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

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL

His Honour Judge Tayler (Appeal No: CA-2025-000486)

The Honourable Mrs Justice Stacey (Appeal No: CA-2025-002063)

EAT CASE Nos: EA-2023-000927-AT,
EA-2023-000928-AT and EA-2024-001071-AT

B E T W E E N

TESCO STORES LIMITED

Appellant

and

Ms K ELEMENT and others

Respondents

APPELLANT'S APPEAL SKELETON ARGUMENT

20 JANUARY 2026

This skeleton argument is produced in respect of the two separate appeals referred to above. The appellant is referred to as "Tesco" and the respondents are referred to as the "claimants", as they were before the Employment Tribunal. References in the form [CB/XX], [SB/XX] and [CSB/XX] are to pages of the Core Bundle, Reference Supplementary Bundle and Core Supplementary Bundle respectively.

1. Introduction

1.1 In appeal number CA-2025-002063 (the "**Substantive Appeal**") Tesco appeals against aspects of the decision of the Employment Appeal Tribunal (the "**EAT**") on its appeal against three decisions of the Employment Tribunal (the "**ET**") in these claims for equal pay. The three decisions of the ET were given during "stage 2" of the process for determining whether the work of six sample claimants was of equal value ("**EV**") to

the work of eight comparators[1]. The EAT handed down its main judgment on 31 July 2025 (the "**EAT Judgment**") [**CB/86-159**] and a judgment on disposal on 15 October 2025 (the "**EAT Disposal Judgment**") [**CB/168-179**]. The EAT also made an order dated 31 July 2025 (the "**July EAT Order**") [**CB/76-77**] and a further order dated 23 October 2025 (the "**EAT Disposal Order**") [**CB/160-167**].

1.2 This is extremely large and complex litigation. There are now close to 60,000 claimants in total, around 34,000 of which form the "multiple" with which these particular appeals are concerned. The sums at stake are also very large. A Leigh Day press release has estimated the value of the litigation against Tesco in the billions of pounds.

1.3 As explained below, the applicable legislation sets out a clear and structured "roadmap" for the determination of EV claims, which the ET should follow. This roadmap provides that, at stage 2 of EV proceedings, the ET's core function is to determine the factual disputes between the parties: see rule 6(1)(a) of the Employment Tribunals (Equal Value) Rules of Procedure, which were applicable at the time of the stage 2 hearing in the present case (the "**EV Rules**")[2].

1.4 Tesco submits that the ET took several fundamental wrong turns in undertaking that core function, to the extent that it misunderstood and misapplied the key provisions of the Equality Act 2010 (the "**EA 2010**") and has not in substance complied with the EV Rules. As a result, the ET has erred in law. These errors frustrate the underlying purpose of the EV Rules and significantly undermine the future progress of the EV proceedings.

1.5 The EAT's decisions have already found that the ET went seriously wrong. Of the grounds of appeal which Tesco pursued at the full hearing, the EAT allowed eight in full and two in part. Even in relation to grounds which were dismissed, Stacey J said that she "*anticipate*[d] *difficulties ahead*" because she had "*real doubts that the tribunal's findings were sufficiently clear for the parties to understand them*" (§134 of the EAT Judgment [**CB/130**]). She also observed that "*procedurally, the case has gone awry*" (§209 of the EAT Judgment [**CB/149**]). As a result, the EAT has taken the extraordinary step of directing the parties themselves to undertake the formidable task

[1] The sample claimants and the comparators are together referred to as 'the job holders'.

[2] Schedule 3 to SI 2013/1237. Rule 6(1)(a) is quoted in paragraphs 4.3 and 4.4 below.

of trying to identify and articulate the facts the ET has purportedly found in its multiple decisions: see further paragraphs 2.24 to 2.28 below. In light of the EAT's findings, directions and observations, any suggestion that Tesco's appeals have been "*opportunistic*" (§210 of the EAT Judgment [**CB/149**]) is surprising and misplaced.

1.6 The ET not only went wrong in law but also made its own task (and the task of everyone else involved) substantially harder by:

(a) deciding after the stage 2 hearing to adopt an approach to determining the "work" of the job holders which was not only erroneous in law but also differed from that agreed between the parties, and so was an approach for which the parties did not prepare and could not have anticipated they needed to prepare; and

(b) failing to make individual findings on disputes of fact identified by the parties in "Records of Dispute" ("**RoDs**") prepared over many months for that purpose and instead purporting to make factual findings through making cross-references to many thousands of pages of training and other generic material ("**training documents**") without adequately identifying what those factual findings were.

1.7 As Stacey J observed in §213 of the EAT Judgment [**CB/150-151**], the ET's task would have been much easier if the ET had done what was asked of it by all parties and the ET-appointed independent experts (the "**IEs**"), rather than unilaterally devising its own approach.

1.8 The size and complexity of this litigation cannot and does not mean that errors of law can be overlooked or that the ET's decisions should be given an overly generous reading when, properly analysed, it has gone wrong in law. On the contrary, it underlines the importance of taking the time to make the findings needed and to get things right. Furthermore, although the ET's findings in the present appeal concern six individual sample claimants and eight individual comparators, its decisions – both those of principle/approach and those of fact – could potentially have a significant impact on the claims of a vast number of other claimants.

1.9 Tesco submits that the ET led itself into more legal errors even than Stacey J found and that she was wrong not to uphold the appeal on other grounds, as set out in this skeleton argument.

1.10 The issue in appeal number CA-2025-000486 (the "**Scope Appeal**") is: where an appellant's grounds of appeal identify alleged errors of law in the judgment(s) under appeal and the appellant chooses to illustrate those errors of law in its grounds of appeal by reference to certain specific findings within the judgment(s), is the scope of its appeal to any extent limited to those specific findings used by way of illustration such that, if the appeal is successful, only the specific, illustrative findings are remitted whilst the same error of law inherent in other findings is permitted to persist?

2. Background

2.1 The procedural history of stage 2 of these proceedings is important. Among other things, it illustrates how the ET charted for itself a course which was irregular and unexpected, and which led it into serious error. That history is set out in §§9-67 of the EAT Judgment [**CB/90-108**]. There have been further developments since the EAT Judgment was written which are outlined at paragraphs 2.24 to 2.28 below. In summary, the key stages of the proceedings before the ET were as follows.

2.2 Stage 2 of the proceedings was subject to careful case management over a period of over two years. During that period, in accordance with orders made by the previous Employment Judge and with the assistance and endorsement of the IEs, the parties (a) prepared "equal value job descriptions" ("**EVJDs**") and evidence based on what each of the individual job holders actually did on a day-to-day basis, (b) identified the factual disputes between them (and agreed facts) in tabular RoDs[3], and (c) produced witness evidence addressing points still in dispute. The witness evidence did not address issues which the parties understood to have been agreed prior to its preparation.

2.3 The stage 2 hearing took place over 36 days between March and May 2023. The purpose of the hearing was to determine factual disputes about the "work" of the job holders in accordance with rule 6(1) of the EV Rules, as to which see paragraphs 4.3 and 4.4

[3] The parties' approach is illustrated, for example, by the extract relating to comparator Mr Jones at **SB/902-926**.

below. Those determinations – together with any agreed facts – will form the basis of: (a) a report prepared by the IEs on "the question" (i.e. whether any of the claimants' work is of EV to the work of any of the comparators); (b) any reports prepared by experts whom the parties obtain permission to instruct; and (c) the ET's own ultimate determination of "the question": see rules 6(1)(a) and (2), read with rules 1(2) and 3(1)(b) of the EV Rules. The analysis of the value of the job holders' work will be based on a mosaic of the numerous, individual agreed facts and ET-determined facts, each of which may have a bearing on the outcome.

2.4 At no point before or during the stage 2 hearing did the ET suggest that the approach taken by the parties was wrong or that it considered that the training documents would be assumed to set out the "work" of the job holders unless the parties put forward "*cogent evidence*" showing that this was not what Tesco "*required*" of persons in these roles[4]. The ET only raised this after the stage 2 hearing had concluded. It is therefore unsurprising that, although training documents were in the stage 2 hearing bundle and there was some reference to training documents in the evidence put forward by the parties, none of the parties focussed on producing evidence to rebut an assumption that the training documents described the job holders' work.

2.5 In the ET's judgment dated 12 July 2023 (the "**First Judgment**") [**CB/207-261**], the ET held in §1 that "*the manner in which the parties had put their evidence and contentions before the tribunal* […] *was so inconsistent with the interests of justice that it was not just to determine the factual disputes as they stood at the end of that hearing*" [**CB/208**]. This, the ET said, was because the evidence and submissions focussed on "*what the sample claimants and their comparators in fact did*" (§3 of the First Judgment [**CB/208**]) and not on "*training given to persons doing the jobs of the sample claimants or their comparators*" (§2 of the First Judgment [**CB/208**]). At this stage, therefore, the ET was declining to make factual findings at all. The ET made "*new orders*" for the parties to produce new EVJDs and RoDs to which all parties objected (§92 (and §7) of

[4] At a preliminary hearing on 19 December 2022, counsel for the Leigh Day claimants did suggest that "*it <u>might</u> be possible to deduce from the training which the claimants <u>were given</u> what <u>work they did</u>* […]" (emphasis added), but that is not the same thing at all.

the First Judgment [**CB/260-261**]). It also set out a number of conclusions, primarily in relation to issues of principle and approach.

2.6 In case management orders with reasons dated 26 July 2023 (the "**July CMO**"), the ET then made an order for the parties to recast parts of certain EVJDs, in a way which cross-referred to and appended extracts of relevant training documents [**CB/262-279**]. This was with a view to testing whether the full EVJDs could be recast in this way.

2.7 On 22 August 2023, Tesco appealed to the EAT against the First Judgment and the July CMO [**CB/180-181**]. There were two decisions and hence in form two appeals: EA-2023-000927-AT and EA-2023-000928-AT. Tesco challenged the ET's decision not to determine the factual disputes and certain of the determinations of principle in the First Judgment and the July CMO [**CB/182-186**]. In the EAT Judgment, this appeal is referred to as "A1" and the grounds within it as "A1G1", "A1G2" etc; the same approach is taken in this skeleton argument.

2.8 Then, by an email dated 9 October 2023, the ET informed the parties that it would no longer require them to recast their EVJDs and that, contrary to what it had said in the First Judgment and the July CMO, it would determine the disputes put before it by the parties, but "*primarily by reference to training materials*" [**SB/725**]. As a result of the ET's change of approach, Tesco withdrew several grounds of appeal in A1 and renumbered the remaining grounds.

2.9 At this stage the claimants sent the ET, without invitation, a "Joint Note on the Law" dated 27 October 2023, which, among other things, set out their position (with which Tesco agrees) that: "*The starting point is* 'what is done in practice' *by the claimants and comparators* […]" [**SB/735**]. The ET promptly responded to the claimants by email, rejecting the content of the note and stating that its understanding of the law was "*slightly different*" from that of the claimants [**SB/732**].

2.10 On 13 March 2024, the IEs wrote to the ET to ask for the ET's findings to be incorporated into a single EVJD for each job holder [**SB/745**]. On 4 July 2024, the ET sent to the parties a further judgment (the "**Second Judgment**") [**CB/280-898**]. The ET declined to do what the IEs had requested. Instead, in a discursive judgment spanning 619 pages and including eight appendices, the ET purported to set out findings of fact and further findings of principle. Throughout the Second Judgment, the ET

incorporated training documents and/or decided that the training documents themselves should be viewed by the IEs and treated as setting out the work. There were around 750 training documents referred to and incorporated in the Second Judgment, amounting to over 19,000 pages.

