Neutral Citation Number: [2026] EWCA Civ 580

Case Nos: CA-2025-002063
CA-2025-000486

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL**
**His Honour Judge Tayler**
**[2025] EAT 45**
**Mrs Justice Stacey**
**[2025] EAT 112**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 May 2026

**Before:**

**LORD JUSTICE NUGEE**
**LADY JUSTICE ELISABETH LAING**
and
**SIR NICHOLAS UNDERHILL**

- - - - - - - - - - - - - - - - - - - - -

**Between:**

| | |
|---|---|
| **TESCO STORES LIMITED** | **Appellant** |
| **- and -** | |
| **MS K ELEMENT AND OTHERS** | **Respondents** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

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

Hearing dates: 3, 4 and 5 March 2026

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

This judgment was handed down remotely at 4pm on 12 May 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

## Lady Justice Elisabeth Laing:

*Introduction*

1. This is my decision on two appeals from the Employment Appeal Tribunal ('the EAT') in equal pay claims which were started in the Employment Tribunal ('the ET') in 2018 ('the claims'). A final decision on the claims is still a long way off. I will refer to those two appeals, in their chronological order (and to the relevant judgments), as 'EAT (1)' and 'EAT (2)'. The parties also referred to EAT (1) as 'the scope appeal'. EAT (1) and EAT (2) concern decisions of the ET after a 'stage 2 equal value hearing' held as long ago as March-May 2023. That hearing took 36 days. The EAT dismissed EAT (1). In EAT (2), the EAT allowed eight of the extant grounds of appeal in full, and two in part. After handing down its judgment in EAT (2) the EAT held a disposal hearing (which lasted two days). The EAT made an order ('the disposal order') which required the parties to do a great deal of work, in effect, to turn the decisions of the ET into the makings of determinations on which the independent experts ('IEs') could, in due course, base their reports.

2. The practical issue on the appeals to this court is how long it is likely to take for the ET to make a final decision on these claims. The case of the Appellant ('Tesco') is that the claims should all be remitted to the ET for the stage 2 equal value issues to be re-heard and decided again, about three years after the first stage 2 equal value hearing. The claimants in the ET (to whom I will refer as 'the claimants') accept that the ET's approach was not what they had expected, and that it has led, and will lead, to much further work and expense for the parties. They argue, nevertheless, that that approach was open to the ET and that with the help of the practical measures made by the EAT in the disposal order, the proceedings should continue without any such remittal, as, either Tesco has not pleaded relevant errors of law with sufficient particularity, and/or those which have been particularised are not material to the outcome.

3. Tesco was represented on this appeal by Mr Reade KC, Mr Purchase KC and Ms Chudleigh. There are two groups of claimants. Where necessary, I will refer to them, as the parties have, as 'the Leigh Day claimants' and 'the Harcus claimants'. They were represented, respectively, by Mr Jones KC and Mr Blake (Ms Barrett was not at the hearing, but contributed to their skeleton argument) and by Mr Bryant KC and Mr Butler. I thank counsel for their written and oral submissions.

4. These appeals raise three main legal issues.
    i. What does the word 'work' in sections 64 and 65 of the Equality Act 2010 ('the 2010 Act') mean?
    ii. What is the relevant outcome for the purposes of an appeal to the EAT from a stage 2 equal value hearing? Is it some overarching decision, or is it each of the factual determinations made by the ET after the stage 2 hearing; or both?
    iii. In the light of the answer to the second question, did the ET materially err in law in its decisions after and in connection with the stage 2 hearing?

    The factual question which underlies these appeals is whether the ET was entitled to decide that Tesco's training documents were, in this case, the key to its task. As Nugee

LJ pointed out in his comments on my draft judgment, it is important to understand what is meant by 'training documents' in this case. Their function is not merely to ensure that employees are properly trained. The documents are manuals which explain in great detail how Tesco wants its employees to do every aspect of their jobs. They are so detailed and prescriptive that the ET considered that they were good evidence of the requirements and demands of those employees' jobs.

5. This is a case in which it is convenient to summarise the legal framework first. I will then do the best I can to describe, as shortly as I am able, the proceedings in the ET, and the various decisions of the ET and of the EAT. For the reasons given in this judgment I would dismiss the appeals on all but one of Tesco's grounds of appeal.

*The legal framework*
*The legislative scheme*
*The Employment Tribunals Act 1996 ('the 1996 Act')*

6. As originally enacted, the 1996 Act had three Parts. Part I of the 1996 Act dealt and deals with the ET, and Part II with the EAT. Part III made and makes supplemental provision.

7. Section 21 of the 1996 Act is headed 'Jurisdiction of Appeal Tribunal'. Section 21(1) provides that an appeal lies to the EAT 'on any question of law arising from any decision of, or arising in any proceedings before, an [ET] under or by virtue of' the legislation listed in the paragraphs of section 21(1). Paragraph (g) refers to the 2010 Act ('the 2010 Act'). Section 35 of the 1996 Act is headed 'Powers of Appeal Tribunal'. Section 35(1) gives the EAT power '[f]or the purpose of disposing of an appeal' to '(a) exercise any of the powers of the body…from whom the appeal was brought, or (b) remit the case to that body…' Section 35(2) deals with the enforcement of decisions and awards of the EAT.

*When must the EAT remit a case to the ET?*

8. *Jafri v Lincoln College* [2014] EWCA Civ 449; [2015] QB 449 concerned a claim for unfair dismissal. The ET dismissed that claim. On the claimant's appeal, the EAT accepted that the ET had made legal and factual mistakes in its judgment, but held, nevertheless, that those mistakes had made no difference to the ET's eventual conclusion and dismissed the appeal. On the claimant's further appeal this court held that the function of the EAT was to ensure that ETs made their decisions lawfully. If the EAT found a mistake of law, it had to remit the claim to the ET unless, on the ET's findings (supplemented if necessary by indisputable evidence), the EAT decided either that the mistake could not have affected the outcome and was therefore immaterial, or that the result would have been different without the mistake, but it could decide what the outcome would have been. The EAT was not to make any factual assessment for itself, or any decision about the merits. If, once the error was put right, more than one outcome was possible, the ET had to decide what it should be, not the EAT.

*The Equality Act 2010*

9. Part 2 of the 2010 Act is headed 'Equality: Key Concepts'. Chapter 1 of Part 2 (sections 4-12) defines the protected characteristics. Chapter 2 is headed 'Prohibited Conduct'. It defines discrimination, harassment and victimisation, and imposes a duty to make

reasonable adjustments. Part 5 is headed 'Work'. Chapter 1 makes provision for various types of work (sections 39-60A). Chapter 2 provides for occupational pension schemes. Chapter 3 is headed 'Equality of Terms'. It is divided into five groups of sections: 'Sex equality', 'Pregnancy and maternity equality', 'Disclosure of information', Equality action plans' and 'Supplementary'.

10. Section 64 is headed 'Relevant types of work'. Sections 66-70 apply where 'a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does' (section 64(1)). The references to B's work are not limited to work 'done contemporaneously with the work done by A' (section 64(2)). For the purposes of Chapter 3, section 65(1) defines 'equal to' by reference to three cases: A's work is 'like B's work'; it is 'rated as equivalent to B's work'; or (c) A's work is 'of equal value to B's work'. Section 65(6) explains when A's work is of equal value to B's work. That is so if it is neither like B's work, nor rated as equivalent to B's work, but is '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'.

