted [RSB/767-776]. In his judgment following the preliminary hearing, HHJ Tayler granted Tesco permission to appeal on all the grounds it pursued, but stipulated at §21 [CB/82] that:

*“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”.*

14. At §§29, 33 and 36 of the judgment, the scope of permission granted is confirmed to be limited to the matters specified in the Notices of Appeal [CB/83-85].
15. On 4 March 2025, Tesco made an application [RSB/982-1006] to amend its appeal to challenge an additional 146 passages of the second judgment [CB/198 at §52 and CB/200-206]. The claimants objected to that application [RSB/1007-1017]. On 14 March 2025, Tesco wrote to the EAT in response to the claimants’ objections [RSB/799-800]. HHJ Tayler refused the application, for reasons given in his judgment of 28 March 2025 [RSB/644-653]. Tesco has not appealed against that decision (and, as submitted below, cannot bypass it by means of the First Appeal).
16. In Tesco’s 27 May 2025 appeal skeleton argument for the First Appeal prepared for the first listed appeal hearing in this Court (at §17) [CB/1004], Tesco stated that this appeal related to the following EAT grounds of appeal: A1G5, A2G1, A2G4, A2G5, A2G6, A2G7, A2G8, A2G9, A2G10 and A2G11. In its EAT skeleton at §5.2 it gave a slightly different list omitting A2G4 [RSB/1081]. At the time of drafting this Skeleton Argument, it is not known whether Tesco’s position has changed having reflected on the outcome of the

EAT appeal, including those parts of it which Tesco has not appealed to this Court.

### **What is an equal pay Stage 2 judgment?**

17. Pursuant to s.65 EqA 2010 [AB/75], establishing work of 'equal value' is one of the routes by which claimants in equal pay litigation can show their work is equal to that of opposite sex comparators:

- (1) *For the purposes of this Chapter, A's work is equal to that of B if it is – ...*
- (c) *of equal value to B's work....*
- (6) *A's work is of equal value to B's work if it is –*
  - (a) *neither like B's work nor rated as equivalent to B's work, but*
  - (b) *nevertheless equal to B's work in terms of the demands made on A by reference to factors such as effort, skill and decision-making.*

18. The EV Rules set out a three-stage process for determining "the question" which Rule 1(2) [AB/91] defines as "whether the claimant's work is of equal value to that of the comparator". For assistance in answering that question, the Tribunal may require an independent expert to prepare a report (rule 5 [AB/93]). Each of the three stages of the process is a hearing. Very broadly, the first stage is a case management hearing, the second is where facts relevant to the question are agreed or determined, and the third is where the question itself is determined.

19. Rule 4 [AB/92] lists the standard directions to be made at a Stage 1 equal value hearing, including at r.4(1)(d) that the parties shall:

- ... present to the Tribunal an agreed written statement specifying—*
  - (i) *job descriptions for the claimant and any comparator;*
  - (ii) *the facts which both parties consider are relevant to the question;*
  - (iii) *the facts on which the parties disagree (as to the fact or as to the relevance to the question) and a summary of their reasons for disagreeing...*

20. Rule 6 [AB/93], titled, "Conduct of stage 2 equal value hearing", provides that:

- (1) *... at the hearing the Tribunal shall—*

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

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

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

21. At Stage 2, as summarised by Lavender J in *Beal v Avery Homes (Nelson) Limited* (Unreported, QBD, 6 June 2019) at §23 [AB/383]: *“The aim of this stage of the proceedings is to produce a factual statement of each individual's work, to be used by the expert as the basis for his assessment of the question whether they are of equal value.”*

22. A Stage 2 judgment therefore comprises multiple determinations of the “job facts” relating to claimants and comparators. Each determination of a dispute as to fact or relevance forms part of the judicial product which is the output of the hearing. There is no other judgment, decision, order or outcome at Stage 2. This is a stepping stone to the Stage 3 final hearing where the job facts found at Stage 2 are analysed to determine the question of equal value.

### **The EAT's jurisdiction and procedure**

23. Section 21(1) Employment Tribunals Act 1996 [AB/34] establishes the jurisdiction of the EAT, providing that, *“An appeal lies to the Appeal Tribunal on any question of law arising from any decision of, or arising in any proceedings before, an under or by virtue of—”* legislation including *“the Equality Act 2010”*.