2.11 The six sample claimants were addressed in appendices 1 to 7 of the Second Judgment: five with an appendix each and one with two appendices. The eight comparators were addressed in a single appendix 8. In appendix 8, the ET first made some general findings, largely by reference to training documents (§§1-190 [**CB/658-717**]), before moving on to consider each individual comparator. However, rather than addressing each comparator on a standalone basis, the ET often made findings in respect of a particular activity only for one comparator (effectively, an anchor comparator) on the basis that those findings would also apply to others who undertook that activity.

2.12 This approach was inconsistent not only with what the parties and the IEs had asked the ET to do, but also with what other ETs dealing with similar litigation have done. As shown by the illustrative examples referred to by Stacey J at §129 of the EAT Judgment [**CB/128-129**] and set out in appendix A of the EAT Judgment [**CB/153-154**], other ETs in large-scale equal pay claims against retailers made clear individual findings on individual disputes, identified by reference to RoDs (or EVJDs), and set out in tabular form.

2.13 On 15 August 2024, Tesco appealed to the EAT against aspects of the Second Judgment [**CB/187-188**]. This is appeal number EA-2024-001071-AT. In the EAT Judgment, this appeal is referred to as "A2" and the grounds within it as "A2G1", "A2G2" etc; the same approach is taken in this skeleton argument.

2.14 In an order dated 12 March 2024, HHJ Auerbach allowed one of the grounds in A1 to proceed to a full appeal. In an order sealed on 10 February 2025, HHJ Tayler allowed Tesco's application to amend the grounds of appeal in A1 [**CB/73-75**]. Tesco also confirmed that it did not seek to pursue A1G4 and parts of A2G5 and A2G7. In that order, HHJ Tayler also allowed each of the remaining grounds in both A1 and A2 to proceed to a full appeal. All the remaining grounds of appeal were granted permission to proceed, and the full hearing took place before the EAT on 18 and 19 June 2025.

2.15 In the Second Judgment, recognising that it had, after the stage 2 hearing, taken an approach different from that adopted by the parties, the ET invited the parties to make applications for reconsideration. On 18 October 2024, they each did so.

2.16 On 26 September 2024 and subsequently on 14 January 2025, the IEs wrote again to the ET and raised concerns about carrying out their task with the material they had. They said that it may make their work "*very unwieldy and time consuming*" [**SB/753**] and asked for the ET to direct the parties to prepare "*final, definitive EVJDs*" [**SB/788**].

2.17 In another change of position, on 23 January 2025, EJ Hyams wrote to the parties by email and confirmed that the ET would now itself produce individual "*statements of the work*" for each job holder and that "*the provision of those statements by us will mean that it is neither necessary in the interests of justice, nor desirable, for the parties to do what the IEs have asked us to direct them to do. We have therefore concluded that we should not direct the parties to do what the IEs have asked us to direct the parties to do*" [**SB/789**]. EJ Hyams further noted in that email that "*we are sure that directing the parties to revise the EVJDs by reference to our factual findings would have been very time-consuming, costly for the parties, and highly likely to give rise to further disputes which we would have had to resolve*" [**SB/789**].

2.18 On 30 May 2025, the ET sent the parties a further 307-page judgment (the "**First Reconsideration Judgment**") [**SB/294-600**]. The "statements of the work" set out in 14 appendices to the First Reconsideration Judgment, included some new findings, still made copious references to and incorporated vast numbers of training documents, and also made numerous cross-references back to parts of the Second Judgment.

2.19 On 7 March 2025, Tesco made an application to the EAT to amend the grounds of appeal to include further particulars in relation to existing alleged errors of law. It did so because the EAT had, in the judgment sealed on 10 February 2025 (the "**Tayler EAT Judgment**"), indicated in §§21, 29, 33 and 36 that certain grounds of Tesco's appeals would be limited to the specific challenges, facts and examples[5] in the grounds of appeal, "*absent any successful application to amend*" [**CB/82-85**].

[5] The EAT itself put the point in several different ways.

2.20 On 28 March 2025, HHJ Tayler refused Tesco's application save that in §39 he allowed Tesco's application to add §§53-55 of the amended grounds of appeal to clarify the way in which findings in respect of anchor comparators applied to other comparators [**SB/653**].

2.21 In the First Reconsideration Judgment, the ET again invited the parties to make applications for reconsideration, and, on 11 July 2025, they each did so. On 28 July 2025, the ET issued a further decision (the "**Second Reconsideration Judgment**"), in which it made findings on those further applications for reconsideration [**SB/601-626**].

2.22 The result of this ever-shifting procedural quagmire is five formal, substantive decisions issued by the ET in relation to stage 2 of the EV process, together with substantial email correspondence from EJ Hyams which also purported to set out further decisions and reasons for those decisions. The Substantive Appeal concerns the First Judgment, the July CMO and the Second Judgment. Although in the First Reconsideration Judgment and the Second Reconsideration Judgment the ET did make some material changes to certain of its earlier findings, it continued to apply the underlying principles set out in the earlier decisions and the majority of its earlier findings appear to remain undisturbed. This appeal accordingly remains relevant and consequential.

2.23 On 31 July 2025, the EAT handed down the EAT Judgment and the July EAT Order, in which it upheld substantial parts of Tesco's appeal and rejected other parts. Following a disposal hearing on 14 and 15 October 2025, the EAT issued the EAT Disposal Order, which requires the ET to consider or reconsider various disputes between the parties in respect to appeal grounds A2G1, A2G4, A2G5, A2G6, A2G7, A2G8, A2G9, A2G10 and A2G11 [**CB/160-167**]. The result is that, of the grounds of appeal upheld by the EAT, the Scope Appeal is only relevant to A2G1 limb one, ground (c) (failing to incorporate obvious facts) and A2G11 (excluding mental arithmetic). It is also potentially relevant to grounds 3 and 4 of the Substantive Appeal.

2.24 A further outcome of the EAT disposal hearing is that the EAT, adopting a proposal made by the Leigh Day claimants, ordered significant work be undertaken with the aim of identifying and articulating the facts which the ET purportedly found. This work is to take place after the determination of these appeals.

2.25 Specifically, in §§16-19 of the EAT Disposal Order [**CB/166**], the EAT ordered the production of tables relating to the work of the job holders (the "**Job Holder Tables**") with five columns: (a) the first two columns will repeat the position of the parties in their stage 2 closing submissions, (b) in the third column, the party tasked with the preparation of the table[6] will record its understanding of the ET's adjudications, noting the paragraphs in the ET's judgments on which that understanding is based, (c) in the fourth column, the opposing party will record its agreement or disagreement with the third column, and (d) in the fifth column, the ET will be required to confirm the outcome and final wording in respect of each of the disputes in accordance with its previous judgments. Once this process has been completed, §21 of the EAT Disposal Order then requires the parties to produce final EVJDs for the job holders and to send these to the ET and the IEs.

2.26 This will be a formidable and extremely time-consuming task; the fact that the EAT considers it to be necessary reflects and demonstrates the legal deficiencies of the ET's decisions. Furthermore, there is material risk inherent in the task, namely, that when the ET completes the Job Holder Tables, it will not simply provide confirmation of previous adjudications but will make new adjudications which might then be subject to further challenge by the parties (as foreshadowed by the ET in its email of 23 January 2025 – see paragraph 2.17 above). Notwithstanding this, since the EAT did not uphold A2G1, Tesco agreed to Leigh Day's proposal on the basis that something needed to be done to try to bring some coherence to proceedings. The Harcus claimants did not agree to the proposal on the basis that it was "*not practicable*" and that "*what is being proposed* […] *could only be reformulating into a different format what the Tribunal has already found. It couldn't* […] *involve changing anything that the Tribunal has found*" [**CSB/158**].

2.27 In §§23-26 of the EAT Disposal Judgment [**CB/175-176**] the EAT specified how the parties are to address the training documents referred to by the ET in its judgments when populating the Job Holder Tables. In short, Stacey J directed that the parties

[6] The order requires the claimant law firms to prepare the first three columns of the claimant Job Holder Tables for their respective claimants and Tesco to do the same for the comparator Job Holder Tables.

should "*summarise succinctly the work tasks set out in those materials*", as she considered Leigh Day had done in one paragraph of the sample it produced to the EAT at the disposal hearing (albeit it is notable that the one sample paragraph she endorsed did this by itself cross-referring to a substantial extraneous document) [**CB/176**]. It is submitted that this approach is different from – and indeed cuts across – the approach which the ET deliberately took. The Harcus claimants agree: at the disposal hearing their counsel explained in respect of Leigh Day's sample paragraph that "*what Leigh Day have interpreted the Tribunal's judgment to mean is that the claimants' wording is preferred. What in fact* [paragraph] *83.9* [of the Second Judgment] *does is it incorporates the whole of a document* […] *and* […] *the Tribunal says: 'The whole of the document was relevant.'* […] *And it highlights the difficulty in that the Tribunal did not approach matters in the way that the parties were presenting things to them and it is, we say, impracticable to try and squeeze what the Tribunal has found into this format.*" [**CSB/159**]

2.28 In accordance with §15 of the EAT Disposal Order, the parties have recently exchanged a self-selected sample of part of a Job Holder Table to enable discussions on approach to "*facilitate mutual understanding and clarity*" [**CB/166]**. The approach taken by the parties to the ET's references to training documents differs materially [**CSB/119-120**]. Since the EAT ordered that the parties should record in the Job Holder Tables their understanding of the ET's adjudications, Tesco has sought in its sample to summarise the parts of any training document expressly incorporated by the ET which refer to work tasks or demands. The claimants' samples in contrast do not record the ET's adjudication as made in its judgments; instead the claimants have reviewed the training documents and sought to divine themselves what the ET might have adjudicated in respect of a particular dispute if it had not incorporated the training documents wholesale. It is unclear whether and how the stark difference in approach between the parties can be bridged.

THE SUBSTANTIVE APPEAL

3. Ground 1: The meaning and determination of "work" (§§80-109 of the EAT Judgment, especially §95) (A2G2 and A1G1)

Legal principles

3.1 Section 64(1) of the EA 2010 provides that the equal pay provisions apply when "*a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does*".

3.2 Section 65(6) of the EA 2010 provides that:

"*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."

3.3 Accordingly, the focus of the statute is on the work done by two particular individuals and the demands actually placed on those two individuals. Further or alternatively, a job holder's work comprises the activities they actually "do". This is confirmed by the authorities. For example:

(a) In *Shields v E. Coomes (Holdings) Limited* [1978] 1 WLR 1408 at 1427F, Bridge LJ held that it is necessary to look at "*what is done in practice* […] *comparing their observed activities not their notional paper obligations*".

(b) In *Brunnhofer v Bank der Österreichischen Postsparkasse AG* [2001] All E.R. (EC) 693, at §§42 and 43, the ECJ stated that:

"*42.* […] *the terms* 'the same work'*,* 'the same job' *and* 'work of equal value' […] *are entirely qualitative in character in that they are exclusively concerned with the nature of the work* <u>*actually performed*</u> […]

43. The court has repeatedly held that, in order to determine whether employees perform the same work or work to which equal value can be attributed, it is necessary to ascertain whether, taking account of a number of factors such as the nature of the work, the training requirements and the working conditions, those persons can be considered to be in a comparable situation" (emphasis added).