11. Section 66 is headed 'Sex equality clause'. If the terms of A's work 'do not (by whatever means) include a sex equality clause, they are to be treated as including one' (section 66(1)). Section 66(2) explains the effect of a sex equality clause. If A's contract has a term which is less favourable to A than the corresponding term in B's contract is to B, A's term is modified so as not to be less favourable to A, and if A does not have a term which corresponds to a term which benefits B, A's terms are modified to include such a term. Section 69 is headed 'Defence of material factor'. In short, if the 'responsible person' shows that a difference between A's terms and B's terms is 'because of a material factor' which satisfies section 69(1)(a) and (b) and 69(6), the sex equality clause has no effect.

*The relevant authorities*

12. The claimants submitted an 'agreed' note on the law to the ET in October 2023. By that, they meant a note which was agreed, but only by them. Tesco agreed at the hearing of EAT (2) that the note was accurate (paragraph 42 of EAT (2)). The EAT endorsed it as correct in paragraph 82 of EAT (2). The note was based on section 65 of the 2010 Act and on the relevant rules. It referred to three authorities: *Shields v E Coomes (Holdings) Limited* [1978] 1 WLR 1408 C-D per Bridge LJ (as he then was) ('*Shields*'); the decision of the Court of Justice in *Brunnhofer v Bank der Österreichischen Postsparkasse* (C-381/99) [2001] CMLR 9 at paragraph 48 ('*Brunnhofer*'); *Beal v Avery Homes (Nelson) Limited* [2019] EWHC (QB) 1415 at paragraphs 30, 31 and 32 per Lavender J ('*Beal*').

13. I agree that those are the most relevant authorities in relation to the issues in this appeal. During the proceedings the ET also referred more than once to the decision of the EAT in *Prest v Mouchel Business Services Limited* [2011] ICR 1345 ('*Prest*'). The parties could not explain how *Prest* is relevant to the issues in this case. I will return to this point in paragraph 124, below. I will now summarise the relevant authorities.

*Shields*

14. *Shields* is a decision of this court on an appeal from the EAT in an equal pay case. It was not an equal value case. The claimant, a counterhand in a betting shop, claimed

that she was doing work which was 'like' the work being done by a male counterhand who worked in the same shop (Mr Rolls), and that she should therefore be paid what he was paid. The industrial tribunal ('the IT') dismissed her claim. The EAT allowed her appeal. There were three judgments in this court. The members of the court dismissed the appeal for slightly different reasons.

15. Section 1(4) of the Equal Pay Act 1970 ('the 1970 Act') provided:

> 'A woman is to be regarded as employed on like work with men, if, but only if, her work and theirs is of the same or a broadly similar nature, and the differences (if any) between the things she does and the things they do are not of practical importance in relation to terms and conditions of employment; and accordingly in comparing her work with theirs, regard shall be had to the frequency or otherwise with which any such differences occur in practice as well as to the nature and extent of the differences'.

16. The issue was whether the fact that the man was paid more for filling what Lord Denning MR described as a 'protective role' was a difference which justified the difference in their pay. The protective role was more theoretical than real. It only applied to nine of the employer's 90 shops. In the other 81 shops, both counterhands were women. A complicating factor, which was accepted in this court, was that the EAT had misunderstood the facts. The EAT had thought, wrongly, that men were also employed in the 81 other shops.

17. Lord Denning referred to the principle of 'equal value' which was derived from EEC law. He referred to *Eaton Limited v Nuttall* [1977] 1 WLR 549 and added (at p 1417 G-H) 'But, if the value of the woman's job is equal to the man's job, each should receive the same rate for the job. This principle of "equal value" is so important that you should ignore differences between the two jobs which are "not of practical importance". The employer should not be able to avoid the principle by introducing comparatively small differences in "job content" between men and women: nor by giving the work a different "job description"'. Finally, 'If it is found that the differences are "not of practical importance", then the woman is employed on "like work" with the men and her contract is deemed to include an equality clause giving her the same "rate for the job" as the men…' He then referred to section 1(2) of the 1970 Act (p 1418 D).

18. Orr LJ said that it was clear that the 1970 Act and the Sex Discrimination Act 1975 ('1975 Act'), which were brought into force on the same day, were a complete code about sex discrimination in employment and other fields (p 1421 H). The IT had correctly found that the work was 'of a broadly similar nature'. The question was whether 'the differences (if any) between the things she did and the things he did were of practical importance in relation to terms and conditions of employment. The subsection by its terms requires that, in comparing her work with his, regard should be had to the frequency with which any such differences occur in practice as well as the nature and extent of the differences, and it is abundantly clear… that the comparison which the subsection requires to be made is not between the respective contractual obligations but between the things done and the frequency with which they are done'. The IT had paid too much attention 'to the contractual obligations and too little to the acts as in fact done and their frequency, and in particular to the fact that Mr Rolls had

never in fact, on the evidence, had to deal with any disturbance or attempted violence' (p 1422 E-F).

19. Bridge LJ (as he then was) was satisfied that the application of section 1 of the 1970 Act to the facts led to 'a perfectly clear conclusion' (p 1424 E-F). He agreed with Orr LJ that the 1970 Act and the 1975 Act were a complete code (p 1425 H-1426 A). He referred to section 1(4) of the 1970 Act. A 'difference between the duties which the man and woman whose work is being compared are under a contractual obligation to perform is not a relevant difference unless it results in an actual difference in what is done in practice. It is by comparing their observed activities not their notional paper obligations that the relevant differences are to be ascertained' (p 1427-1427 F). The majority of the IT had misdirected themselves by 'comparing contractual obligations rather than things done' (p 1428 D). Bridge LJ refined that broad dichotomy by referring, at p 1428 F to 'a notional difference in contractual obligations'. Apart from that notional difference, 'there was no significant difference between the things done by the applicant and the things done by Mr Rolls…which could provide material to support the decision of the majority'. The security function was not, either, 'a difference between the things the applicant did and the things Mr Rolls did in the course of their employment…let alone a difference of practical importance' (p 1428 H).

*Brunnhofer*

20. The applicant got the same basic pay as her male comparator. She was also given a monthly supplement, which was less than the supplement paid to a man in the same job category. The job category was the outcome of a collective agreement. She made a sex discrimination claim, based on a breach of equal pay principles in article 119 of the EC Treaty. Article 119 (in short) required equal pay for 'equal work', for 'the same job', or for 'the same work to which equal value is attributed'. Her employer's explanation for the difference in pay was that the man was better at the job than she was.

21. The Austrian court referred various questions to the Court of Justice. In paragraph 25 the Court summarised those questions, which could be 'examined together' as 'essentially' being about 'the concepts of "the same work", "the same job", and "work to which equal value is attributed"'; the relevant rules of evidence; possible objective justifications for differences in pay; and whether an employer could rely on 'certain specific factors, such as the personal capacity or work performance' to justify a difference in pay.

22. The finding that the applicant and the man were paid differently did not of itself show that there was discrimination (paragraph 38). The principle of equal pay 'presupposes that the men and women to whom it applies are in identical or comparable situations…It must also be ascertained whether the employees concerned are performing the same work or work to which equal value may be attributed' (paragraph 39). To be relevant, any difference in treatment must be 'exclusively…based on the difference in sex of the employees concerned' (paragraph 40).