24. At the time the first appeal was lodged, the EAT's procedural rules were supplemented by the Practice Direction (Employment Appeal Tribunal – Procedure) 2018, which stated at §3.5 [AB/100]:

*The Notice of Appeal must clearly identify the point(s) of law which form(s) the ground(s) of appeal from the judgment, decision or order of the Employment Tribunal to the EAT. It should also state the order which the Appellant will ask the EAT to make at the hearing.*

25. At the time of the second appeal, the EAT Practice Direction 2023 was in force, which provided at §3.8.1 [AB/108] that:

*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... short and focused grounds of appeal are usually more persuasive...*

26. Further, §3.8.6 [AB/110] provided that:

*In the grounds of appeal you must state the order that you will ask the EAT to make if you win (will you ask the EAT to send back the whole or part of the case for a new decision to the same or a different Employment Tribunal, or to substitute a different decision for that of the original Employment Tribunal?).*

27. The need for concision in describing an error of law alleged in an appeal (relied on by Tesco at §24 of its 27 May 2025 appeal skeleton [CB/1006]), does not absolve the appellant from the requirement to identify the “*judgment, decision or order*” under appeal and to specify what is sought to be remitted or substituted. Often this will be obvious; for example, when appealing a judgment that a dismissal was unfair. However, in a more complex case, and *a fortiori* in a Stage 2 equal pay judgment, it is necessary to identify *what* is being appealed as well as *why* it is said to be wrong.

28. In relation to disposal, s.35(1) of the Employment Tribunals Act 1996 [AB/39] provides:

*(1) For the purpose of disposing of an appeal, the Appeal Tribunal may—*

*(a) exercise any of the powers of the body or officer from whom the appeal was brought, or*

*(b) remit the case to that body or officer.*

29. Where determinations subject to a successful appeal are remitted back to the Employment Tribunal, the scope of that remission must be precise, as it defines the

jurisdiction of the Employment Tribunal on the remitted issues: see EAT Practice Direction 2024 at 11.15.1 [AB/143], and the judgment of HHJ Tayler rejecting Tesco's application to amend its Grounds of Appeal (*Tesco Stores Ltd v Element* [2025] EAT 43 at §20 [RSB/648]).

**No appeal against an error of law *per se***

30. No appeal lies against an error of law *per se* – only against a determination or outcome which is affected by an error of law. The White Book guidance to CPR r.52 states at §52.0.6 [AB/156]:

*“Appeals are against orders, not reasoned judgments ... In a number of cases it has been stated that the function of an appeal court, in particular of 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.”*

31. In the EAT context, in *Harrod v Ministry of Defence* [1981] ICR 8 at p.11 [AB/182], May J held 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”*. This was cited with approval by the Court of Appeal in *Riniker v University College London* [2001] EWCA 597 at §25 [AB/231] and recently applied in *Durey v South Central Ambulance Service NHS Foundation Trust v Protect* [2024] EAT 173 [AB/542-6] by HHJ Auerbach.

32. Similarly, HHJ McMullen QC held in *Waterman v AIT Group Plc* UKEAT/0358/05 at §6 [AB/295]:

*“I am not aware of any appeal being brought in respect of a matter before an Employment Tribunal which did not result in a determination being under threat, but which focuses upon, for example, the reasoning of a tribunal. Even if the language of section 21 were broad enough to include matters arising such as criticisms of the procedure or allegations of apparent bias, I cannot see how they would be entertained as a question of law unless they led to an adverse determination against the Appellant which is appealed. They may lead to a complaint relating to the administration of justice or against particular judicial officers, but in my judgment the language of section 21 regulates appeals on questions of law only against judgments, orders and decisions and not against reasons”*.

33. In *Wolfe v North Middlesex University Hospital NHS Trust* [2015] ICR 960 at §§90-100 [AB/371-5], Judge Serota QC confirmed the principle that an “*appeal lies against the order made by the lower court, not against the reasons which that court gave for its decision or the findings which it made along the way*” applies in the EAT as it does in other jurisdictions.
34. Tesco has referred to *Mackie v John Holt Vintners Ltd* [1982] ICR 146, an old case concerning an appeal from a pre-hearing assessment, the precursor to a deposit order. The EAT concluded, “*We can... see no overwhelming requirement that there should be a right of appeal against an opinion expressed at a pre-hearing assessment. For the reasons we have given there are great practical difficulties in such an appeal being heard*” [AB/186]. The case does not support Tesco’s argument; the claimant failed to establish a right of appeal against a pre-hearing assessment and the EAT did not hold that an error of law is appealable in the absence of a decision or determination. In any event, if *Mackie* said what Tesco submits it does, it would be inconsistent with *Riniker*.
35. It follows that in the context of a Stage 2 judgment, it is the determinations of job facts to be included (or excluded) at the next stage of analysis which are susceptible to appeal.
36. Tesco says it complied with the relevant provisions of the EAT Practice Direction by identifying errors of law. However, errors of law *per se* do not found appeals. It is the decision or order said to be affected by the legal error which is appealable. An error in legal reasoning which has no impact on the outcome is not appealable. As HHJ Tayler correctly noted at §31 of his judgment [CB/84]:
- “It may be the case that some of the Employment Tribunal’s legal musings about the job it had to do did not have a significant effect on the way some, or all, of the fact finding was undertaken.”*
37. There is a distinction between the cases cited above in which an appellant objects to reasoning or incidental findings in a judgment that could not have affected the outcome, and the current circumstance where Tesco says the errors of law alleged in its grounds of appeal *did* have a material effect on the outcome(s) but has not (other than in respect of “examples”) identified what that effect was. However, the overarching principle that an appeal can only lie against determinations or outcomes, and not judicial reasoning

*per se*, applies equally to this situation.