(c) In *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v Wiener Gebietskrankenkasse* [2000] ICR 1134, at §29 of his opinion, the Advocate

General summarised the position as follows: "[…] *the only criterion for the existence of* 'equal work' *or* 'work of equal value' *is the actual activity of the workers.*"

(d) That approach was reflected in the approach taken by the EAT in *CSC Computer Science Limited v Hampson* [2023] EAT 88, at §13, when HHJ Tayler held that the "*focus is on what the employees do in practice, rather than what they might be required to do under their contracts or job descriptions*".

3.4 Accordingly, the question is not what the employer might expect or require of people generally in the same role or, indeed, what the employer might expect or require of the job holders themselves under their contracts, job descriptions or – it must follow – training. The question is what they actually do.

3.5 Tesco accepts that not everything that a job holder does in the workplace is necessarily "work". As Lavender J held in *Beal v Avery Homes (Nelson) Limited* [2019] EWHC 1415 (QB), at §30, "*an employee who loafs around during work hours does not thereby convert loafing into part of their work*". The activity in question must be capable of being considered "work". However, the boundaries of that concept are not defined by the "requirements" of the employer, whether in principle or in practice.

3.6 That is illustrated by some examples given in *Beal*. In §32, Lavender J accepted that "work" includes:

(a) activities which an employee is merely encouraged or requested to do, even if they are not instructed to do them;

(b) things which the employee does which their manager knows about and to which the manager does not object; and

(c) things which the employee does which are "*a way of doing something which forms part of their work*", even if they are neither instructed, encouraged or requested to do them.

3.7 Accordingly, although the mere fact that a particular job holder does the same activity better or worse than another job holder is not a relevant factor at this stage, if a job

holder carries out the same general task in a particular or different way, that does form part of that job holder's work.

3.8 Similarly, if a job holder carries out the same task but in different conditions or with particular expertise, that is also relevant. At §24 of his opinion in *Angestelltenbetriebsrat*, the Advocate General confirmed that: "[…] *it is possible for two workers to carry out the same duty, but for the work they do to be of different value either because it is done under different conditions, or because the workers concerned have different experience or different skills.*" The ECJ followed this opinion: see for example §18 of its judgment.

The ET's approach

3.9 The ET took a fundamentally different and erroneous approach. This is demonstrated by a multitude of findings and observations throughout the ET's decisions. These include the following:

(a) "*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.*" (§3 of the First Judgment [**CB/208**]).

(b) "*That paragraph in our view showed 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*." (§11 of the July CMO [**CB/265-266**]).

(c) "*The most basic principle of all was this: an employee's job is not what the employee says it is, but what the employer says it is. The employer requires the employee to do work, and the employee is required to do that work*." (§9 of the Second Judgment [**CB/284**]).

(d) The facts and ruling in *Shields* were "*of only very little relevance to at least the majority of the factual disputes before us here*" because (among other things)

"*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*" (§13 of the Second Judgment [**CB/285-286**]).

(e) "*It would be very surprising if the value of the work of those thousands of employees* [doing the job of customer assistant or warehouse operative] *could be said to differ according to which employee did it* […] *and where it was done* […]" (§18 of the Second Judgment [**CB/287**]).

3.10 In §25 of the Second Judgment [**CB/290**], the ET asserted that the ECJ did not say in *Brunnhofer* that it was necessary to ascertain what a job holder did. The ET set out the following heavily-edited extract from §48 of the judgment – "*it was necessary to ascertain* […] *the nature of the activities actually entrusted to each of the employees in question in the case*" – as if this meant that a job holder's work was limited to what was required of them by the employer. However, the ET unaccountably failed to cite or to address the passages in which the ECJ made clear that work included all activities "*actually performed*": see paragraph 3.3(b) above, and see also, for example, §49 of *Brunnhofer*: "*It is for the national court, which alone has jurisdiction to find and assess the facts, to determine whether, in the light of the actual nature of the activities carried out by those concerned, equal value can be attributed to them* […]" (emphasis added).

3.11 Applying this erroneous approach, the ET held 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* [i.e. no longer determinative of what Tesco "required"]" (§14.2 of the Second Judgment [**CB/286**]).

3.12 Thus, the ET did not treat training documents simply as evidence, even weighty evidence, of the work of the job holders. It elevated them into a presumptive record of the work, even where there was no evidence or suggestion that individual job holders had undertaken that training. The ET did this because it considered that a job holder's work is what an employer requires of people holding that position, and not the "*actual nature of the activities carried out*". Further, and in any event, even where there was plainly cogent evidence of what the individual job holders actually did in practice and

this evidence was referred to by the ET in the Second Judgment (see, for example, §§237 and 251 of appendix 8), this was not sufficient to rebut the presumption: the evidence had specifically to show that the training documents were not, or were no longer, "*determinative*" of what Tesco "*required*".

3.13 The ET itself acknowledged on numerous occasions that this was not how the parties had prepared and presented their evidence or submissions: see, for example, §4 of the introduction [**CB/208**] and §85 [**CB/258**] of the First Judgment and §§10 [**CB/285**], 48 [**CB/299**] and 51 [**CB/299**] of the Second Judgment. The parties did not direct their evidence to proving, cogently or otherwise, which of the 19,000 pages of training documents were not "*determinative*" of what Tesco "*required*". Accordingly, it is submitted that, even if (which is denied) the ET was right in its approach to the meaning of "work", deciding to approach its decision-making in the manner in which it did (i.e. only after the stage 2 hearing had ended) was not fairly or lawfully open to it.

The EAT's decision

3.14 In §84 of the EAT Judgment [**CB/115**], Stacey J observed that the ET had used "*various iterations and sometimes different forms of words*" when setting out its views on the meaning of "work" in "*a multiplicity of places*" in its various decisions. However, in §90 [**CB/117**], she held that a "*coherent and consistent approach*" was discernible.

3.15 As for what that approach was, in §91 of the EAT Judgment [**CB/117-118**], Stacey J accepted that counsel for Tesco was "*right that the startling and clumsily expressed first pronouncement in the First Judgment at [3]* […] *was an unpromising start*" and that "*one can see why the parties were alarmed when they first read the First Judgment and the claimants prepared their Joint Note to assist the tribunal*". In §95 [**CB/119**], Stacey J held that there was a "*genuine and troubling puzzlement*" over why the ET stated and considered its understanding of the law to be different from the parties.

3.16 Despite all of this, Stacey J concluded that the ET "*did not inadvertently lose sight of the basic principles*" (§92 [**CB/118**]) and had understood "*the importance of Brunnhofer in its entirety*" (§91 [**CB/118**]).

3.17 It is submitted that the EAT was wrong so to hold and the basis for the conclusion has not been explained.

3.18 The ET rejected the Joint Note prepared by the claimants (and, in so doing, reiterated in terms the ET's view that the test was not what job holders did in practice) and, although it did cite passages from *Brunnhofer*, at the operative part of its Second Judgment it quoted in a highly selective manner from that judgment which did not reflect what the ECJ actually held overall [**CB/290**]: see paragraph 3.10 above.

3.19 Whilst it is true that the ET expressed itself slightly differently on the numerous occasions when it addressed this issue, its consistent approach was: (a) to elevate and focus on what the employer required, (b) at a level of generality rather than in relation to individual job holders, (c) based on notional obligations set out in generic training, at least as a presumption which was extremely difficult to rebut, and/or (d) at the expense of other work activities which were done in practice, including the way in which particular tasks were carried out by particular individuals if this was not set out in the training documents. Each of those elements of the ET's approach was wrong in law for the reasons explained above.

3.20 The EAT erred in failing to find that the ET's clear misdirection undermined the judgment as a whole.

3.21 As Eady J held in *Godfrey v Natwest Market plc* [2024] EAT 81, at §16:

"[…] *where an ET has fallen into error, the EAT's role is not to strive to uphold a decision where the reasoning reveals a fundamental error of approach; as Sedley LJ observed in* ***Anya v University of Oxford*** *[2001] ICR 847 CA:*

*'*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* '".

3.22 It is respectfully submitted that this is what Stacey J did. The ET's "*enthusiasm*" for what the EAT accepted was its "*misplaced*" reading of *Prest v Mouchel Business*

Services Limited [2011] ICR 1345 and its statement to the effect that it would be surprising if different job holders with the same job title might be doing different work were not, as Stacey J put it, "*throw away comments*" or "*whimsical aside*[s]" (§§97-98 of the EAT Judgment [**CB/120-121**]). They were reflective of an entrenched and fundamental error of law.

3.23 It may be that a factor which contributed to Stacey J's willingness to interpret the ET's judgments so generously was that she herself seemed to accept too narrow a definition of the meaning of "work". In §81 of the EAT Judgment [**CB/113-114**], Stacey J observed that the parties had agreed the summary of the law as set out in the claimants' Joint Note (as to which, see paragraph 2.9 above) but, in §82 [**CB/115**] she then accepted a proposition by counsel for the Leigh Day claimants which was different to that set out in the Joint Note as an "*accurate distillation of the case law*", namely that "work" is "*what the employer requires in practice*". For the reasons explained above, even that is too narrow a definition.

3.24 In §95 of the EAT Judgment [**CB/119-120**], Stacey J said she "*came back to this ground after I had considered all the other grounds, to reconsider the flaws and legal errors that were apparent in some of those grounds and I revisited the question of whether the tribunal's approach was fundamentally flawed*". She concluded that "*the errors were self-contained in the specific ground of appeal and did not leach into this overarching ground to contaminate the whole judgment*". However, it is entirely unclear how Stacey J reached this conclusion, especially given the number of grounds she allowed which, combined with the ET's repeated incorrect assertions as to the law, ought to have alerted her that there were serious issues with the ET's approach.

4. Ground 2: incorporating "training documents" in place of finding facts (§§129-134 of the EAT Judgment, as clarified in §1 of the July EAT Order) (A1G2)

Legal principles

4.1 The EV Rules set out a clear pathway to the determination of EV. There are four key staging points.

4.2 First, pursuant to rule 3, the ET considers whether to appoint one or more IEs (the ET appointed three IEs in the present case) and, if it does so, generally then fixes a date for

a stage 2 hearing. Pursuant to rule 4(1)(f), the parties are then required to present to the ET (prior to the stage 2 hearing) "*a statement of facts and issues on which the parties are in agreement, a statement of facts and issues on which the parties disagree and a summary of their reasons for disagreeing*".

4.3 Secondly, pursuant to rule 6(1)(a), the primary task for the ET at the stage 2 hearing is that it "*shall* […] *make a determination of facts on which the parties cannot agree which relate to the question* […]". Rule 1 defines "*the question*" as "*whether the claimant's work is of equal value to that of the comparator*".

4.4 Thirdly, rule 6(1)(a) requires the ET to ask the IEs to prepare a report on "*the question*" "*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'*)*", i.e. the agreed facts and the ET-determined facts. The IEs can only comply with this requirement and prepare their report if the ET has complied with rule 6(1)(a) and made findings on the job facts on which the parties cannot agree.

4.5 IE reports conventionally assess EV using a factor plan: the IEs analyse the facts relating to the question, assess the demands placed on each job holder, and allocate the job holder a score for each factor in the plan, with the aggregated scores being the overall score for the work of that job holder: see *Middlesbrough Borough Council v Surtees and others (No 2)* [2008] ICR 349, §§8-9. The IEs in the present case have indicated that they intend to use a factor plan in their report and shared a provisional factor plan with the parties and the ET on 17 March 2021 [**SB/654-721**]. As is typical in these cases, the parties may also instruct, and with the ET's permission call, their own experts, to challenge approaches taken by the IEs in scoring the work and make their own assessment of EV, including by applying different methodologies or factors: see *Surtees*, §§20-21.