23. In paragraph 41 the Court said the national court was essentially asking whether the fact that the jobs of the applicant and of the man were 'classified in the same job category under the collective agreement… is sufficient to reach the conclusion' that

they were doing 'the same work' to which 'equal value is attributed within the meaning of article 119 of the Treaty and article 1 of the directive'. It was clear from the Court's caselaw that those terms were 'entirely qualitative in character in that they are exclusively concerned with the nature of the work actually performed' (paragraph 42). It was necessary to find out 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' (paragraph 43).

24. It followed that the same job classification in a collective agreement was not enough (paragraph 44). Other evidence might also support the conclusion that the employees were doing the same work or work of equal value (paragraph 45). As a matter of evidence, any general indicators in the collective agreement must be 'corroborated by precise and concrete factors based on the activities actually performed by the employees concerned' (paragraph 47). It was necessary to find out, whether 'when a number of factors are taken into account, such as the nature of the activities actually entrusted to each of the employees in question in the case, the training requirements for carrying them out and the working conditions in which the activities are actually carried out, those persons are in fact performing the same work or comparable work' (paragraph 48). It was therefore for the national court to decide whether in the light of 'the actual nature of the activities carried out by those concerned, equal value can be attributed to them' (paragraph 49).

25. Of particular relevance in the current case were the facts that the man was 'responsible for dealing with important customers' and had 'authority to enter into binding commitments, whereas Ms Brunnhofer, who supervise[d] loans' had 'less contact with clients' and could not 'enter into commitments that directly' bound 'her employer' (paragraph 50).

*Beal*

26. In *Beal* the claimants made their equal pay claim, somewhat unusually, in the High Court. The claimants were women. They were care workers. Lavender J gave the judgment in what, he said, would have been a stage 2 equal value hearing, had the claims been heard in the ET (paragraph 1). The comparators were male 'maintenance operatives' who were paid a higher hourly rate. In that case the job descriptions ('JDs') were largely agreed. Issues continued to be agreed up to, during, and after, the hearing (paragraph 5).

27. In paragraph 19, Lavender J said that he would start his judgment by considering some 'general themes' in the claims. He made some general comments about 'work' in paragraph 23. The aim at this stage was to produce 'a factual statement of each individual's work' to be used by the IE as the basis for his assessment. The word 'job' and the phrase 'job description' should not be a distraction. The key word in the 2010 Act was 'work'. In paragraphs 27-33 he returned to that theme, drawing on the judgment of Underhill P (as he then was) in *Potter v North Cumbria Acute Hospitals NHS Trust* [2008] ICR 910. In paragraphs 27-28 he quoted remarks about the dividing line between tasks which are only done infrequently but are still part of the 'work' and those which have not been done for such a long time that they are no longer part of the

'work'. Drawing that line was difficult; 'much will depend on why the task has not in practice' been done.

28. The parties had not referred Lavender J to any other authorities. He said that 'there were a number of issues about what constitutes "work" and, if it is different (which I doubt) what it is to be "employed on work"' (paragraph 29). He recorded, in paragraph 30, the parties' agreement that 'it was appropriate to look at what the employee actually did, and not *simply* at documents (such as contracts, job descriptions, or work manuals), even if they had contractual force. Such documents are relevant, but not *necessarily* determinative, when considering what constitutes someone's work. Likewise, what the employee actually did is an important consideration, but is not necessarily determinative. To take an obvious example, an employee who loafs around during work hours does not thereby convert loafing into part of their work. Likewise, as the parties agreed, *if an employee refused or neglected to do something they were supposed to do, that activity would remain part of their work*' (my emphases).

29. A further relevant consideration was whether a particular activity was a 'requirement or expectation' (paragraph 31). 'Of course' if an employee's contract requires him to do something (and he is still required to do it), 'then that activity will form part of their work (even if, in practice, they neglect or refuse to perform it)'. He added that, in relation to many of the issues in that case, 'the position was not so clear-cut. On the whole, the dispute was not as to what the employee did, but as to whether it formed part of their work' (paragraph 32).

30. He described his approach to that question in four sub-paragraphs of paragraph 32. The emphases are mine.

    1. If an employee is told by his manager to do something, then, 'if they do it, that is *surely* part of their work. Moreover that is so, even if they might have been entitled to say, "But that is something I am not obliged to do"'.
    2. The same is '*likely to be the case*' if a manager does not instruct but encourages an employee to do something. If the employee cannot be required to do it, that information may be relevant for the IE.
    3. Something *might be* work even if the employee has not been instructed or encouraged to do it, if, for example, it is a way of doing something which is part of their work and/or the manager knows he is doing it but does not object and 'thereby tacitly approves' it.
    4. Something '*may* not be part of' an employee's work if he 'has not been instructed, requested or encouraged to do it…it has not been approved by [the] employer' and it is not 'a way of doing something which forms part of [his] work'.

31. Lavender J qualified those general points in paragraph 33. They were 'merely general considerations, which are not intended to place a gloss on [the 2010 Act]'. He stressed that 'each disputed issue has to be considered on the basis of its own particular facts'. The ET also referred, in its judgment promulgated on 12 July 2023 ('judgment 1'), to

paragraphs 91, and 104 and 105 of Lavender J's judgment. My understanding of those passages, when they are read together, is that Lavender J was not saying that 'statements of the obvious' should not be included in a JD; they should be, as it would be for the IE to assess whether any such obvious matters did, or did not, increase the value of the work of the claimant or of the comparator.

*The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013*

32. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (2013 SI No 1237) ('the ET Rules') are made under the provisions of various Acts. Those provisions include several provisions of the 1996 Act. Regulation 13 of the ET Rules introduces Schedules 1 to 3 to the ET Rules. The versions of Schedules 1-3 which were in force at the relevant time have since been revoked and replaced by the Employment Tribunals (Procedure Rules) (Consequential Amendments) Regulations 2024 (2024 SI No 1156), with effect from 6 January 2025.

33. Schedule 1 was divided into fourteen groups of rules. One group was headed 'Rules common to all kinds of hearing'. Rule 42 obliged the ET to consider any written representations from a party if they were delivered to the ET and to the other parties not less than seven days before the hearing. Rules 70-71 were headed 'Reconsideration of judgments'. Rule 70 deals with the relevant principles, rule 71 with how an application for reconsideration is made, and rule 72 with the relevant procedure. Rule 73 is headed 'Reconsideration by the [ET] on its own initiative'.

34. Schedule 3 was headed 'The [ET] (Equal Value) Rules of Procedure'. Schedule 3 applied 'to proceedings involving an equal value claim and modifie[d] the rules in Schedule 1 in relation to such proceedings' (rule 1(1)). There are several definitions in 1(2). 'Comparator' meant 'the person of the opposite sex to the claimant in relation to whom the claimant alleges that his or her work is of equal value'. 'Equal value claim' meant 'a claim relating to a breach of a sex equality clause …within the meaning of' the 2010 Act. 'The facts relating to the question' was defined by reference to rule 6(1)(a). The 'question' meant 'whether the claimant's work is of equal value to that of the comparator'.