38. In its permission and appeal skeletons, Tesco repeatedly refers to “*findings of principle and / or general application*”. This obfuscates the distinction between legal reasoning in a judgment (which is not by itself appealable) and the resulting determination (which is). In its second judgment, the Tribunal made findings of fact. It set out its reasoning for the way it approached the findings of fact. Any error in the reasoning might provide the basis for appealing a resulting determination affected by the error, but does not in and of itself found an appeal.

#### **Permission decision correctly limited to matters expressly particularised**

39. HHJ Tayler was asked to decide whether to grant permission to appeal in respect of six grounds in Tesco’s appeal against the First Judgment and July CMO<sup>1</sup> and eleven grounds in its appeal against the Second Judgment. The grounds pursued in the appeal against the First Judgment and July CMO, were prospective in that they challenged aspects of that judgment and order which Tesco said would lead to erroneous decision-making when the Tribunal came to determine the issues in the Stage 2 hearing (which the Tribunal went on to do in the Second Judgment). It was the appeal against the Second Judgment therefore in which Tesco set out what it contended *had* gone wrong with the decision-making at Stage 2. In this appeal, Tesco elected to identify only ‘examples’ of factual determinations said to have been affected by the errors of law alleged in the grounds of appeal.
40. The claimants responded in their EAT Respondents’ Answers by setting out why the examples given do not bear out the criticisms made in the ground of appeal (see Leigh Day’s Answer at §§39, 41, 44-46 [RSB/1028-1031] and Harcus’ Answer at §35 [RSB/1049-1051]). They were not, of course, in a position to do this in respect of unspecified further “*instances*”.
41. HHJ Tayler provided Tesco with an opportunity exhaustively to specify the determinations subject to challenge in his direction of 25 November 2024. The direction required Tesco to set out the orders it sought from the EAT. Tesco did not make use of that opportunity. The orders sought identified no further specific instances of any

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<sup>1</sup> A1G8 already had permission and A1G4 was not pursued (A1G3 was dropped later).

alleged error of law.

42. In the circumstances, HHJ Taylor at §§21, 29, 33 and 36 of his judgment [CB/82-85] properly and, it is contended, inevitably limited the scope of the permission to the matters expressly particularised in Tesco's Notices of Appeal.
43. Tesco complained at §38 of its 27 May 2025 appeal skeleton [CB/1009-1010] that the scope of the permission given meant that if any ground of appeal were to be successful, "*some findings which were affected by that error of law would remain undisturbed while others would be overturned*", and at §39, that relief would be granted only in respect of the specified 'examples'. That this is a potential consequence of Tesco's approach is, so to speak, admitted and averred. Tesco complains about the consequences of its own omission properly to particularise the determinations it wanted overturned.

#### **Practical implications of Tesco's argument are unworkable**

44. What Tesco asks this Court to approve is an approach in which they identify an example of an alleged error and then the EAT produces an order broad enough to require the Tribunal to consider, on remission, not just that example but a number of other specific determinations, none of which were the subject of specific consideration by the EAT. This is wrong in principle: the scope of remittal must be precise: see EAT Practice Direction 2024 at 11.15.1, and *Tesco Stores Ltd v Element* [2025] EAT 43 at §20.
45. Putting aside principle, that approach is unworkable in practice. The first possibility is that the Tribunal would be expected to determine for itself which other determinations are affected. In its letter to the EAT dated 14 March 2025 [RSB/799-800], Tesco stated of its 146 additional "example" passages sought to be added to the appeal that "*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*". It appears the proposal at that time was that rather than the EAT deciding which, if any, of the determinations in the passages under challenge were flawed and remitting those determinations which required to be remade, instead it would be left to the Tribunal to decide for itself whether any flaws in its reasoning identified on appeal infected its own decision-making, and if so in respect of which determinations.

46. Even if it were permissible, it would introduce significant additional delay such as would derail the ongoing first instance proceedings. The Tribunal might not identify all the instances Tesco had in mind. That would result in further, contested, applications. The Tribunal might go further than Tesco had envisaged, which would likely provoke applications from the claimants. Tesco might draw up a list of the determinations that it considers are affected for submission to the Tribunal before a remission hearing, but that does not resolve the difficulties because the claimants may not agree that the EAT's findings have the effect that Tesco contends for. That would lead either to the Tribunal attempting authoritatively to determine the true scope of the remission (and inevitably, to further appeals) or to the parties going back to the EAT to have it clarify whether it considers the contested further determinations do or do not fall within the scope of its order, which would be, in substance, a further appeal. Of course, if a list could be drawn up for the Tribunal it could equally have been drawn up for the notice of appeal.
47. The second possibility is that Tesco would ask the EAT to decide what determinations to remit when making its disposal order, without having been first asked to decide whether to uphold any appeal against those determinations. In its 27 May 2025 appeal skeleton at §19 [CB/1005], Tesco submitted that *"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."* That cannot be right. If the EAT were to identify error(s) of law without considering how these impacted the individual findings made in the judgment, and stop there, there would be no need to determine relief because the appeal would not have succeeded. It is a basic and overarching principle, rehearsed in the case law cited above, that only errors of law which make a difference to the outcome can found a successful appeal.
48. A taste of the difficulties that would be caused by Tesco's approach has been had already, first in the context of Tesco's application to amend and second at the disposal hearing that followed the determination of the EAT appeal.
49. Tesco says at footnote 2 to its 27 May 2025 appeal skeleton [CB/1013], *"Tesco has in substance provided further particulars by way of the application to amend"*. The suggestion is that the application removes the room for doubt and dispute. It does neither. Before considering why it does not provide the assistance claimed, it should be