4.6 Fourthly, the ET will hold a final hearing (sometimes referred to as a "stage 3 hearing") to determine "the question", i.e. whether the claimant's work is of EV to any comparator. When determining "the question" at the final hearing, the ET is permitted, under rule 6, only to rely on the facts relating to the question. The ET has no power to make changes to the facts relating to the question after stage 2 has concluded unless the

IEs make an application pursuant to rule 6(4) for any of the facts to be amended, supplemented or omitted and that application is allowed by the ET.

4.7 The underlying purpose of the EV Rules is for stage 2 to produce a suite of facts of sufficient clarity and precision that the parties, the IEs, any party experts and, in due course, the ET have a firm factual foundation from which to assess and, in the ET's case, determine "the question". If the output of stage 2 is unclear or not reasonably workable, the legislative purpose will have been frustrated.

4.8 As Stacey J implicitly accepted in §134 of the EAT Judgment [**CB/130**], read with §74 [**CB/112**], the obligation on an ET to produce "*candid, intelligible, transparent and coherent*" reasons (see *Clark v Clark Construction Initiatives Ltd* [2009] ICR 718, §5) means that its stage 2 findings of fact must also be "*candid, intelligible, transparent and coherent*".

The ET's approach in the Second Judgment

4.9 The ET chose not to follow the path which had been carefully laid out for it and requested of it by the parties: to make individual findings on the disputes of fact identified in the RoDs, which had been prepared by the parties over many months for that purpose. It chose a very different path – one which was not anticipated by the parties and which it is submitted was inconsistent with the requirements of the EV Rules.

4.10 The ET took it upon itself during its deliberation time to work through the hundreds of training documents in the stage 2 hearing bundle to find those which the ET considered to be relevant. The ET then sought itself to describe the work by reference to those training documents, including through their incorporation, rather than simply undertaking the task of determining the disputes in accordance with rule 6(1)(a), and leaving the description of the work in the form in which it had been presented by the parties in the RoDs.

4.11 Although the ET determined certain disputes and, in some instances, relied on training documents as evidence to support those determinations, in very many instances and inconsistently with the requirements of the EV Rules, the ET's approach resulted in it

making no, or no clear, determination of disputes between the parties. This was the case where:

(a) the ET relied on training documents instead of making factual findings or relied on training documents as containing factual findings but without adequately identifying those findings; or

(b) the ET relied on training documents generally, which, at times, had the effect of incorporating facts which had nothing to do with the disputes which the parties had presented to the ET and/or with the job holder in question at all.

4.12 The ET acknowledged this approach at §200, appendix 8 to the Second Judgment where it stated that "*in some cases we do not deal expressly here with disputes which were maintained about things which were dealt with in full in the training materials*" [**CB/718-719**]. It gave to the IEs the task of working out whether a dispute had been resolved by the training documents and said that, if the IEs believed it had not been, "*either in full or at all, then they can ask us to state our resolution of the factual dispute which they think has not been resolved by us*".

4.13 By way of illustration of the ET's approach:

(a) in the opening words of §83, appendix 1 to the Second Judgment [**CB/331**], the ET stated that "*The manner in which* [the job holder] *was required to do the work of replenishment is stated in the following training documents* […] *if and to the extent that the training documents show that a task was intended to be done differently from the manner in which either the* [job holder] *or the respondent contended it was in fact done, then in our judgment the manner stated in the training document was the work*". The ET then referred, throughout the remaining sub-paragraphs of §83, to numerous pages of numerous training documents without, in most cases, making findings on how they resolved any particular dispute and/or by incorporating them in place of resolving the disputes identified by the parties. It continued this approach later in appendix 1 and in later claimant appendices in numerous places: see, for example, §§185 [**CB/355**], appendix 1 and also §§266 and 277 [**CB/428**], appendix 2 [**CB/430**]; §18, appendix 4 [**CB/464**]; §6, appendix 5 [**CB/528**] and §6, appendix 6 [**CB/573**];

(b) in §§17.1-17.24, appendix 8 to the Second Judgment, the ET listed around 30 different generic documents "*showing what was involved in the task of assembly*" and then at §19 stated: "*we concluded that we should record here what we saw as the work of an assembler as stated or described in the documents before us, in part by quoting from them and in part simply by referring to the parts of the documents from which we drew our understanding* […]" [**CB/668-672**]; and

(c) for Mr Jones, the anchor comparator for the task of assembly, the ET in some cases "*recorded the work… of an assembler*" by quoting from training documents, intending those quotes to form part of Mr Jones' job facts, e.g., at §§22, 28 and 30-43, appendix 8 to the Second Judgment [**CB/672-677**]. Frequently, however, for Mr Jones (and also for other comparators), the ET referred to pages in training documents without setting out any particular text or finding, e.g., at §247, appendix 8 [**CB/729**], the ET referred back to §§58-66 and confirmed that "*the work of stacking in an ambient DC was definitively stated in the documents to which we refer in paragraphs 58–66 above. To the extent that what was in paragraphs 6.95–6.127 of the EVJD for Mr Jones differed from what was said in those documents, what was said in those documents had to prevail*". In §§58-66 of appendix 8 the ET referred to parts of ten separate training documents regarding the "*Stacking of cages*" [**CB/681-682**]. Accordingly, the ET treated multiple pages of training documents (some pictorial e.g., D9/229 [**SB/225**]) as setting out the "work" of an assembler and made no attempt to articulate how these pages resolved the disputes between the parties or even which dispute was meant to be resolved.

4.14 Instances of the ET referring to entire documents in place of making findings, can be found in the Second Judgment at:

(a) §137, appendix 1, where, in respect of the sale of age-restricted products in stores, the ET found that "[…] *there were* […] *many words about age-restricted sales* [in the claimant's draft job description]*, when few words would have been far better, with cross-references to the applicable training materials*". It then stated, "*The* [jobholder's] *responsibilities (and those of all other checkout operators employed by the respondent) in this regard were stated apparently*

comprehensively in the training documents at C7/13, C7/15 and (to the extent, if at all, it added anything) C7/190". Instead of determining the actual disputes listed in the RoDs, as it was required to do, the ET then stated, "[...] *if and to the extent that the parties have disagreed about the job facts relating to age-restricted sales and any of those documents contains a statement relating to that disagreed matter, that statement is determinative*" [**CB/346**] and for the documents referred to see [**SB/75-154**; **SB/193-208** and **SB/67-68**];

(b) §63 of appendix 8, where the ET said "*There were at D9/145 some highly informative 'Cage Stacking Guidelines' accompanied by pictures showing what a well-stacked cage looked like and what a poorly-stacked cage looked like. There were similar but also helpful pictures in the 'Information Card[s]' numbered 1, 2, 4, 5, 6 and 7 (Information Card 3 was apparently not before us) at (respectively) D9/230, D9/227, D9/228, D9/225, D9/229, and D9/226*" [**CB/682**] and for the documents referred to see [**SB/221-226**][7]; and

(c) §67 of appendix 8, where the ET said, "*We thought that the task of the stacking of dollies, as described in the SSOW at D8/9 with the title 'Stacking Trays Above Shoulder Height Onto Dollies' in the 'Warehouse', was probably done more in fresh DCs than in ambient DCs. In any event, that document needed to be taken into account in assessing the demands of the work of assemblers putting trays onto dollies*" [**CB/683**] and for the document referred to see [**CSB/161**] – again, that document was in significant part pictorial and there was no finding on any dispute between the parties or any indication as to which disputes this was meant to resolve.

4.15 Instances of where the ET relied on training documents generally in the Second Judgment, which had the effect of incorporating facts which had nothing to do with the job holder in question can be found at:

[7] The ET confirmed in §§27.6 and 27.7 of appendix 7 of the First Reconsideration Judgment [**SB/501**] that these documents – together with many, many others – were intended to be incorporated in their entirety as setting out the facts relating to the "*manner in which an assembler was required to stack cages*".

(a) §83.1 of appendix 1, (the appendix for Mrs Worthington) where the ET incorporated C7/142 and specifically identified pages 11 and 12 [**CB/331-332**] and for the document referred to [**SB/165-166**]. Page 11 concerned the movement of pallets using a pallet truck. However, Mrs Worthington was not trained or authorised to use a pallet truck and did not use a pallet truck (and the claimants do not suggest otherwise). Page 12 was referred to by the ET in relation to "[…] *the use of ladders* […]", but no party asserted that Mrs Worthington used a ladder. Unsurprisingly, therefore, the ET was not asked to decide any matter regarding the use of a pallet truck or the use of ladders: see Tesco's closing submissions, §§65 and 66 [**SB/891**] and §§94 and 95 [**SB/892-893**], for the very limited nature of the dispute.

(b) §83.1, appendix 1 to the Second Judgment (four lines from the foot of the page) where the ET incorporated C7/454/3 and identified page 3 as setting out the task of "rotation" [**CB/331**] and for the document referred to [**SB/71**]. Page 3 gave instructions in relation to different types of "produce" (which, in this context, means fruit and vegetables). However, Mrs Worthington did not deal with "produce". She worked in the dairy department.

4.16 Important as they are, the examples set out above highlight just some of the particular consequences of the ET's approach. The most fundamental concern arising from this approach, taken as a whole, is that the ET has frustrated the underlying purpose of the EV Rules that stage 2 must produce a clear and firm factual foundation upon which stage 3 can proceed. The ET has instead produced a stage 2 outcome of labyrinthine complexity and uncertainty and, with it, a material risk of injustice at stage 3 since:

(a) the parties, the IEs, any party experts, and the ET itself are likely to approach the assessment of EV with different factual perspectives and each without clarity as to the factual perspectives of the others;

(b) the scope for the parties meaningfully to question or challenge the approach taken by the party experts or the IEs will be significantly reduced; and

(c) the parties' ability to make meaningful, impactful submissions to the ET will be significantly impaired.

4.17 This is especially so given the volume of documents involved, which currently comprises multiple lengthy judgments and many thousands of pages of training documents. The training documents set out not only text but illustrations and sometimes video content and which are frequently expressed not in clear, objective factual terms but (as is to be expected) in colloquial, vivid or simplified terms or in terms otherwise unsuitable for the task at hand.

4.18 That this is the situation was accepted by counsel for the Leigh Day claimants at the EAT disposal hearing. He confirmed that if, as the ET had directed, the IEs were required to prepare their report on the basis of "*a number of judgments, some of which would inter-refer, a pile of training material and that* [they] *should go away and work out what the findings of facts actually are*" there would be "*a transparency problem at stage 3*" and "*it* [would] *be very hard for* [the parties] *to agree what the Tribunal has decided*, *it* [would] *be equally hard for us to agree with the IEs what the Tribunal has decided and they are going to face cross-examination on the basis of findings that the Tribunal might itself not agree that it made*" [**CSB/160**].