35. Rule 2 was headed 'General power to manage proceedings'. Rule 3 related to the stage 1 equal value hearing. There was to be such a hearing if 'there [was] a dispute as to whether one person's work [was] of equal value to another's...' 'Equal value' was to be construed in accordance with section 65(6) of the Equality Act 2010 (rule 3(1)). Rule 3(1) gave the ET a list of its options at such a hearing. It had to make a choice. One option was to decide to require an IE to prepare a report 'on the question' (rule 3(1)(b)). If the ET chose that option, it had also to fix a date for a 'stage 2 equal value hearing' ('a stage 2 hearing') (rule 3(1)(c)).

36. Rule 4 provided a list of default 'standard orders' to be made at a stage 2 hearing, to be made unless the ET 'consider[ed] it inappropriate to do so'. Those orders included an order requiring the respondent to give the claimant or his or her representatives access to the respondent's premises to allow any comparator to be interviewed. A further order could require the parties to present an agreed statement to the ET 'specifying' JDs for the claimant and for any comparator, and 'the facts which both parties consider[ed

were] relevant to the question;' and '(ii) the facts on which the parties disagree[d] (as to the facts or as the relevance to the question) and a summary of the reasons for disagreeing' (rule 4(1)(d)). They had to exchange 'written statements of any facts on which they intend[ed] to rely in evidence' at the hearing, and disclose them to the ET and to the IE (rule 4(1)(e)). They were also required to present to the ET 'a statement of the facts and issues on which the parties [were] in agreement, a statement of the facts and issues on which they disagree[d], and a summary of their reasons for disagreeing' (rule 4(1)(f)).

37. The ET had power 'at any stage of the proceedings, on its own initiative or on the application of a party' to order the IE to help it 'in establishing the facts' on which the IE might rely in preparing his or her report (rule 5).

38. Rule 6 was headed 'Conduct of stage 2 equal value hearing'. It provided:

'(1) Any stage 2 equal value hearing shall be conducted by a full tribunal and at the hearing the Tribunal shall –

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

(2) Subject to paragraph (3), the facts relating to the question shall, in relation to the question, be the only facts on which the Tribunal shall rely at the final hearing.
(3) At any stage of the proceedings, the independent expert may make an application to the Tribunal for some or all of the facts relating to the question to be amended, supplemented or omitted.
(4) The Tribunal shall give the parties reasonable notice of the date of the stage 2 equal value hearing and the notice shall draw the attention of the parties to this rule and give notice of the standard orders in rule 7'.

39. Rule 7(1) required the ET, 'unless it consider[ed] it inappropriate to do so' to order the IE to produce 'his report on the question' and provided that the IE was then required to 'prepare his report on the question on the basis only of the facts relating to the question'. Rule 7(2) gave the ET power to 'add to, vary, or omit' any of the standard orders in rule 7(1). Unless the ET determined that the IE's report was 'not based on the facts relating to the question' the ET was obliged to admit the IE's report in evidence at the final hearing (rule 8(1)). If it did not admit the report, the ET was able to decide the question itself or to require another IE to prepare a report on the question (rule 8(2)). The ET might 'refuse to admit evidence of facts or submissions on issues which have not been disclosed to the other party as required by these rules or any order (unless it was not reasonably practicable for a party to have done so)' (rule 8(3)).

40. Rule 9 dealt with the duties and powers of the IE. The IE owed to the ET the duties listed in rule 9(2)(a)-(g). Those included the preparation of 'a report based on the facts relating to the question', and attending hearings. Rule 9(3) enabled the IE to 'make an application to the [ET] as if he were a party to the proceedings'. Rule 10 made provision about the use of expert evidence. Where the ET had ordered an IE to produce a report,

the ET could not admit 'evidence of another expert on the question unless' it was 'based on the facts relating to the question' (rule 10(4)). Rule 11 enabled the parties to put written questions to an expert, but, unless the ET 'agree[d] otherwise' those questions could only be 'for the purpose of clarifying the factual basis of the report' (rule 11(1)(c)).

41. Rule 12 was headed 'Procedural matters'. If an IE had been required to produce a report, the ET had to send him or her 'notice of any hearing, application, order or judgment in the proceedings as if the [IE] were a party to those proceedings'. Anything which the rules required one party to disclose to the other had also to be disclosed to the IE (rule 12(1)). There might be more than one stage 2 equal value hearing in any case (rule 12(2)).

42. For the purposes of this judgment, I will refer to the rules in Schedule 3 as 'the Rules'. If it is necessary to refer to the provisions of the other Schedules, I will refer to them as the rules in 'Schedule 1' or 'Schedule 2', as the case may be.

*A summary of the proceedings in this case*

43. The claimants work in Tesco stores and are mostly women. The majority of the people who work in the stores are women. They have chosen male comparators who work in Tesco's distribution centres. Most, but not all, of the employees in distribution centres are men. As I have said, the claims were started in 2018. Tesco says that there are now nearly 60,000 claimants. There are about 34,000 claimants in the group which is relevant to this appeal. The claims have been said to be worth several billions of pounds. There are six sample claimants and eight comparators. The comparators were chosen by the claimants.

44. The ET had been managing these claims for about five years before the stage 2 equal value hearing. The parties produced, in accordance with orders made by the ET, and with the endorsement of the IEs, detailed JDs for the claimants and for the comparators. They identified which facts about the jobs they agreed, and the facts about which they did not agree, in tables called Records of Disputes ('RoDs'). They prepared witness statements about the facts which they understood to be in dispute.

45. As I have said, the stage 2 equal value hearing took 36 days between March and May 2023. The ET did not, before or during the stage 2 equal value hearing, say to the parties that it did not agree with their approach to the hearing. It nevertheless promulgated judgment 1 on 12 July 2023 which, it seems to be agreed, came as a surprise to all the parties. The ET had not determined any of the disputes identified by the parties. Instead, it made orders for the parties to produce new JDs and RoDs, the focus of which should be Tesco's relevant training documents. A little later, on 26 July 2023 the ET issued case management orders with reasons ('the CMO'). The ET ordered the parties to redraft their JDs to refer to and add extracts from the training documents.

46. On 22 August 2023, Tesco appealed to the EAT against judgment 1 and against the CMO. The EAT assigned two appeal numbers to those appeals. The EAT in EAT (2) nevertheless referred to these appeals as 'A1', and to the grounds of appeal in that

appeal as 'A1G1', 'A1G2', and so on. I will refer to those appeals as 'EAT (1)'. I will also refer to the grounds of appeal in the same way as the EAT.

47. The ET then emailed the parties on 9 October 2023. The ET said that it would no longer require the parties to re-draft the JDs. It proposed, instead, to decide the disputes itself, 'primarily by reference to training materials'. Tesco then withdrew some of the grounds of appeal in EAT (1), and re-drafted others. On 27 October 2023, the claimants, unasked, sent the ET a 'Joint Note on the Law'. It said, among other things, that 'the starting point is what is done in practice' by the claimants and the comparators. The ET's response by email on the same day, was that its understanding of the law was 'slightly different'. The ET referred to *Prest*. The work being evaluated was that of 'customer assistants and distribution centre workers employed by the respondent so that the proper focus of [the ET's] inquiry is what were their jobs, or what was their work, for equal pay purposes, and that is a matter which falls to be determined by the employer, not the employee. Thus the inquiry is primarily what work the employees in question were required by the employer to do, not how they did it, or what they in practice did if it was different from how they were required to do it, unless that which they did was explicitly or implicitly approved by the employer so that it became part of their jobs'.