noted that the application to amend was refused. Tesco, therefore, is asking the Court of Appeal to compel the Tribunal on remission to redetermine its findings on matters which the EAT expressly declined to consider. That refusal was not appealed.

50. The amended grounds of appeal contain a table setting out by paragraph and page references “*further erroneous determinations, facts, examples and matters on which the Respondent relies*” by way of passages in the Stage 2 judgment which Tesco sought, but was not permitted, to add to its appeal [CB/198 at §52 and CB/200-206]. These “*examples and matters*” were said to relate to appeal grounds A2G1, A2G3, A2G4, A2G5, A2G6, A2G8, A2G9, A2G10 and A2G11 (i.e., nothing in relation to A1G5 or A2G7, which are both cited in this appeal, but including A2G3, which is not). Many of the additional “*examples and matters*” cited are passages in the Second Judgment containing multiple paragraphs, without any explanation of why and how each passage is said to be affected by the error of law alleged in the relevant ground of appeal. As explained in the Leigh Day Claimants’ Objection to the Amendment Application at §17 [RSB/1012], analysing those additional “*examples*” required considerable work to identify: (1) the determination in the passage which Tesco might be appealing (as some passages contain multiple determinations); (2) what dispute the determination relates to, by cross-reference to the Records of Dispute as they stood at the close of the Stage 2 hearing; (3) how Tesco might be expected to argue that the determination relates to the ground of appeal; (4) what the claimants’ response to that (hypothesised) argument would be; (5) including in many cases by reviewing the lengthy Stage 2 judgment as a whole to identify how the relevant dispute has been determined outside the passage specified. Doing this 146 times would take hundreds of lawyer hours. Further, Tesco has not stated whether, if successful in this appeal, the expansion of its case on appeal in the EAT would be limited to the 146 additional “*examples*” listed in the amendment application, or whether the expansion would be yet broader.

51. Tesco says at §50 of its 27 May 2025 appeal skeleton that its proposed approach “*might require a separate hearing for the EAT to consider disposal including issue of remission but that is a simple matter of case management*” [CB/1013]. The disposal hearing on 14-15 October 2025 took two (intensive) days in the EAT to work out which underlying disputes should be remitted *just from the examples* that Tesco had appealed in its

successful grounds of appeal. It appears that Tesco envisages the EAT holding a disposal hearing of multiple times the length of the appeal hearing at which it is discussed whether the errors alleged in the grounds of appeal made any difference to the Tribunal's determinations, and if so which ones. This is wrong in principle, chaotic and unworkable.

## **CA2 – THE SECOND APPEAL**

52. Tesco's Second Appeal is principally founded on CA2/1, the correct approach to 'work'. Its other grounds amount to minor criticisms of specific parts of the Stage 2 Judgments which have been wholly or largely overtaken by subsequent developments in the proceedings. However, the legal principles on the correct approach to 'work' are not disputed between the parties and the suggestion that Stacey J misunderstood their clear and agreed position is not well-founded. Essentially, Tesco's gripe is that despite Stacey J allowing many of its grounds of appeal and making some serious criticisms of the Tribunal, she did not consider that the first instance judgments were flawed such that the entire Stage 2 fact-finding process required to be re-run. That it appears may be Tesco's goal. The consequence of that approach would be to render already protracted proceedings into a true war of attrition, where the steps back outnumber the steps forward.

### **CA2/1 – Stacey J adopted the correct approach to the meaning of 'work'**

53. At ground CA2/1, Tesco argues that the EAT erred in finding that the Tribunal had correctly understood and applied the meaning of 'work' [CB/29]. Tesco says the Tribunal erred in its formulation of the legal test at §3 of the First Judgment, and by its focus on training documents as a source of evidence when making factual findings, as discussed at §2 of the First Judgment and §14.2 of the Second Judgment (see §1(a) to (c) of Tesco's Grounds of Appeal [CB/29-30]).

54. This ground resurrects (in part) the following grounds Tesco advanced in the EAT:

54.1.A1G1 [CB/183] alleged that §11 of the July CMO [CB/265-266] showed the Tribunal making findings about 'generic jobs';

54.2.A1G2 [CB/183] was that the Tribunal erred at §§2-6 of the First Judgment [CB/208-209] by its focus on training documents;

54.3.A2G2 [CB/193] criticised the legal discussion on approach to ‘work’ at §§9-25 of the Second Judgment [CB/284-290].