The ET's approach in the First Reconsideration Judgment

4.19 In the First Reconsideration Judgment, the ET:

(a) of its own volition, purported to "*finish the job of stating precisely what was the work of each sample claimant and each comparator*" (§53) [**SB/318**] and set out findings in 14 appendices;

(b) continued with the wholesale incorporation of training documents (where the word "*incorporated*" appears 909 times) – see for example §§29-31, appendix 11 to the First Reconsideration Judgment [**SB/543**], where various training documents are "*incorporated here*";

(c) went further than it had in the Second Judgment and incorporated 16 videos into the sample claimants' and comparators' job facts: see, e.g., §11, appendix 1 [**SB/383**] and §23 of appendix 7 [**SB/500**]; and

(d) made the position even more tortuous and open to misinterpretation. As well as incorporating training documents instead of determining disputes, the ET in the

First Reconsideration Judgment referred to the various reconsideration decisions made in response to applications by the parties and cross-referred back to the Second Judgment, often stating that its decision in the First Reconsideration Judgment should be read in the context of and subject to what it decided in the Second Judgment, e.g., see §50 of appendix 7 – "*Part 5 of the EVJD, which was paragraphs 6.202-6.230 of the EVJD, was in our view less helpful as a statement of what was involved in 'Completing Assignments and Delivering Assembled Cages to the Loading Bay' than (1) the overview in rows 56-62 of D9/620 (although the first part of that series of rows applied to high value stock only), (2) D9/170/7-8, and (3) what we say in paragraphs 273-282 on pages 456-458 of our second reserved judgment, but with the latter read as corrected in the light of our conclusion on reconsideration stated in paragraph 112 on page 39 above*" [**SB/506**].

4.20 Accordingly, the First Reconsideration Judgment does not affect the continuing significance of this ground of appeal, and in fact underscores the error. It is worth observing that, in a revealing passage in §56 of the First Reconsideration Judgment [**SB/319**], the ET (a) apologised to the IEs "*for what will appear to them to be a less than ideal approach*", and (b) implicitly accepted that, by incorporating these sorts of documents, it was not making the necessary findings but referring the IEs to "*very helpful **evidence** of a number of aspects of the work*" (emphasis added).

4.21 In the circumstances, it is submitted that the ET failed to make the findings required by rule 6(1)(a) of the EV Rules. Further or alternatively, it failed to make findings in an unambiguous, coherent and workable manner which is consistent with the legislative purpose. It has outsourced to the IEs and to the parties the task of trawling through the voluminous evidential material incorporated into its judgments to try to identify the factual content of the work and to resolve the factual disputes and has neglected the core function of the ET at stage 2, which is to determine the job facts on which the parties cannot agree. In so doing, it has imposed upon the parties, the IEs and the ET presiding over the final hearing an impossible task of seeking to understand what work of each job holder must be evaluated. This cannot be in the interests of justice.

The EAT's approach to the ground of appeal

4.22 At §134 of the EAT Judgment [**CB/130**], Stacey J said that this was a "*borderline ground of appeal*". She said that she "*had real doubts that the tribunal's findings were sufficiently clear for the parties to understand them and thus failed the intelligibility and transparency requirement set out in Clark*". At §131 [**CB/129**], she observed that "*the tribunal itself has acknowledged that its decision does not set out all the facts it has found in a self-contained way and that further co-operation between the parties is required*" and, at §132 [**CB/129**], she recognised that this was "*unlikely to result in agreement* [and] *is therefore likely to involve the need for a further adjudication*". At §133 [**CB/129-130**], she held that: "*The IEs graphically described the complexity involved and that it may be necessary to have strings of references and sub-sub-references that might make the findings of fact too unwieldy and complicated to be useful*".

4.23 It is respectfully submitted that this was not a "*borderline*" issue. The only proper conclusion to be drawn from these accurate observations is that the ET has erred in law in that it has not carried out the task entrusted to it by the legislation.

4.24 However, at a hearing on 31 July 2025 when Stacey J handed down the EAT Judgment and, in the July EAT Order, Stacey J confirmed that the relevant sub-ground of appeal (A2G1 part one, limb (a)) was dismissed. This was because, as she explained in §130 of the EAT Judgment [**CB/129**], "*I have tried to work through one example*" and that "*whilst it is a very laborious process, it looks to me as if it is possible to marry the two* [i.e. the particular training documents and the relevant part of the RoDs] *up*" and "*although difficult, it is possible to divine the findings*".

4.25 It is submitted that Stacey J was wrong to make such a finding. First, she had considered the incorporation of only one training document as a single example. However, there are innumerable such examples in the ET's judgments and, even if the appeal is limited to the specific examples set out in the grounds of appeal, A2G1 referred to a paragraph of the Second Judgment which incorporated twelve such training documents [**CB/331-334**]. Secondly, although Stacey J thought that, in that one example, it "*was possible to divine*" the findings, she did not appear to have carried the process through: certainly, she did not identify which findings she considered had accordingly been made. Thirdly,

in any event, even if in theory it might be possible to undergo this "*laborious*" process to "*divine*" the findings in relation to each of the many hundreds of training documents incorporated into the Second Judgment, it remains the case that the ET has abdicated its responsibility under the rules by failing to produce findings which are "*candid, intelligible, transparent and coherent*". To repeat the observation of Eady J in *Godfrey*, cited in paragraph 3.21 above: "*where an ET has fallen into error, the EAT's role is not to strive to uphold a decision* […]". It is not appropriate "*to comb through a patently deficient decision for signs of the missing elements*".

4.26 That the ET's approach is erroneous is clear from the EAT Disposal Judgment and the EAT Disposal Order. With a view to trying to work out and set out actual findings on the issues in dispute between the parties in the Job Holder Tables, the EAT has required the parties to engage in huge amounts of additional work at major expense in a way which is bound to – and indeed is anticipated to – lead to further disputes which will then need to be resolved. It is not the role of the parties to traverse thousands of pages of incorporated or cross-referenced documents and to try to marshal that material so as to deduce how the ET resolved or would have resolved particular disputes. Under the EV Rules and as a matter of general principle, it is the ET's function to resolve and set out its findings on those disputes.

4.27 Further or alternatively, at §23 of the EAT Disposal Judgment, Stacey J said that, when producing the Job Holder Tables referred to in §§15-21 of the EAT Disposal Order, the parties should "*summarise succinctly the work tasks set out in those materials*" [**CB/175-176**]. At §25, she said that incorporating the whole of the parts of the training documents to which the ET referred "*was utterly unworkable*" [**CB/176**]. However, as shown by the illustrative examples set out above, the ET took a conscious and deliberate approach of doing exactly that, including where those documents described situations or processes in pictorial form. Despite purporting to uphold the ET's approach in this respect, the EAT's decision implicitly undermines it and acknowledges that it is "*unworkable*".

4.28 The very fact that the EAT ordered the parties to prepare the Job Holder Tables, and made the comments which it did about their preparation, demonstrates that it should have allowed this ground of appeal. Further, whilst the EAT may consider the preparation of the Job Holder Tables an adequate answer to the difficulties the ET has

caused, the recent process of producing sample sections of the Job Holder Tables has, in fact, shown that their production is very likely to create more disputes.

5. Ground 3: rejecting agreed facts (§§137-141 of the EAT Judgment) (A2G1, limb two)

Legal principles

5.1 Under the EV Rules it was not part of the ET's function at stage 2 to reject, amend or set aside facts which were agreed between the parties. Under rule 6(1)(a) it is the role of the ET only to "*make a determination of facts on which the parties cannot agree* […]".

The ET's approach

5.2 Despite this, in the Second Judgment, the ET decided to reject certain agreed facts.

5.3 By way of illustration:

(a) In §§283-295, appendix 8 of the Second Judgment [**CB/737-741**], the ET rejected agreed facts relating to paragraphs 6.232-6.235 of the EVJD of Mr Jones.

(b) In some cases, the ET replaced the agreed facts with different determinations of its own: see, e.g., §898, appendix 8 of the Second Judgment [**CB/884**].

(c) In further instances, the ET expressed opposing views about the correctness or relevance of agreed facts, but it is unclear whether it intended those agreed facts to be taken into account or not: see, e.g., §501, appendix 8 of the Second Judgment [**CB/789**].

5.4 It is submitted that this breached rule 6(1)(a). Further, and in any event, because the parties did not produce evidence or address the ET on facts agreed before the hearing, it was wrong of the ET to go behind them.

The EAT's approach

5.5 In relation to the example in paragraph 5.3(a) above, in §137 of the EAT Judgment [**CB/131**], Stacey J held that the ET was entitled to hold that "*there would* 'never be a

need to tilt a cage to get it onto the forks' *of the LLOP* [i.e. low level order picker]*, which was what the parties had eventually agreed should be in Mr Jones' EVJD*". Stacey J gave two reasons for reaching this conclusion:

(a) First, she noted that the agreement was reached late in the day. However, as rule 6(1)(a) makes clear, this is immaterial: facts which are agreed "*at any stage of the proceedings*" must be placed before the IEs. In any event, the fact was agreed before the ET started its deliberations.

(b) Secondly, she held that the ET was entitled to reach the conclusion it did and to find that this undermined the credibility of Tesco's case more widely. This neatly illuminates one reason why the ET should not have taken this approach. In §§98 and 99 of the First Reconsideration Judgment [**SB/328**], the ET accepted that it had got this wrong and that distribution centre ("**DC**") workers did have to manoeuvre cages onto the forks of LLOPs. Thus, going behind the parties' agreement not only resulted in an accurate fact being overridden, but it also wrongly affected (in a way which cannot fully be known) the way the ET approached the "credibility" of other aspects of Tesco's case.

5.6 In relation to the example at paragraph 5.3(b) above, Stacey J held in §140 of the EAT Judgment [**CB/131-132**] that the ET had not sought, in §898, appendix 8 of the Second Judgment [**CB/884**], to replace the agreed facts. However, this was incorrect. In §898, the ET held that "*the only accurate way to describe the work of an assembler in the circumstances described* [in the agreed paragraphs] *was either in conjunction with the content of the AMC guide for picking by line and any other relevant training materials, or simply by referring to the relevant parts of those documents*".

5.7 Further, in relation to the example at paragraph 5.3(c) above, at §§140-141 of the EAT Judgment [**CB/131-132**], Stacey J held that the ET had identified that agreed parts of Mr Hornak's EVJD were "*unreliable*" and that its own conclusions were "*perfectly discernible*". It remains unclear whether Stacey J considered that the agreed facts were still to form part of the facts relating to the question or not but, either way, the ET's approach was inconsistent with the EV Rules. Furthermore, Stacey J noted that if and to the extent that there was any unfairness arising from the evidence underpinning the agreed facts not being heard at the stage 2 hearing, this could be remedied by the

reconsideration process. However, this is not an answer to the appeal and, in any event, is incorrect. Even on the assumption that there would be a proper basis for a reconsideration application, where a decision is vitiated by an error of law a party is entitled to have that error corrected on appeal. Indeed, in their recent appeal to the EAT, the claimants challenge a decision by the ET even to consider revisiting a finding which it made contrary to the agreement of the parties.

The Reconsideration Judgments

5.8 At §4 of the Second Reconsideration Judgment, the ET clarified that, "[…] *what we said in paragraph 54* […] *of* [the First Reconsideration Judgment, including that if the IEs 'see something which is agreed and to which we have made no reference in any of our three judgments, then they can take it into account'] *has the effect that any agreed fact which we have not incorporated in our findings of fact stated in appendices 1-14 to our reconsideration judgment, even if that agreed fact is* 'inconsistent with one or more of [those] findings of fact'*, can be taken into account by the IEs and we will assess the weight of the agreed thing (subject to submissions and any clarificatory evidence at the final hearing) when we see it in their report to us*" [**SB/602**].