48. On 13 March 2024, the IEs asked the ET to put its findings into a single JD for each job holder.

49. On 4 July 2024, the ET sent the parties a second judgment ('judgment 2'). Judgment 2 is 83 paragraphs long and has eight appendices. Its total length is 619 pages.

50. On 15 August 2024 Tesco appealed against judgment 2. This appeal is the appeal to which I have already referred as 'EAT (2)'. In EAT (2) the EAT referred to this appeal as 'A2' and to the grounds of appeal in A2 as 'A2G1', 'A2G2', and so on. I will refer to the grounds of appeal in the same way.

51. In an order on the papers dated 12 March 2024, HHJ Auerbach allowed one ground of appeal in EAT (1) to go to a full hearing. After an oral hearing on 5 February 2025, HHJ Tayler gave Tesco permission to amend its grounds of appeal in EAT (1). Tesco withdrew one ground of appeal and parts of two more. HHJ Tayler allowed all the remaining grounds of appeal in EAT (1) and EAT (2) to go to a full hearing. He nevertheless limited some of the grounds of appeal to the examples pleaded in Tesco's notice of appeal, unless Tesco were to apply successfully to amend those grounds. On 7 March 2025, Tesco applied to amend those grounds of appeal. HHJ Tayler refused that application, with a limited exception. Tesco did not appeal against that refusal.

52. The EAT heard EAT (1) and EAT (2) on 18 and 19 June 2025. It allowed the appeals in part only, and made further directions at a disposal hearing.

53. Although later decisions of the ET are not the subject of the appeals to this court, I should also record briefly what the ET did after sending judgment 2 to the parties. In judgment 2, the ET invited the parties to apply for reconsideration, but did not encourage it. They did so on 18 October 2024. The IEs wrote to the ET on 26 September

2024 and on 14 January 2025 describing their difficulties with the work which they would have to do as a result of the ET's approach. On 23 January 2025, the ET wrote to the parties to say that it now proposed to produce 'statements of work' for each jobholder. The ET acknowledged that asking the parties to revise the job descriptions to reflect the ET's approach would be time-consuming, expensive, and likely to provoke further disputes.

54. On 30 May 2025 the ET sent to the parties its first reconsideration judgment. It was 307 pages long and had 14 appendices setting out 'statements of work', which contained some new findings. There were many references to the training documents, some were incorporated, and there were cross-references to judgment 2. The ET also invited the parties to apply for reconsideration. They did so. On 28 July 2025 the ET sent its second reconsideration judgment to the parties.

*Judgment 1*

*The judgment*

55. The ET said in paragraph 1 that the parties' presentation of their cases had been 'so inconsistent with the interests of justice that it was not just to determine the factual disputes as they stood' at the end of the stage 2 equal value hearing. The ET had concluded that the 'key documents' were those which were 'the best evidence of in-person training given to' the job holders or were 'in themselves' the training 'in that they were to be read and applied by' the job holders during the relevant period (paragraph 2). The ET did not know if Tesco had disclosed all those documents.

56. It was Tesco's case that the training documents were only relevant if the job holders had in fact received the training they described, and that the ET's factual inquiry was about what the job holders 'in fact' did from day-to-day, rather than what Tesco 'required them to do as their jobs as evidenced by the training which [Tesco] gave to persons doing those jobs'. The ET had concluded that those contentions were wrong (paragraph 3).

57. The parties had prepared the JDs on the assumption that the ET's 'primary focus… was (or should be) what (1) the claimants and their managers and (2) the comparators and their managers said about the manner in which (respectively) the claimants and their comparators did their jobs'(paragraph 4). That assumption was wrong. The ET's view was that all of the training documents 'should here have been at least the primary focus of the…inquiry into, and determination of, the facts which relate to the question…Only if [a job holder] did any aspect of his or her job in a way which differed from the manner shown by or stated in such training documents could there be a need to hear oral evidence about that aspect' (paragraph 5).

58. The interests of justice required the parties to provide to the ET, for each job holder, new written JDs, a new statement of the facts which the parties considered were relevant to the question, and a new statement of the factual issues on which the parties disagreed (whether as to the claimed fact or its relevance to the factual issue in question), and a summary of their reasons for disagreeing (paragraph 7). The precise terms of the orders in paragraph 7 would be discussed and if possible agreed at a further hearing on 19 July 2023.

*The reasons for judgment 1*

59. The ET gave 93 paragraphs of reasons for judgment 1.

60. The ET quoted section 65(6) of the 2010 Act in paragraph 10. It quoted paragraphs 41-43 and 48 of *Brunnhofer* in paragraph 11, and several passages from *Shields* in paragraphs 12-18. The ET noted that *Shields* was a case about like work, but said that this court's observations about how 'the manner in which a job done by [a job holder] must be assessed' applied to claims such as these. The ET gave three reasons why in paragraph 12.

61. It quoted paragraphs 32 and 33 of *Beal* in paragraph 19, paragraphs 43-45 in paragraph 20, paragraph 88 in paragraph 21, paragraphs 89-91 in paragraph 22 and referred to paragraphs 104-105 in paragraph 23. The ET understood paragraphs 91 and 104-105 to show that 'there may in some cases be "merely a statement of the obvious", in other words something that adds nothing material to the factual position, but that in some cases the statement may be about something that increased the value of an employee's work', which were not for the ET but for the IEs to assess. It added a similar point about evaluative statements in paragraph 24.

62. In paragraphs 25 and 26 the ET quoted paragraphs 11-13 and 21-23 (including four endnotes) from the decision of Underhill P in *Prest*.

63. The parties had told the ET it was going to have to determine 'thousands of factual disputes'. The ET had to apply its 'own critical analysis to the question of what factual disputes required determination' (paragraph 28). It then quoted a long passage (paragraphs 19-41) from one of the claimants' skeleton arguments. That contended, in short, that Tesco was distorting the process by talking up the work of the comparators, talking down the work of the claimants and 'smuggling… evaluative language' into the JDs. Many of the outstanding disputes were about such issues. The purpose of the stage 2 equal value hearing was not, for example, to resolve 'editorial disputes', to make decisions about the 'demands' made by work on a job holder, or to resolve other issues of evaluation.

64. In paragraph 35, the ET recorded that on 8 March 2023, the Employment Judge had discussed with the parties the need to limit the inquiry to what was relevant. The ET did five site visits (paragraphs 37 and 38). The ET listed the 32 witnesses whose evidence it heard in paragraph 49.

65. In paragraphs 50-63, the ET considered three 'salient aspects of the evidence' and made findings about those. It found, first, that the claimants were put under time pressures in the same way as staff in the distribution centres and the only material difference between them was that some of the latter wore arm-mounted computers ('AMCs') which made it possible to monitor their use of time (paragraph 55). Second, it found that Tesco's witnesses had given evidence about things of which they had no direct knowledge, such as statistics or percentages. The ET said, in paragraph 56, 'The Leigh Day claimants referred to this as "an exercise in ventriloquism"'. The ET accepted the claimants' submission that Tesco's witnesses had complicated the work of the

comparators and understated the work of the claimants. The ET commented adversely on the way in which the lawyers who were instructed by Tesco at the time had prepared and presented the witness statements with a view to supporting its case. Witnesses had felt obliged if possible to agree with their witness statements, which in some cases, they had not read properly (paragraph 57).