55. Stacey J addressed these grounds together in her judgment, as the parties had in their submissions, at §§80-109 [CB/113-123]. As she noted at §80, “*Happily the parties are all agreed as to the applicable law that the tribunal should have applied.*” The relevant law is set out in a Joint Note which was agreed on behalf of all claimants at first instance, and also by Tesco in the EAT. It is reproduced at §81 of Stacey J’s decision [CB/114]. All were in agreement that:

55.1. The task of a Tribunal at a Stage 2 Hearing is to determine the work of the individual jobholders, not a “generic” job: *Shields v E Coomes (Holdings) Ltd* [1978] ICR 1159, 1174-1175 [AB/171-2].

55.2. Documents such as work manuals and training materials are relevant but not necessarily determinative: *Brunnhofer v Bank der Österreichischen Postsparkasse AG* [2001] 3 CMLR 9 at §48 [AB/250]. The Tribunal must consider what was actually done in practice.

55.3. However, things that the jobholder is instructed, requested or encouraged to do form part of the ‘work’ even if in fact they are done infrequently or not done in practice: *Beal v Avery Homes (Nelson) Ltd* [2019] EWHC 1415 (QB) per Lavender J at §32 [AB/385]. (See also for the same proposition *Potter v North Cumbria Acute Hospitals NHS Trust* [2008] ICR 910, app. §7 [AB/319]: it is a matter of factual inquiry whether a task has not been performed for so long it has fallen into desuetude.)

56. Stacey J reviewed the Tribunal’s decisions against this agreed legal approach and concluded it had not in fact fallen into the error, as alleged by Tesco, of elevating employer requirements above what was done in practice (§91 [CB/117]). Stacey J noted at §95 [CB/119] that the Tribunal had cited in full the relevant guidance in *Beal* (at §19 of the First ET Judgement [CB/216-217]) and therefore had in mind the correct legal test. She considered that there were “*slim pickings*” from which Tesco had sought to construct its argument that the Tribunal had not considered the individual jobholders’ work (§98 [CB/121]). She held, to the contrary, that “*The tribunal was focussed on what the individual claimants and their comparators did in the 619 pages of the Second Judgment*

*which made reference to the particular evidence and facts of each of them, albeit some were arrived at by considering the training materials” (§98 [CB/121]). Further, the Tribunal was entitled to use the training materials as the “best way into the evidence” and did not accord them irrebuttable weight (§104 [CB/122]) nor focus on them exclusively (§105 [CB/122]).*

57. The “*slim pickings*” relied on below are not more substantial now. The factual findings in the Second Judgment are consistent with the agreed legal test for ‘work’. In particular:

57.1. Tesco is wrong at §1(a) [CB/29] to say that the Tribunal’s focus was on generic jobs rather than the work of individual jobholders [CB/29]. First, the passage relied on by Tesco in this limb of the ground does not support the proposition: §2 of the First Judgment [CB/208] simply describes the training materials as “*key documents*”, it does not say the Tribunal intended to use those materials to make findings about ‘generic jobs’. Secondly, the Tribunal had in mind the individual jobholders and not some broadly generic test. It noted at §13.3 of the Second Judgment [CB/286], “*What was 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.*” It went on at §25 [CB/290] to cite from *Brunnhofer* the principle that it is “*necessary to ascertain [among other things] the nature of the activities actually entrusted to each of the employees in question in the case*” (Tribunal’s emphasis). The Tribunal also acknowledged that it was necessary to “*anchor our findings... on a particular employee’s situation*” (appendix 4 §59 Second Judgment [CB/475]) rather than to make generic findings at large.

57.2. Tesco contends at §1(b) [CB/30] that the Tribunal wrongly declined to consider what jobholders “in fact did on a day-to-day basis” and thought that the question was what the employer “required them to do as their jobs”. This submission is based on §3 of the First Judgment [CB/208], which reads: “*It was the respondent’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 the respondent 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 the*

*respondent's contentions in those respects were wrong.*" This is not a misstatement of the law: as set out above, 'work' is not simply (all of or solely) the things actually done on a day-to-day basis. Further, this paragraph has to be read in context. The Tribunal was right to identify the evidential importance of training materials to resolving, particularly, those disputes which arose because Tesco's case was that the sample claimants' jobs were less demanding than indicated by the store training materials but the comparators' jobs were more demanding than indicated by the warehouse training materials. For example, at appendix 3, §29 of the Second Judgment [CB/439], the Tribunal reasoned that Tesco's description of Ms Cannon's work as "*routine and repetitive*" was inconsistent with statements in a training document. More broadly, it should be read in the context of the extensive fact-finding exercise about the activities undertaken by the sample claimants and comparators in the Second Judgment.