5.9 Accordingly, the position now appears to be that: (a) agreed facts will not be placed before the IEs unless the ET happened to refer to them in its judgments, but (b) if the IEs happen to "*see*" such an agreed fact they may take that fact into account, and (c) they may take into account agreed facts even if they are inconsistent with the ET's own findings. Accordingly, the ET is contemplating that the IEs will be confronted with conflicting facts which they may have to take into account. That is not what was contemplated by the EV Rules. In fact, the claimants themselves have appealed to the EAT against this part of the Second Reconsideration Judgment, albeit (as Tesco understands it) on the basis that the ET's contradictory findings should prevail over any agreement between the parties when, as a matter of law and principle, the position is the reverse: the ET was not entitled to displace or subvert agreed facts.

5.10 It is submitted that the Court of Appeal should make clear that (a) the facts agreed between the parties should be placed before the IEs (and any party experts) and (b) the ET was not entitled to reject those facts or make findings inconsistent with them.

6. Ground 4: failing to make findings on the training actually received by the job holders (§§164-171 of the EAT Judgment) (A1G5)

Legal principles

6.1 In §165 of the EAT Judgment [**CB/139**], Stacey J held that "*the extent of a job holder's training is plainly a fact relevant to the equal value question*". This finding is consistent with *Brunnhofer* at [43] where the ECJ held that, in order to determine EV, it is necessary to ascertain "*the training requirements*".

6.2 The training undertaken by job holders is relevant even if it was undertaken before the period relevant to the claim because it evidences the knowledge the job holder required and applied in order to undertake the work they did. It is especially relevant where particular training is a prerequisite for undertaking that work. This is a different matter from the ET's reliance on generic training documents as evidence of the content of the "job", particularly when individual job holders might not have undertaken the training described in generic materials.

Background

6.3 The IEs included a factor called "*Experience - Training and Education required*" in their provisional factor plan [**SB/658**] and listed the actual training received by job holders in some detail in the sample job descriptions they supplied [**SB/661-692**] and [**SB/693-721**]. This is standard in EV cases – for example, in the Asda final hearing judgment (an EV case involving another supermarket), at §§311-488 the ET took into account induction training, continuation training and role-specific training received by the job holders.

6.4 The work of the comparators in Tesco's DCs involved driving mechanical handling equipment ("**MHE**") such as forklift trucks, low-level order pickers ("**LLOPs**"), and ride-on powered pallet trucks. The presence of MHE, along with the nature of the operations (e.g., the loading of heavy goods vehicles that might reverse out of the DC unexpectedly), the manual handling requirements, and the presence of high-rise racking containing pallets of products, make DCs a hazardous environment. To ensure that DC workers knew how to safely use the equipment, Tesco provided training to employees

in DCs, much of which was validated by practical and written tests that had to be passed before the job holder was permitted to undertake the work.

6.5 Tesco included facts relating to the training actually undertaken by each comparator in section 4 of the comparator EVJDs. These facts were evidenced by documentary and witness evidence if they were not agreed.

6.6 The claimants also considered that "*there should be a section* [in the EVJDs] *dealing with training and experience*": see, e.g., §153 of the closing submissions for the Leigh Day claimants [**CSB/129**]. Furthermore, the claimants agreed some of the job facts contained in the training sections. For example, the claimants agreed with paragraph 4.11 of Mr Davis' EVJD that "*The job holder was trained, and assessed as competent, in the use of an Assembly Truck (LLOP with rear-facing forks) from the outset of his employment. This training and the relevant tests were undertaken in the job holder's induction week in October 2004*" [**SB/930**].

The ET's approach

6.7 In §§87 and 88 of the First Judgment [**CB/258**], the ET held that there was "*no good reason to make determinations about precisely what training the sample claimants and their comparators had actually received, with one exception*". That one exception was where the training "*led to a determination* […] *that the employee was competent to do the thing to which the training related and the respondent would (or could) not permit the thing to be done without such determination*".

6.8 That is not a principled distinction and, in any event, is inconsistent with the EAT's accurate finding at §165 of the EAT Judgment [**CB/139**] that the extent of a job holder's training is "*plainly*" a relevant fact. Accordingly, the ET erred.

6.9 Further or alternatively, in §88 of the First Judgment [**CB/258**], the ET confirmed that it had in mind, as an example of the training which fell within the exception, "*training to be a forklift truck driver*" and "*could see no other training in regard to which we would need to make a specific finding of fact of that sort*". It then made no findings at all in the Second Judgment about training actually undertaken by the job holders.

6.10 However, there were numerous types of training other than training in respect of forklift truck driving which Tesco required to be completed successfully by the comparators and validated by testing, before they were permitted to do the work. Indeed, the claimants agreed paragraph 4.12 of Mr Pratt's EVJD, which provided: "*In order to be deployed onto any additional core activity* [other than assembly work which is the first skill taught to all warehouse operatives by Tesco]*, it was mandatory for the job holder to have completed the relevant training and demonstrated the required level of competence*" [**SB/928**].

6.11 Evidence that was before the ET regarding mandatory training was set out in schedules A to D of Tesco's skeleton argument for the EAT [**SB/1145-1159**]. It was also largely evidenced by material in the comparators' personnel files which was in the hearing bundle and cross-referenced (and hyper-linked) in closing submissions tables for each comparator. The ET failed to address and make findings on the mandatory training (or any actual training) received despite there being no reasonable basis on which to reject such evidence.

The EAT's approach

6.12 On the face of the EAT's primary findings, the ET erred in law or reached a perverse conclusion. As Stacey J held in §165 of the EAT Judgment [**CB/139**], §87 of the First Judgment "*does appear to be not only surprising, but wrong*".

6.13 However, Stacey J chose to treat this as a "*finding of fact*" which the ET was entitled to make. She concluded that the ET held that there was a "*strict requirement for everyone to follow and apply all the training materials to the letter*" and that, accordingly, it was "*not important whether or not there is a record of when or whether the individual sample claimant or comparator had him or herself received or undertaken the particular training*". In §167 [**CB/139-140**], she said that the ET had made a finding that "*if the training applied to the job holder's job* […] *it could be taken as a given that they had done the training*".

6.14 However, with respect, this is not correct. The ET's findings about the training documents were not to the effect that each of the job holders had to be treated as having actually undertaken that training. Given the sheer number of documents and their date ranges, that would have been an unsustainable finding and no party sought it. Further,

the fact that the ET did consider it ought to make findings on some of the training actually undertaken underlines this point.

6.15 Accordingly, even if (contrary to grounds 1 and/or 2 of this appeal) the ET was entitled to rely on the training documents as the primary source of job facts, this does not answer the question about what training the job holders themselves undertook.

6.16 Further or alternatively, the ET erred by not making findings on mandatory training other than for forklift truck driving, which was relevant even on its own analysis. In §170 of the EAT Judgment [**CB/140**], Stacey J held that "*these were exactly the type of matters that the tribunal said it would reconsider*" and noted that the ET had made findings about induction training in the First Reconsideration Judgment[8].

6.17 It is submitted that the proposition that the issue was something which could have been dealt with by way of reconsideration is questionable but, in any event, immaterial. The ET made an error of law or acted perversely by failing to make – or even address – findings which fell within its own definition of relevance. That was properly raised as a ground of appeal, and it falls to be determined as such.

6.18 Further, in §§4-7, appendix 7 to the First Reconsideration Judgment, the ET made findings (on its own initiative), only about induction training with reference to comparator, Mr Jones, but not other actual training, mandatory or otherwise. However, it did so not on the basis that this was the actual training individual job holders received but on the basis that "*it was typical of the induction training for becoming an assembler*" [**SB/496**]. The ET subsequently explained in the Second Reconsideration Judgment at §64 [**SB/620**] that it made these findings because "*we could see that it might be unsafe and unreasonably disruptive for warehouse operatives to start work in a DC as such operatives without such a period of induction*". However, this is no answer to the appeal as it was not comparator specific (save for Mr Jones), and the ET did not make similar findings for other types of mandatory training.

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[8] Stacey J said that, if she were wrong about that, then the issue could "*perhaps be raised at the disposal hearing*". However, in §171 of the EAT Judgment [**CB/140**] and in the July EAT Order, she dismissed this ground of appeal, so there was nothing to dispose of in this respect and no order was made.

Conclusion

6.19 If Tesco's challenge to the ET's reliance on training documents succeeds, then the foundation for the EAT's (erroneous) decision not to allow this ground of appeal outlined in paragraph 6.13 above falls away. It is submitted that it would follow that this ground of appeal should also be allowed, as there will then be an incomplete set of facts regarding the comparators' training which as the EAT stated is "*plainly* […] *relevant to the equal value question*".

6.20 However, it is submitted that this ground should in any event be allowed as a stand-alone ground. The Court of Appeal should find that the ET erred in law by failing to determine the disputes about what training the comparators had received, as the nature and extent of that training is relevant to EV. At the very least, the ET erred in law or made a perverse decision by failing to find the facts about all the comparators' mandatory training, which was relevant even on its own analysis.

7. Ground 5: Limiting the appeal

7.1 This ground concerns limitations imposed by the EAT which are the subject of the Scope Appeal. At a hearing on 17 July 2025, the Court of Appeal adjourned consideration of that appeal pending the hand-down of Stacey J's judgment and any further appeal against that judgment.

7.2 In §§69 and 70 of the EAT Judgment [**CB/110-111**], Stacey J indicated that she would apply the earlier decision of HHJ Tayler. Tesco accepts that it would not have been appropriate for the EAT itself to depart from its own earlier decision. However, because HHJ Tayler's decision was wrong for the reasons set out in the Scope Appeal, any restrictions applied by Stacey J were also wrong.

7.3 The outcome of this ground of appeal will turn on and follow from the outcome of the Scope Appeal.

THE SCOPE APPEAL

8. The issue arising in this appeal

8.1 Tesco's approach in the grounds of appeal was to identify and briefly explain each error of law which it alleged the ET had made. Where Tesco considered it would assist the EAT and the claimants to understand the nature of the alleged error, Tesco provided illustrative examples of specific findings which appeared to have been affected by that error of law.

8.2 However, Tesco did not identify and list each and every specific finding or omission which was or might have been affected by the errors of law it had identified. This was partly because it did not understand this to be required by the relevant legislation or the applicable EAT Practice Direction and/or Practice Statement (namely, in respect of A2, the EAT Practice Direction 2023 and, in respect of A1, the EAT Practice Direction 2018 and the EAT Practice Statement 2015); indeed, as explained further below, it appeared that such an approach would have been contrary to those provisions. It was also partly because, at least in large part, the identified errors of law concerned findings of principle, general approach or general application. These affected the fact-finding exercise as a whole and/or in ways which may not necessarily be explicit or discernible in relation to individual findings.