66. The ET decided that there was no evidential basis for Tesco's statistics (paragraph 58). It would not admit them at that stage, but left the door open for Tesco to prove them by evidence when the parties, as they would have to, reformulated their cases (paragraphs 61 and 62). In paragraph 63 the ET considered 'A salient inconsistency in [Tesco's] case'. This concerned whether or not the cages which contained goods might or might not cut their users' hands. The suggestion was that the cages in the stores would not, whereas the cages in the distribution centres might. Tesco might have failed to see this inconsistency because of a 'focus on the intended submissions of [Tesco] rather than on the facts'.

67. In paragraph 64 it summarised the submissions on how it should make its findings. A major issue was the extent to which the ET should record in its determinations those things on which the parties had agreed. The ET had initially thought it should record things which were agreed. Having spent days reaching factual conclusions about Mrs Worthington's job, and having started to do the same with the job of Ms Williams, and having considered the claimant's submissions about the job of Ms Thompson, the ET had reached the conclusions stated in its judgment (see paragraphs 55-58, above). One of the results of compliance by the parties with the orders described in the judgment would be that there would be no need for the ET 'to record the agreed facts' (paragraph 64).

68. The ET then described its 'conclusions on points of principle' in paragraphs 66-88. Its first conclusion on those points was that it had to decide what was relevant and not what might reasonably be relevant. That was what the law (in particular rule 6(3) of the Rules) and the interests of justice required (paragraph 66). In paragraphs 67-69 the ET rejected Tesco's suggestion that the lack of an adverse consequence for not doing a thing meant that it was not part of a claimant's job, referring to some of the reasoning in *Shields* and *Beal*.

69. In paragraphs 70-74 the ET considered measures of performance and working conditions. Tesco's Performance Index was relevant to the time pressures on the comparators. Tesco's training documents might be relevant to the time pressures put on the claimants. The demands of the job included its physical conditions, dangers and the extent to which those were mitigated, and pressures of time (paragraph 77).

70. The ET considered training documents and manuals in paragraphs 75-88. Before the ET had considered the parties' submissions about the factual issues, it had reached a 'provisional conclusion' that the training and related documents including safety manuals or instructions were 'likely to be the best evidence of what the job in each case entailed…because of the case law' to which the ET had referred; that is to say, *Shields*, *Brunnhofer*, *Beal* and *Prest* (see paragraphs 14-31, above). The ET recorded the submission of Mr Epstein KC (who represented Tesco at that hearing) that *Shields* was

a claim about like work, not work of equal value, but it was authority for the proposition that 'in determining whether work was "equal work" within the meaning of section 65(1) [of the 2010 Act], the question is what was the *job* of each person, not what it was that they did minute by minute when they were at work [original emphasis]. That which they did which went beyond their employer's express written requirements might (given what was said in paragraph 32 of …*Beal*…and what Bridge LJ said in *Shields* …) have become part of their job for the purposes of an equal pay claim, but that did not in any way detract from the proposition that the best way to see what was an employee's job was for those purposes was to see how the employer required the employee to work. That in turn could at least normally best be seen by reference to what was in the employer's training documents …and its instructions on how to do the things which the employee did, or was contractually required to do…' (paragraph 75).

71. After the hearing, the ET had done what it described in paragraph 89. It had taken the ET over a week to make findings on the disputes which the parties had identified about Mrs Worthington's job. The ET had looked for and had found training documents, to which the parties had not referred, but which were relevant to her job. The ET was 'dismayed' by the length and complexity of the parties' submissions on the facts about her job, given that her work was mostly re-filling things, and working the check-out. The claimants' submissions about Ms Thompson's work did not refer to many of the training documents. The ET had then thought again about the parties' presentation of their cases. The ET concluded that all the parties had gone wrong in the presentation of their cases. Tesco's presentation was 'fundamentally erroneous' and to the extent that the claimants had done the same, 'they too had erred'; although by the time of closing submissions, the claimants were at least to some extent relying on the training documents.

72. Having done what it described in paragraph 89, the ET had reviewed the parties' submissions about this issue. Tesco's position (more or less) was that it was only if a claimant had actually received training of a particular kind that the ET could take the training documents into account. The ET quoted paragraphs 215 and 216 of the Harcus claimants' closing submissions, which argued that the training materials were 'excellent evidence of a. what the job holders actually did, b. how they did it, and c. what [Tesco] required/expected of the jobholders'. In paragraph 77, the ET referred to Tesco's argument that the training materials were merely aspirational, and to the claimants' detailed response to that. Having spent over a week determining the factual disputes about Mrs Worthington's job, the ET 'came to the clear conclusion' that the submissions of the Harcus claimants were 'entirely correct' (paragraph 78).

73. The ET referred in paragraph 79 to Tesco's submissions that the ET should make findings of fact about the training which each claimant had in fact received. The premise of those submissions was that the IEs needed to know what training each claimant had had. It was 'fundamentally flawed'. That was not what the IEs had asked for (paragraphs 79 and 80). In any event, the training which the claimants received would only 'rarely be relevant' to the factors in which the IEs were interested. The only material training was mandatory training for example, for driving a fork-lift truck or an HGV. The key factor then would be a formal qualification or a certificate. The actual training received would be evidence of what the job required by way of training, and

experience, but the formal qualification would probably be the 'best evidence of what the job required in that regard' (original emphasis) (paragraph 81).

74. The training the claimants received during their employment about their jobs was relevant to show what the jobs were. The ET referred to its earlier paragraph 75: see paragraph 70, above. Whether they had had all of the training was not 'determinative' of what those jobs were, for the reasons given in paragraph 75; 'Far from it'. There was much documentary evidence in the hearing bundle, but it was referred to by Tesco in its closing submissions 'only with a view to showing wherever possible that the sample claimants had not received that training' (original emphasis) (paragraph 82).

75. Tesco's submissions on this topic were 'remarkably long': 80 pages in the case of Mrs Worthington (in the form of a table with text underlined and struck out in red) (paragraph 83).

76. The claimants' closing submissions did not refer to all or even to most of the relevant training documents, almost certainly because of the volume of that evidence, and the difficulty of dealing in submissions with every factual dispute. Some of those documents had been provided pursuant to an order for which the claimants had asked at a preliminary hearing (paragraph 84).

77. As a result, there was 'a substantial number of documents' in the bundle which were evidence of 'the training which [Tesco] would have expected to be given to persons doing the jobs of the sample claimants'. The parties had not referred to all of those during the hearing, but the ET had made it clear during the hearing that they were potentially relevant to the question of what the job of each sample claimant was, and no party had told the ET that it should not refer to them when deliberating. The ET had during its deliberations referred to more of the training documents than those to which the parties had directed its attention (paragraph 85).