57.3. At §1(c) Tesco renews its submission that the Tribunal was wrong at §2 of the First Judgment [CB/208] and §14.2 of the Second Judgment [CB/286] to say it would place weight on the training materials as a source of evidence. This submission is not well-founded:

57.3.1. There was a reasoned basis for according weight to the training materials. As the Tribunal observed at §14 of the Second Judgment "*the respondent had a strong business need for the work of the claimants to be done in the same way throughout the respondent's stores*" [CB/286]. As the Tribunal further noted at §§15-17 [CB/286-7], the comparators' tasks were carried out in accordance with digital systems. The wording used to describe the jobs done by the comparators was largely identical across the job descriptions prepared by Tesco. The Tribunal was entitled to take into account the fact that certain activities did form part of the standard requirements of a job, where there was a dispute as to whether those activities were in fact performed or a dispute about how they were performed.

57.3.2. However, the Tribunal did not end its inquiry by interrogating what was required of the sample claimants and comparators in the training materials.

Rather, it evaluated the parties' contentions by reference to witness evidence, training materials and other documentary evidence. The Tribunal was prepared to accept tasks that were done differently from the way set out in the training materials should form part of the Stage 2 factual findings. For example, at appendix 4, §94 of the Second Judgment [CB/484], the Tribunal found that the way Ms Cannon replenished shoes and handbags was inconsistent with the applicable training document, but that *"However, given that the respondent did not object that the way in which the JH did the things described... we concluded that it was approved by the respondent, so it became part of her work..."*. The Tribunal also found that tasks were done which were not set out in training materials. For example, at appendix 3, §80 [CB/453], the Tribunal accepted on the basis of Ms Cannon's witness evidence that she walked around her clothing department on arrival at work to identify gaps in displays, even though there was no training document to that effect.

57.3.3. This approach was wholly consistent with the guidance in *Beal* [AB/385], where Lavender J referred at §30 to documents *"such as contracts, job descriptions or work manuals"* as relevant while not necessarily determinative. Such documents may not be determinative, for example, where in reality the employer's expectations differed from what had been recorded in writing, or where a different way of working was approved of or accepted.

57.4. At §1(d) [CB/30] Tesco submits that the Tribunal's judgment as a whole is undermined by legal misdirection. In its permission skeleton at §37 [CB/53] Tesco picks out six parts of passages across the three first instance decisions which it says do not accurately state the case law. As set out above, the parties agree that the requirements of the employer are relevant to determining the scope of the 'work'; the Tribunal was not wrong about this. More fundamentally, it is not appropriate to comb through hundreds of pages of first instance decisions looking for differences in the way the legal tests have been expressed: see the law on the importance of not an unduly forensic analysis at the appellate stage in *Stacey J's* decision at §§72-79

[CB/ 111-113]. The “guiding principle” for an appellate court is that, “*if the tribunal has directed itself correctly in law and reached a conclusion which is open to it on the evidence, the use in other passages of its reasons of language inappropriate to the direction it has properly given itself should not be allowed to vitiate the conclusion unless the relevant words admit of no explanation save error of law*”: *Jones v Mid Glamorgan CC (No.2)* [1997] ICR 815 [AB/198]. The question is whether the Tribunal approached its fact-finding exercise correctly; Stacey J asked the right question and came to the right conclusion.

### **CA2/2 – Stacey J was right to dismiss A2G1 limb 1(a) regarding training materials**

58. At ground CA2/2 Tesco submits that the EAT erred in finding that the ET had resolved all of the relevant disputes between the parties [CB/30]. However, that overstates the scope of the EAT’s inquiry. The relevant ground below was A2G1 limb 1(a): “*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] at §16(a)). Only one example of this alleged error was identified: at §83 of appendix 1 to the Second Judgment. As a result of HHJ Taylor’s scope decision, that was the only matter in relation to which Stacey J was asked to check whether the Tribunal’s reference to the training materials determined disputes.
59. The passage at §83 of appendix 1 to the Second Judgment [CB/331-334] addresses the way Mrs Worthington went about tasks relating to replenishing stock in her department. These activities were addressed in the Leigh Day Claimants closing submissions at [RSB/891-901]. While Tesco (and indeed the Leigh Day Claimants) would have preferred the Tribunal to set out its determination of disputes about replenishment in the same order as presented in the job description and closing submissions, that does not mean that there is any error of law in the Tribunal making a series of positive findings which refer to the way replenishment activities are described in relevant training documents.
60. This sub-ground of appeal is described at §125 of Stacey J’s decision [CB/127] and addressed at §§130-134 [CB/129]. While it is noted that the process of marrying up the disputes between the parties in the Records of Dispute and the Tribunal’s findings by reference to the training materials is “*very laborious*” (§130 [CB/129]), Stacey J concluded that it is possible and ultimately that the Tribunal’s approach had not been wrong in

principle (§134 [CB/130]).

61. At the disposal stage, Stacey J directed that the Tribunal reorganise its findings in tabular form matching the Records of Dispute between the parties: see §§12 and 16-21 of her disposal order at [CB/165-167]. This will have the effect of distilling the outcome of each dispute that has been determined by cross-reference to the training materials into a single document. In relation to the specific matter under appeal, the Tribunal has since drawn together its findings on Mrs Worthington’s replenishment tasks at §§17-51, internal pp.91-95 of the First Reconsideration Judgment [RSB/384-388 ] and it is those consolidated findings which will be inserted in the table.