8.3 However, in §21 of the Tayler EAT Judgment [**CB/82**], HHJ Tayler – having referred to sections 3.8, 3.9 and 3.10 of the EAT Practice Direction 2023, the latter two of which deal respectively with perversity appeals and appeals based on "procedural impropriety" – held that: "*That requires particularity of each dispute rather than the provision of* 'examples'. *In any event, I consider 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.*"

8.4 In §§29, 33 and 36 of the Tayler EAT Judgment [**CB/83-85**], HHJ Tayler identified the particular grounds to which he said this finding applied. These are: A2G1, A1G5, A2G4, A2G5, A2G6, A2G7, A2G8, A2G9, A2G10 and A2G11 (the "**Relevant Grounds**"). In fact, in light of the way in which the EAT disposed of the appeal (and a proper construction of the ET's approach to using "anchor" comparators), Tesco does not need to pursue this ground of appeal in relation to A2G4, A2G5, A2G6, A2G7, A2G8, A2G9 and A2G10. However, HHJ Tayler's limitation did have the effect of limiting the impact

of the successful appeals in relation to A2G1, limb one paragraph (c) and A2G11. It might also affect the scope of some of the grounds which are the subject of the Substantive Appeal to the Court of Appeal. Accordingly, although the impact of HHJ Tayler's decision is more limited than it was at the time of filing of the Scope Appeal because of the terms of the EAT Disposal Order, the Scope Appeal continues to raise important issues of principle which have a direct effect on some of the grounds.

A2G1

8.5 A2G1, limb one, paragraph (c) (which succeeded before the EAT) concerned the failure by the ET to determine facts which it considered to be "obvious". The disposal of the EAT appeal was confined to the examples specified in paragraph 16(c) of the grounds of appeal [**CB/202-203**], namely those contained in §§322 and 325, pages 467-468 of the Second Judgment [**CB/746-747**].

8.6 The result of this is that the same error of law has not been corrected in relation to facts not flagged in the grounds of appeal. Where Tesco has been able to identify these, they are listed in the Schedule to the proposed amended grounds of appeal submitted to the EAT [**CB/200-206**]. However, as Stacey J herself accepted in §136 of the EAT Judgment, "*since the tribunal has announced that it does not intend to state the obvious the parties do not know what other facts (if any) the tribunal thought were too obvious to mention*" [**CB/130-131**]. It is inherent in the nature of the error of law made by the ET that Tesco is not in a position to list exhaustively the facts which the ET omitted to make as a result.

A2G11

8.7 A2G11 (which also succeeded) concerned the ET's decision to exclude from the relevant job facts the requirement for a comparator to carry out mental arithmetic. An illustrative example was given in the grounds of appeal. This was at §50 [**CB/198**] and concerned comparator Mr Todd.

8.8 The EAT accepted that the ET erred in law by relying on what a "reasonable employer" would have done rather than on what actually happened: see §206 of the EAT Judgment [**CB/148**]. In §11 of the EAT Disposal Order, the EAT remitted this particular paragraph to the ET [**CB/165**]. However, there are other instances of the ET having made the same

legal error which have not been remitted because of HHJ Tayler's limitation (see the Schedule to the proposed amended grounds of appeal [**CB/200-206**]). One such instance is in respect of comparator Mr Pratt at §666, appendix 8 of the Second Judgment [**CB/826**]. There, the ET said that "*whether mental arithmetic would be required was not clear* […] *given that an electronic calculator might usefully have been made available*" and said that it had returned to this issue in §762. In §762, it made the error identified in the EAT Judgment in relation to Mr Todd and held that "*if the respondent failed to provide a checker with calculator, then that was in our view incapable of adding to the demands of the work* […]" [**CB/850-851]**. Accordingly, this same finding applies to Mr Pratt. This finding of fact stands despite the EAT's correct conclusion that this was an error of law and accordingly, there is a significant risk Mr Pratt's work will be undervalued.

Other grounds which are the subject of the Substantive Appeal

8.9 HHJ Tayler indicated that the limitation on the scope of the appeal also applied to A2G1, limb two and A1G5, which were dismissed by the EAT but which form the subject matter of grounds 3 and 4 of the Substantive Appeal. For the avoidance of doubt, insofar as the claimants might seek to argue that the Tayler limitation applies more broadly to any other issue which is the subject of the Substantive Appeal to the Court of Appeal, Tesco also maintains that it would be wrong in law to apply any such limitation.

8.10 Tesco submits that HHJ Tayler was wrong to limit the scope of the appeal. All that the grounds of appeal are required to do is identify the alleged errors of law. The extent to which any error of law affected the individual factual findings made in the judgment is a matter to be considered when determining relief. In any event, if and insofar as HHJ Tayler considered that it was appropriate to require Tesco to identify and list each and every factual finding or failure to make a factual finding which was or might have been affected by each identified error of law, he should simply have made an order to that effect rather than seeking to restrict the jurisdictional scope of the appeal.

9. Legal background

General

9.1 Under section 21 of the Employment Tribunals Act 1996 (the "**1996 Act**"): "*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* […]".

9.2 Under rule 3(1) of the Employment Appeal Tribunal Rules 1993 (SI 1993/3854) (the "**EAT Rules**"), read with Form 1 in the schedule to the EAT Rules, a Notice of Appeal is required only to identify the "*grounds*" on which the ET "*erred in law*".

9.3 Accordingly, there is nothing in the legislation which requires the Notice of Appeal to identify each individual factual determination, or failure to make such a determination, which is or might be affected by the error of law. Tesco chose to offer illustrative examples in some of the grounds of appeal to assist the EAT and the claimants to understand the nature of the error being asserted, in the context of the fact that the Second Judgment was a 619-page document which may have been difficult on the sift for a Judge to digest.

9.4 This is underlined by the applicable EAT Practice Direction and/or Practice Statement. In particular, in the EAT Practice Direction 2023:

(a) Paragraph 3.8.1 states 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*** […]" (bold in the original).

(b) Paragraph 3.8.3 states that: "*Each ground should have in the heading a brief description of the error of law* […] *The heading should be followed by a brief explanation of the error of law that is sufficient to enable a Judge to understand the error of law that is being asserted, but no more* […]" (emphasis added).

(c) Paragraph 3.8.4(a) states that the grounds of appeal should "*be short and focussed*".

9.5 Similar provisions are set out in sections 3.7 and 3.8 of the EAT Practice Direction 2018, and the EAT Practice Statement 2015 emphasised the importance of a "*short, well-directed*" Notice of Appeal.

9.6 Had Tesco included in the grounds of appeal a reference to each and every specific finding and omission which was or might have been affected by the errors of law it had

identified in the Relevant Grounds, the grounds of appeal for A2 would have been significantly increased in length and would certainly no longer have been "*short and focussed*".

Particular categories of grounds of appeal

9.7 As set out above, HHJ Tayler relied on provisions of the EAT Practice Direction 2023 which address "*perversity*" appeals and appeals which rely on allegations of "*procedural impropriety*".

9.8 These were not the primary basis on which the relevant grounds of appeal rested. Of the grounds identified by HHJ Tayler that are of current relevance, A2G1 relies on serious procedural irregularity, but only in the alternative (and as stated at paragraph 9.11 below, this is not the same thing as procedural impropriety). A1G5 and A2G11 rely on perversity, but again only in the alternative. Further, in the case of A2G11, which was upheld in the EAT, Stacey J accepted that the ET had made an error of principle and thus the appeal was allowed without reference to perversity: see §206 of the EAT Judgment.

9.9 In any event, section 3.9 of the EAT Practice Direction 2023 addresses what should be provided in relation to grounds which allege perversity. Paragraph 3.9.4 states that:

"*It is not sufficient to make a generalised allegation in a ground of appeal such as 'the judgment was contrary to the evidence', or that 'there was no evidence to support the judgment', or that 'the judgment, order, direction or other decision was one which no reasonable Employment Tribunal could have reached and was perverse'. The grounds of appeal must set out full details of the matters relied on in support of any allegation of perversity*."

9.10 This does not mean that, where the alleged perversity lies in a general approach or in a determination of principle or of wider application, it is necessary to list each and every specific factual issue which was affected by it. As paragraph 3.9.4 makes clear, all that is needed is for the allegation of perversity itself to be properly supported.

9.11 As for procedural impropriety, one of the Relevant Grounds – paragraph 21 of A2G1, limb two – makes an allegation of a "serious procedural irregularity" in the alternative

and in relation to one element of the ground. However, A2G1 does not make an allegation of "impropriety".

9.12 In any event, what paragraph 3.10.1 of the EAT Practice Direction 2023 requires is that "*you must include in the specific ground(s) of appeal full details of each complaint made*". Accordingly, what is required is details of the procedural impropriety which is being alleged. There is nothing in section 3.10 of the EAT Practice Direction 2023 which requires an appellant to list each and every specific factual determination or omission which is or might have been affected by that impropriety.

10. Submissions

10.1 In the circumstances, it is submitted that HHJ Tayler was wrong to limit the scope of the appeal to the specific examples of the impact or application of wider errors of law identified in the grounds of appeal.

10.2 First, HHJ Tayler erred in law in that he misunderstood or misapplied the legislation and/or the EAT Practice Direction in relation to what an appellant is required to set out in a Notice of Appeal.

10.3 Secondly, some if not all of the alleged errors of law concern matters of principle which permeate the Second Judgment in ways which might not be obvious in relation to individual findings. Further, a large number of individual factual findings, or failures to make factual findings, are likely to be affected.

10.4 A1G5 (now ground 4 of the Substantive Appeal) was an appeal against a finding in the July CMO about a point of principle regarding actual training received by comparators made *before* the ET had even made its detailed findings of fact in the Second Judgment [**CB/184-185**]. A2G1 rests in part on decisions made in the overarching introductory section to the Second Judgment and in part on approaches discerned from the appendices. A2G11 relies on errors discerned from the appendices but has a degree of general impact.

10.5 In the circumstances, it was wrong for HHJ Tayler to hold that Tesco needed to list in the grounds of appeal all of the instances in which individual findings or omissions

were affected by these errors. This decision imposed an impermissible fetter on the grounds of appeal.

10.6 Thirdly, insofar as HHJ Tayler relied on sections 3.9 and 3.10 of the EAT Practice Direction 2023:

(a) Section 3.9 was an irrelevant consideration other than insofar as the grounds allege perversity. Some of the grounds do not rely on perversity at all and, of those that do among the grounds which remain in issue, they rely on it only in the alternative.

(b) Section 3.10 was an irrelevant consideration other than insofar as the grounds allege procedural impropriety. None of the relevant grounds allege procedural impropriety and, even if the allegation of a "serious procedural irregularity" in paragraph 21 of A2G1 should be treated as constituting such an allegation, that is only one small aspect of one relevant ground. Section 3.10 was accordingly either not relevant at all or alternatively almost entirely irrelevant.

(c) In any event, the grounds of appeal are compliant with those sections of the EAT Practice Direction 2023 for the reasons given in paragraphs 9.3 to 9.6 above. Tesco accepts that, insofar as a perversity challenge is in the nature of an allegation that particular findings were not supported by the evidence or the ET's findings of fact, each such particular finding needs to be identified. However, where, as here, the alleged perversity lies in errors of approach or findings of wider application, all that the EAT Practice Direction 2023 requires is for those allegations of perversity to be identified and supported. Similarly, where a ground of appeal alleges procedural impropriety, all that is required is full details of the impropriety itself. The grounds of appeal comply with these provisions.

10.7 Fourthly, HHJ Tayler's decision will lead to inconsistency. Even though the EAT has found that the ET made errors of law, some findings which were affected by that error of law remain undisturbed whilst others have been overturned. The same is likely to apply if HHJ Tayler's decision is applied to any further grounds which are successful in the Substantive Appeal. This is particularly important in the context of EV proceedings, in which the "value" of a person's work depends on an assessment of a

mosaic of numerous individual facts. If relevant facts are omitted or not corrected despite being incorrectly made, the comparators' work risks being undervalued.