78. Given the ET's conclusions in paragraphs 75-78 (see paragraphs 70 and 72, above), it saw no reason to decide precisely what training the sample claimants and their comparators had actually received, with one exception (paragraph 87). That was in a case in which the training led to 'a determination' that the employee was competent to do the thing to which the training related and Tesco would not or could not 'permit that thing to be done without such determination'. The ET referred to the training to drive a fork-lift truck. The question whether a comparator had had that training was material, but 'we could see no other training in regard to which we would need to make a specific finding of fact of that sort' (paragraph 88).

79. The ET considered 'The way forward' in paragraphs 89-93. I have already summarised paragraph 89 (see paragraph 71, above). In paragraph 90 the ET described how one of the training documents seemed to have been 'sliced up' and appeared in different parts of the bundle. The ET did not know whether Tesco had disclosed all the relevant training documents. It occurred to the ET that Tesco should be ordered to do a further search. The ET's earlier order, referred to in paragraph 84 (see paragraph 76, above) had not been as wide as the ET now thought it should have been (paragraph 91). In paragraph

92, the ET described the new form of job descriptions it would order. If it was 'contended that the job-holder carried out that task in a way which differed from the manner shown by that training' (that is, 'the training which a person doing that job would, or, as far as [Tesco] was concerned should, have received') the JDs must say whether Tesco knew about that method, and if so and 'it was correct to say it' whether Tesco 'had approved or at least knowingly tolerated that different manner' (paragraph 92).

80. In paragraph 93, the ET said that it would hear submissions on the precise form of any orders at a hearing in July. The ET did not expect all the training documents to be appended to the JDs.

*The July CMO*

81. There was a hearing in July. It led to a case management summary and orders which were sent to the parties on 26 July 2023. I will only summarise the most significant aspects of those. It is clear from this document that the ET was then intending to have a further stage 2 equal value hearing (see, for example, paragraph 41), as rule 12(2) of the Rules permits (see paragraph 41, above).

82. In paragraph 1, the ET said that although it had called judgment 1 a 'judgment', it might in fact not be a 'judgment' for the purposes of rule 1(3) of the Employment Tribunals (Rules of Procedure) 2013. The circumstances had been and were still 'highly unusual'. In paragraph 4 the ET referred to 'a dialogue by email' between the Employment Judge and the parties after judgment 1 was sent to the parties. In one of those emails he had said that he thought that the ET's new approach would make things simpler. Tesco had asked the ET to postpone the hearing on the grounds that it proposed to appeal against judgment 1.

83. In paragraph 11 the ET referred to paragraph 22 of *Prest*. It thought that paragraph 22 showed that what matters is the work which the employer in practice required those in the role of the comparator to do, rather than the way in which that comparator actually worked. If the comparator worked otherwise than in accordance with the employer's requirements, it was necessary to know whether the employer condoned that. That did not detract from 'the implication' of *Prest* that the focus of section 65(6) of the 2010 Act is 'primarily' what the employer required the job holder to do, and not how he in practice did the job. There was no justification for taking a different approach to the work done by a claimant when there were many claimant employees 'with the same job title and at least broadly similar tasks to do for the employer'.

84. The ET acknowledged that the claimants accepted that Tesco had disclosed all the relevant documents already (paragraph 16). In paragraph 26 it referred to a description in the JDs of the comparators about the importance to Tesco of each part of its network of distribution centres. The ET then referred to the Employment Judge's observation during the evidence that 'that was a statement of the obvious which served no apparent purpose, and in any event was about something which was not obviously relevant at a stage 2 hearing'. In paragraph 28 it recorded that the RoD for Mrs Worthington had 1427 numbered rows. The ET foresaw that it would need to sit for at least three consecutive months, probably 'rather more than that' to resolve the thousands of

disputes as currently framed by the parties (paragraph 31). The ET was not satisfied that the only problem was the number of disputes maintained by Tesco. Another problem was that every element of the work was described in a narrative, and not, primarily, by reference to the training documents. The Leigh Day claimants had done some helpful work which showed how much of the narrative was based on training documents which had not been specifically identified (paragraph 33).

85. In paragraphs 34-36 the ET gave an example (the 'four-point check'). In paragraph 37 it repeated that given its decision that the training documents were the best evidence of 'the content of an employee's work', it would only be if either party contended that the employee did the work in a different way that oral evidence would be needed. Such evidence would be limited. Tesco could only contradict it by calling a witness who actually knew how that employee worked, and could give direct evidence that 'the employee either did not work in the way stated in the document…, or, as the case may be, that he or she did indeed work differently from the way stated in the document, but that it was neither authorised nor permitted by' Tesco (original emphasis). It gave another example in paragraph 38.

86. In paragraphs 39-41 it gave a summary of its reasons for the order it had proposed in paragraph 2. In the light of its conclusion about the significance of the training documents, many of the current disputes were 'unnecessary and indeed mistaken'. It would make its findings primarily by reference to the training documents and only secondly by reference to the oral evidence 'unless the oral evidence concerned a matter which was not covered by any of the training documents (paragraph 39). In order to give effect to its analysis, the ET was going to have to go back to square one and do the job which it thought the parties should have done. If the ET was going to have to re-work the RoDs, that would divert much judicial time from other litigants' cases. The ET 'would probably be going further than a court or tribunal would usually do when determining disputes between parties'. It explained why (paragraph 40). Tthe parties were going to have to prepare the rest of their job descriptions and evidence for 'the intended further stage 2 hearings'. The result would be that the ET's 'determinations of the facts in issue at all of the stage 2 hearings would be in consistent terms, which would in itself be in the interests of justice (and not just convenient)' (paragraph 41).

87. The two IEs who were at the hearing said that this was not the standard practice which had always been followed in their experience. The ET accepted that that practice was the correct approach in some cases, and that oral evidence would always be necessary. 'But in this case, with the large volume of highly detailed and prescriptive training material which was before us …the standard practice was… not applicable' (paragraph 42). The IEs would also prefer the text of the training documents not to be included in the text of the job description, but to be appended to it (paragraph 43).

88. The ET summarised the reasons for its other orders in paragraphs 44-49. By the end of the hearing on 20 July 2023, the ET was 'even more sure' that the parties' presentation of the case was so inconsistent with the interests of justice and the ET's understanding of the law that they should give the ET a new statement for each claimant and comparator recast in the light of the ET's explanation of its approach. Tesco and the Leigh Day claimants resisted that, Tesco on the ground that it was going to appeal against judgment 1. The Employment Judge pointed out that any appeal would be

premature unless the ET had made an order to reflect judgment 1. The ET recorded that Mr Jones had suggested a compromise by which the ET would make limited orders for a 'trial run'. That was what the ET ordered in paragraph 2 of its order.

89. It adjourned the stage 2 equal value hearing to 10 November 2023. It was possible that by then any appeal to the EAT might have been heard (paragraph 51). I have described the exchanges of emails in October 2023 in paragraph 47, above.