62. There was no identifiable legal error at the Tribunal stage or at the EAT stage. Tesco’s concern regarding clarity of determinations has now been resolved. This ground of appeal was meritless and is now academic.<sup>2</sup>

### **CA2/3 – Stacey J was right to dismiss A2G1 limb 2 regarding agreed facts**

63. Under this ground, Tesco argues that the EAT erred in holding that the ET was entitled to depart from, or make findings inconsistent with, facts agreed between the parties [CB/31]. The relevant ground in the EAT was A2G2 limb 2: that *“In breach of r.6(1), and consequently in error of law, the Tribunal in various ways rejected certain of the Agreed Facts”* [CB/192]. Tesco identified three parts of the Second Judgment which it appealed under this sub-ground. Taking each in turn:

63.1. The passage at appendix 8, §§283-295 [CB/737-741] related to Mr Jones transferring cages of stock from a vehicle called a low level order picker truck (“LLOP”) when the battery was low, to another LLOP. The Tribunal concluded that at

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<sup>2</sup> Should Tesco’s First Appeal succeed, Tesco may argue that it should be permitted to raise other examples of disputes said not to have been determined. If necessary, the Leigh Day Claimants would respond as follows. The Tribunal expressly stated that it would not determine disputes that were duplicative or insufficiently relevant to the question of equal value: §§53-54 Second Judgment [CB/300]. It can therefore be inferred that disputes not resolved on the facts fell into one of these two categories. There was no error of law in this approach: Tesco’s ground A1G8 on relevance failed (§§143-153 [CB/132-136] and has not been appealed.

appendix 8 §290 [CB/739] that if Mr Jones had run out of battery charge and swapped his LLOP, this would not have been an authorised way of working and therefore did not form part of his 'work' for the purposes of s.65 EqA 2010 [CB/739]. The EAT held that the Tribunal was entitled to reach this conclusion on the evidence and that, as the dispute had not been agreed by Leigh Day until closing submissions, there was no procedural unfairness (§§137-138 [CB/131]). The Tribunal reconsidered these paragraphs of its own motion at §100 of the First Reconsideration Judgment, and made some adjustment to its factual findings while reaching the same conclusion [CSB/28]. There was no legal error at first instance because it was open to the Tribunal, following *Beal*, to conclude that something the parties accepted as a matter of fact was done nonetheless was not an authorised and relevant part of a comparator's "work" for the purposes of determining the equal value question. Stacey J was right to say the Tribunal was entitled to find as it did and there was no procedural unfairness.

63.2. At appendix 8, §501 [CB/789] the Tribunal expressed doubt that the Leigh Day Claimants ought to have agreed to a paragraph in Mr Hornak's job description which dealt with Mr Hornak positioning cages by hand ready to be picked up by the forks of a Loading Truck. There is no legal principle that prevents a Tribunal from expressing such doubts. Stacey J rightly held that the Tribunal was entitled to explain why it found parts of the agreed facts about scanning and unloading UODs that formed part of Mr Hornak's work were "*unreliable*" ([CB/132] at §140). In any event, Tesco was successful in applying for reconsideration of this part of the second judgment (First Reconsideration Judgment §127-128 [CSB/29-30] and §53 of appendix 8 [CSB/33]) and so this example has fallen away.

63.3. At appendix 8, §898 [CB/884], the Tribunal commented on assembly tasks performed by Mr Young. ('Assembly' involves collecting items from warehouse racking for onward dispatch.) Tesco argued that the Tribunal replaced agreed facts with determinations of its own. In fact, the Tribunal commented that the agreed paragraphs ought to be read in conjunction with the relevant guidance, or that the work of an assembler could be accurately described by simply referring to those materials. However, the Tribunal did not strike the agreed paragraphs from Mr

Young's job description. Stacey J held that *"Properly read, this paragraph does not replace agreed facts with a different determination, it merely attempts to illuminate the task of paying attention when checking the content of a multi-product pallet, which reveals no discernible error"* ([CB/131-132] at §140). This is correct.

64. There is no discernible legal error in any of the three examples, and it was disproportionate to pursue them to a second appeal in circumstances where, as a result of the reconsideration and EAT disposal processes, it can make little practical difference.<sup>3</sup>

65. At §§80-81 of its permission skeleton [CB/63], Tesco raises a concern that as a result of the Second Reconsideration Judgment, the IEs have been told that agreed facts are to be taken into account, but there is no mechanism for ensuring all the agreed facts are placed before the IEs and there is a risk of inconsistency. This concern has been fully addressed by Stacey J's disposal decision. The final job descriptions based on the consolidated tables to be produced in compliance with the disposal order will contain all the agreed facts, as well as the Tribunal's determinations of the disputed issues.