10.8 Fifthly, the effect of HHJ Tayler's decision, made at a preliminary hearing, was impermissibly to fetter the powers of the EAT hearing the full appeal. It is clear from Stacey J's decision that the ET made errors of law which went beyond the specific examples given in the grounds of appeal: see paragraphs 8.6 to 8.8 above. However, she considered herself bound by HHJ Tayler's decision and so did not grant relief other than in relation to those specific examples.

The Respondent's Notices

10.9 In the Respondent's Notices, the claimants also assert that the EAT's "jurisdiction" is limited to challenges to those individual findings of fact which are specifically identified in the grounds of appeal. They rely on a number of authorities. It is submitted that this assertion is wrong, for the following reasons.

10.10 First, insofar as the claimants assert that an appeal to the EAT lies only against a "*decision*", that is wrong. Section 21 of the 1996 Act expressly extends the EAT's jurisdiction to consider appeals not only in relation to errors of law arising from "*decisions*" but also errors of law otherwise "*arising in* […] *proceedings*": see paragraph 9.1 above. Accordingly, for example, a party could in principle appeal against a mere "*indication of opinion*" expressed by an ET in a pre-hearing assessment: see *Mackie v John Holt Vintners* [1982] ICR 146 at 147D. (The EAT did not allow such an appeal to proceed for practical reasons which are immaterial to the present case: the ET was not required to give reasons for its opinion, and, in any case, it was highly improbable that the opinion would have any adverse effect on the outcome of the proceedings.) Insofar as any of the authorities relied on by the claimants would have contrary effect, they are wrong.

10.11 Secondly, and in any event, it is important to understand what was really decided in the authorities on which the claimants rely. The purpose of those decisions was not to introduce any restriction or formality in relation to the granularity of the way in which the term "decision" must be applied, much less the way in which grounds of appeal must be pleaded. Rather, the intention was to ensure that appeals did not lie against

elements of an ET's reasoning which did not – or, in a case like the present, could not – have a bearing on the outcome of the claim.

10.12 Thus, in *Harrod v Ministry of Defence* [1981] ICR 8, at 11H-12A, the appellant employee accepted that the ET had rightly concluded that he had not been unfairly dismissed but sought to appeal against an interpretation of his contract of employment which could therefore not have changed the decision. This is the context for the EAT's view that "*the appellant must be seeking to set aside the decision, judgment or order, whatever it may have been of the tribunal below*".

10.13 Similarly, in *Waterman v AIT Group* (UKEAT/0358/05/DM), the ET made a preliminary determination as to the effective date of termination of the appellant employee's employment. That determination was not challenged on appeal, but only "*certain aspects*" of the reasoning: see §9. Accordingly, the EAT held that the appeal was "*academic*" and that "*given that there is no appeal against the adverse judgment, there is no scope for an appeal against the reasoning*": see §11. That is the context in which the EAT indicated in §6 that it was "*not aware of any appeal being brought… which did not result in a determination being under threat, but which focuses upon, for example, the reasoning of a tribunal*".

10.14 *Cie Noga d'Importation et d'Exportation SA v Australia and New Zealand Banking Group* [2003] 1 WLR 307 was concerned with the different rules which governed appeals to the Court of Appeal. These were more narrowly expressed than section 21 of the 1996 Act: appeals lay only from a "judgment or order" of the High Court or a "determination" of the county court. However, even in that context, the observations of Hale LJ at §53 do no more than indicate that an appeal does not lie against a judge's reasons for their own sake:

"[…] *these words refer to the result of the hearing rather than to the reasons given by the judge for reaching that result. Hence I agree with Waller LJ (paragraph 27, above) that:*

'Lake v Lake [1955] P 336 properly understood means that if the decision when properly analysed and if it were to be recorded in a formal order would be one that the would-be appellant would not be seeking to challenge or vary, then there is no jurisdiction to entertain an appeal'."

10.15 In §27, Waller LJ explained the key principle: "*if the decision of the court on the issue it has to try (or the judgment or order of the court in relation to the issue it has to try) is one which a party does not wish to challenge in the result, it is not open to that party to challenge a finding of fact simply because it is* […][9] *one he or she does not like*."

10.16 In fact, these passages indicate a clear lack of formality, for example in not requiring an appeal to be made against an actual concrete order. What does matter is that the appeal should concern an error which was material to the "*result of the hearing*". Thus, the only relevant principle is that an element of a court's reasoning which did not affect the outcome (or which does not lead to a challenge to the overall "result") is not an appealable decision.

10.17 In the present case, the ET made findings which it promulgated in two "judgments", and one "order" with reasons. It is quite clear from the grounds of appeal that the results of the hearings as set out in those decisions are challenged. Tesco is not challenging the ET's reasoning for its own sake: indeed, the claimants rightly do not suggest this. The claimants also rightly accept that, although the ET's decisions do not finally determine the claims, as necessary and consequential staging posts on the route to a final determination, they are appealable in principle.

10.18 There is accordingly no jurisdictional issue. The only issue is the extent to which an EAT Notice of Appeal is required, as a matter of pleading, to set out each and every individual factual finding which was affected by the alleged errors of law. In the present case, those individual factual findings are set out in a judgment which comprises more than 600 pages and which had not even been handed down when A1 was made.

10.19 For the reasons set out above, there is no such requirement. It is sufficient that the appeal seeks to challenge the outcome of the hearing and not simply the reasoning for its own sake. Further or alternatively, it is sufficient that the grounds of appeal concern errors which are of a nature which permeate the judgment, or which relate to categories of findings which are inherent in the alleged error or otherwise identified in the grounds of appeal. If it was considered that further particulars would be helpful or necessary,

[9] In the report, there is a further 'not' here, but this is clearly in error.

these could and should have been ordered[10], but the appeal was not limited to factual examples set out within the grounds of appeal which were designed to be illuminative and not exhaustive.

10.20 The bold assertion of the claimants that the approach which ought to have been taken by the EAT to the Notice of Appeal below would create "*unworkable practical consequences*" is fallacious (§4 of the Harcus claimant's Respondent's Notice) [**CB/988**]. It is only necessary to separate the points of principle determined on the hearing of the appeal before the EAT from the consequences for disposal, including remission, of the appeal. That might have required a separate hearing for the EAT to consider disposal, including the issue of remission, but that is a simple matter of case management (and in fact there was a separate disposal hearing where the parties largely agreed what individual factual disputes should be remitted). The only truly unworkable consequences would flow from persisting in the erroneous approach of the EAT below: this risks leaving factual findings, which were the product of the same erroneous legal approach of the ET which led to other findings being set aside, remaining operative simply because there had not been a compendious iteration of all of them in the grounds of appeal.

11. Disposal

11.1 Tesco proposes that the appeals should be allowed. In relation to the Substantive Appeal, Tesco also suggests the following orders:

(a) The judgment(s) and orders of the ET dated 12 July 2023, 26 July 2023 and 4 July 2024 and any decision on any reconsideration of those judgments are set aside.

(b) Paragraph 1 of the July EAT Order (save insofar as it dismissed ground 8 of appeal numbers EA-2023-000927-AT and EA-2023-000928-AT) is set aside.

[10] Tesco has in substance provided further particulars by way of the application to amend the grounds to which reference is made in paragraph 2.19 above.

(c) Paragraphs 12(b) and 16-21 of the EAT Disposal Order (regarding the production of, and adjudication by the ET upon, Job Holder Tables) are set aside.

(d) Any part of the EAT Disposal Order which excludes matters from remission to the ET (including in particular sub-paragraphs (a) to (h) of paragraph 7 and sub-paragraphs (a) to (h) of paragraph 10) is set aside.

(e) Paragraph 12(d) of the EAT Disposal Order (regarding the ET's findings on reconsideration) is set aside.

(f) Otherwise, the EAT Disposal Order remains in force.

(g) The claims are remitted to a differently constituted ET to determine each dispute between the parties contained in the latest Records of Dispute for the sample claimants and the comparators, applying the judgment of the Court of Appeal. The ET shall record its decision on each dispute in table format.

11.2 The reasons why Tesco submits that this matter should now be remitted to a different tribunal are, in summary, as follows:

(a) First, in the words of the EAT in *Sinclair Roche & Temperley v Heard* [2004] IRLR 763, §46.4, "*the first hearing was wholly flawed* [or] *there has been a complete mishandling of it*".

(b) Secondly, there is a very high risk that it will be difficult or impossible for the same ET to approach fact-finding on remission with a fully open mind and to apply the law correctly. The ET has already had many "bites of the cherry" in its numerous decisions and emails. Further, the task which the parties asked it to complete, and the legal basis on which it was asked to do that task, was orthodox and consistent with the approach taken by other ETs in similar cases. However, in the face of that, the ET consciously chose to take a different and seriously flawed approach and firmly committed itself to that approach.

(c) Thirdly, after the EAT set aside and remitted a decision of EJ Hyams on whether to allow expert evidence in the "*material factor defence*" part of these proceedings ([2025] EAT 26), his second decision on the same issue was also

appealed and also set aside ([2025] EAT 145). As a result, the parties and the EAT agreed that the application for permission to rely on expert evidence should be remitted to a differently constituted ET. The Regional Employment Judge then, of his own volition, directed that the entirety of the "material factor defence" part of the proceedings be managed and heard by a different ET. This underlines Tesco's concern as set out in paragraph 11.2(b) above. However, it also means that a major part of the proceedings is now already being dealt with by a different ET.

(d) Fourthly, although it might appear superficially that remission to a differently constituted ET would cause some additional delay, in fact it would be likely to reduce delay in the longer term. There is a greater chance that the fresh decision will be made on the correct basis, reducing the risk of further appeals or applications for reconsideration.

(e) Fifthly, the witness evidence at the stage 2 hearing was transcribed. This is an extremely valuable resource for both any fresh ET and the parties which should significantly reduce both the time needed for a further hearing and any additional cost and inconvenience to the parties.

(f) Sixthly, in any event, the scale and value of these proceedings means that this remission to a differently constituted ET would be proportionate.

11.3 Tesco submits that Disposal of the Scope Appeal will be encompassed in the suggested orders set out above. Alternatively, Tesco proposes the following orders:

(a) In relation to ground 3 of the Substantive Appeal, the ET is directed that all facts agreed by the parties are "facts relating to the question" within the meaning of rule 6(1) of the EV Rules in schedule 3 to SI 2013/1237.

(b) In relation to ground 4 of the Substantive Appeal, the ET is directed to consider and determine each dispute between the parties contained in section 4 of each comparator's EVJD as set out in the latest versions of the Records of Dispute.

(c) In relation to A2G1, limb one, paragraph (c), the ET is directed to make a determination of fact on each dispute between the parties that it regarded as "obvious".

(d) In relation to A2G11, in addition to the matter remitted to the ET by the EAT in §11 of the EAT Disposal Order, the ET is directed to consider and determine the disputes regarding the following EVJD paragraphs excluding the concept of a reasonable employer.

Comparator	**EVJD Paragraphs**
Mr Davis	6.140, 6.141, 6.142, 6.522
Mr Hornak	6.139, 6.140, 6.141, 6.459
Mr Jones	6.137A
Mr Macko	6.459
Mr Pratt	6.120, 6.356, 6.357, 6.372
Mr Pustula	6.82, 6.97
Mr Todd	3.12, 6.200, 6.230, 6.300, 7.9
Mr Young	6.246

DAVID READE KC
MATHEW PURCHASE KC
LOUISE CHUDLEIGH

20 JANUARY 2026