#### **CA2/4 – No error in Stacey J's conclusions on A1G5 regarding training**

66. Tesco argues that the EAT erred in holding that the Tribunal was entitled to take the approach it did to making findings about the training received by jobholders [CB/31-32]. This relates to ground A1G5 below [CB/184-185], which challenged a passage about training at §§87-88 of the First Judgment [CB/258]. That passage says:

*"given our conclusions stated in paragraphs 75-78 above, we saw no good reason to make determinations about precisely what training the sample claimants and their comparators had actually received, with one exception... the question whether an employee had received training would be material if the training had led to a determination (by whomever) that the employee was competent to do the thing to which the training related and the respondent would (or could) not permit that thing*

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<sup>3</sup> Again, should the First Appeal succeed and Tesco wish to make arguments in relation to other 'examples', the Leigh Day Claimants will submit (if necessary) that there is no legal principle preventing a Tribunal from finding that agreed facts are wrong. However, this argument should not be determined in the abstract absent any determination under challenge where the Tribunal actually did so.

*to be done without such determination. We had in mind in this regard training to be a forklift truck driver...”*

67. This passage has to be read in the context of the First Judgment as a whole, and the further fact-finding judgments issued by the Tribunal. Taking into account this context:

67.1. The cross-reference to *“our conclusions stated in paragraphs 75-78 above”* is to a section of the First Judgment subtitled *“Training documents and manuals”* [CB/252-255] in which the Tribunal accepted and endorsed closing submissions from the Marcus Claimants on the use of training materials as evidence both of what the jobholders did, and the skills necessary to do the job (§78 and citation immediately *supra* [CB/255]). Therefore, the reference to there being no need to make findings about *“precisely”* what training the jobholders had actually received was not a rejection of the need to make findings about the knowledge and skills that needed to be acquired to undertake their work. The relevant background to this was that the training records retained in the stores were inconsistent with the fuller records retained in the DCs; Mrs Worthington’s training record had been lost entirely.

67.2. In the Second Judgment, the Tribunal gave reasons for making the findings it did about the training, and declining to make other findings, at appendix 8, §§212-213 [CB/518]. It stated that *“Paragraphs 4.2-4.17 of the EVJD seemed to us to be irrelevant in the circumstance that the training materials to which we refer in paragraphs 8-190 above which were applicable to the work of Mr Jones showed precisely what training he ought to have received in order to do his job”*. The cross-referenced section, at appendix 8 §§8-190 [CB/666-717], sets out in detail the content of the training which was required in order to do the job. Paragraph 213 related to Mr Jones’ job description but the Tribunal expressly did not repeat its conclusions which were cross-applicable to other comparators (§53 [CB/300]).

67.3. Induction training is now specifically covered in a section of appendix 7 to the First Reconsideration Judgment (§§4-7 [CSB/31-32]), which incorporates wording from Tesco’s job descriptions and refers to training materials covered subsequently in that judgment. In its Second Reconsideration Judgment, the Tribunal additionally incorporated findings about the induction training for the sample claimants (§§62-70 [CSB/37-40]). In Tesco’s 27 May 2025 appeal skeleton, the objection is made that

the Tribunal took the approach of making findings about the training jobholders would typically have received rather than that which they actually received (§94 [CB/65]); this is a distinction without a difference. As the records were incomplete, this was an appropriate way to reach findings on the best available evidence.

68. There was no error in principle in the Tribunal making findings in the Second Judgment, based on the training documents, about the knowledge and skills that needed to be acquired in order to do the work, rather than focussing on the records about when the training courses were undertaken by each jobholder, given the disparity in recordkeeping of the latter. In any event, additional findings on training have now been added to the job facts at first instance, rendering this ground of appeal otiose.

69. Stacey J addressed A1G5 at §§164-171 of her judgment [CB/139-140]. The learned judge considered that although the Tribunal's conclusion on training was not one every tribunal would come to, there was no identifiable error of law and it was therefore not a finding she could disturb (§165 [CB/139]). Her reasoning was apt and sensible, and there was no error in the conclusion reached on that basis.

70. Tesco argues that as a matter of principle, Stacey J was wrong to dismiss its complaint under this ground that there were activities other than forklift truck driving that required a qualification, and the Tribunal ought to have included those activities in its fact-finding. However, Stacey J did not dismiss this point; she noted it had been addressed by the First Reconsideration Judgment, and if there remained any outstanding matters in this category it was open to Tesco to raise them by way of the reconsideration process *or at the EAT disposal hearing* (§170 [CB/140]). Tesco did not press for any such matter to be added to the disposal order and has not appealed the disposal decision.

#### **CA2/5A – Scope revisited**

71. Tesco does not suggest that it was open to Stacey J to depart from HHJ Tayler's scope decision. Please see the submissions on CA1 above.

#### **CONCLUSION**

72. The Court is invited to dismiss both appeals for the reasons given above. The Leigh Day Claimants will make submissions on disposal as appropriate once Tesco's position is clearer.

**SEAN JONES KC**  
**ANDREW BLAKE**  
**RACHEL BARRETT**

~~20 January 2026~~ ~~22 January 2026~~ 23 February 2026