*Judgment 2*

90. The ET sent a further reserved judgment to the parties on 5 July 2024. The ET did not do what the IEs had asked it to do. Instead, the ET made some findings of fact and made some decisions of principle. The ET relied extensively on the training documents; some were incorporated and the IEs were directed to view or to read others. The ET referred to or incorporated about 750 training documents, amounting to about 19,000 pages. Appendices 1-7 covered the six sample claimants. Most were covered in one appendix, but one was covered in two appendices. Appendix 8 covered all the comparators. The ET made some general findings in appendix 8, mostly based on the training documents. The ET then made findings about each comparator, but in some cases made findings about tasks done by more than one comparator by reference to an anchor comparator, and applied those findings to comparators who did the same task. The ET explained the purpose of judgment 2 in a three-paragraph introduction. It would correct several minor errors and omissions in judgment 1 (paragraphs 5-7), would 'expand' what the ET had said about the legal principles in judgment 1 (paragraphs 9-28), would describe what had happened since, and would describe its conclusions on various issues of principle 'which arose during the course of our determinations of the thousands of factual disputes'.

91. The most basic principle is that an employee's job is not what he says it is, but what the employer says it is. The employer agrees to pay the employee for the work which the employer requires the employee to do. If he does not do that work then he is not doing his job. The employee cannot by failing to do his job or by doing it badly change 'the nature of the job'. It is only if the employer agrees to the employee not doing the work in the way required by the employer that the employee can say for the purposes of an equal pay claim that his work is now 'to be done in that different manner' (paragraph 9).

92. The parties had probably focused exclusively on oral evidence about what the job holders did every day, in some cases minute by minute, and in others, second by second, because of some passages in *Shields* about the need to look beyond the contract of employment 'and to see instead what was in the contract, what the employees…actually did' (paragraph 10).

93. In paragraph 13 the ET gave five reasons why *Shields* was different, including that it was an equal value, not a like work, case; Tesco did not rely on any contractual provisions to justify paying the comparators more than the claimants; the ET had to decide what tasks Tesco required the claimants and the comparators to do; and if there had been no documentary evidence about those tasks, then only oral evidence would have been available. It added three further factors.

1. Tesco operates in a highly regulated environment (there is criminal liability for selling some foods).
2. It uses sophisticated digital stock control and related systems.
3. It has extensive and detailed training materials.

94. Those factors meant that

1. Tesco had 'a strong business need for the work of the claimants to be done in the same way throughout [Tesco's] stores'.
2. The training materials 'stating how the work was to be done were going to be determinative of what [Tesco] required the claimants to do unless there was cogent evidence …that one or more aspects of those training materials was not (or was no longer) determinative' (paragraph 14).

95. In paragraphs 16-18 the ET gave further reasons for its view that oral evidence was even less necessary or relevant. It described Tesco's digital systems and the AMCs worn by employees in the Distribution Centres. The AMCs could not be used without 'what was in effect a manual', which meant that oral descriptions were 'highly likely, if not certain, to be of far less value than the relevant parts of that manual' and any other relevant training materials. 'There was obviously no point in repeating the content of a document in evidence'. It would speak for itself, and 'unambiguously' (paragraph 16). The ET was unlikely to have to decide which buttons on the AMC should be pressed to enable the IEs to do their job. The ET could not see how the demands of a job could differ according to the order in which buttons on the AMC were pressed. The AMCs had instructions which might be determinative if the work had to be done in accordance with the instructions. They, in turn, were likely to be explained in the relevant training materials, which were even more likely to be determinative (paragraph 17).

96. A further critical factor was that the claims had been made by thousands of employees 'doing the job of customer assistant', who compared their work with what was done by thousands of warehouse operatives. 'It would be very surprising if the value of the work of those thousands of employees could be said to differ according to which employee did it (so that it was affected by how well or otherwise the employee did it)…' (paragraph 18).

97. The ET again referred to *Prest*. It was 'noteworthy' that none of the parties had referred to *Prest*. It was not referred to in the relevant section of *Harvey on Industrial Relations and Employment Law*. That did not undermine the ET's approach. It was 'an omission on the part of the editors…' (paragraph 19). That was supported by various passages in *Beal* (paragraph 20). The ET quoted paragraph 23 (see paragraph 27, above) and paragraphs 27-30 (see paragraphs 27-28, above). The parties had not seen the significance of Lavender J's reference to 'contracts, job descriptions or work manuals' as 'relevant, but not necessarily determinative'. That was also consistent with *Brunnhofer*. In paragraph 48 the Court had said that it was 'necessary to ascertain [among other things] the nature of the activities actually entrusted to each of the employees in question in the case' (the ET's emphasis) (paragraph 25).

98. The requirements of the Rules were for 'what are traditionally called pleadings. They are assertions both of fact and of relevance, which may or may not be accepted by the

tribunal after the hearing of evidence'. The same applied, with the exception of agreed matters, to what the parties produced pursuant to rule 4(1)(d) of the Rules. It was 'not the norm' for courts or tribunals to consider whether the parties had 'correctly agreed facts'. But the court or tribunal could in appropriate cases decide whether the agreed fact was relevant to any of the issues. If something is agreed but is irrelevant it is usually ignored (paragraph 28). In paragraph 47 the ET added that relevance is a question of law, not fact, and the parties could not by agreement make something relevant if it was not. Neither the ET nor the IEs were obliged to take into account 'whatever the parties agreed by way of words to be included in a "job description"'. In paragraph 48 the ET said that many of the agreed matters were 'only about what the relevant employee did', but were not about his 'job' or 'work'. In some cases the ET thought the agreed fact was unlikely to be correct, because it was illogical or highly improbable. Such agreements, the ET concluded, were not about the work of the employee, but only about the 'the way in which the employee in fact acted, which was in the circumstances a different thing'.

99. In paragraphs 35-42 the ET described what the parties had done to comply with the July orders, and their objection that the further work would take thousands of hours of chargeable time. It was the equivalent of a judge sitting full time for two years. In paragraph 42 it said that it had decided to 'do the best we could' and get on with the job. The ET had told the parties in an email dated 6 October 2023. In paragraphs 43-54, it described what it had done, and in paragraphs 56-61 why there were eight appendices.

100. The ET had analysed the documents which recorded or stated what training Tesco had given to claimants and comparators and had then begun to go through the evidence about the way in which the employee did the work. 'Only if that evidence added anything relevant to what was in the training materials did we take it into account… for the purposes of section 65(6)…' (paragraph 52). If a factual assertion about the work was not agreed and the ET considered it necessary to do so, it resolved the dispute, and explained why. The ET had not resolved disputes which it considered were 'highly unlikely' to affect the views of the IEs (paragraph 54). The ET had been forced by the interests of justice to do a job which the parties should have done, but the parties had not had an opportunity to comment.

101. In paragraph 55 the ET said that in the circumstances the parties could therefore apply for reconsideration if they thought that the ET had made a material error. The IEs could also ask for clarification.

102. In paragraphs 56-61 it explained why there were 8 appendices. When it had finished determining the relevant disputes in the case of Mrs Worthington, adapting the parties' job description to suit its approach, the ET had realised that Tesco's evidence was 'in some respects markedly inconsistent with its own training materials'. They then worked on the parties' submissions about the work of Ms Williams. The ET found that it could not accept key parts of her evidence, and so had to consider each factual dispute carefully (paragraph 57). In appendix 3 the ET had explained the two stages of its work about Ms Cannon. In appendices 4-7 the ET had taken what it thought was the best

approach to determining the disputes about the work of Ms Cannon, Ms Thompson, Ms Oz and Ms Garrod.

103. The ET had taken a different approach in appendix 8. First, the work of the comparators was 'even more extensively described in training materials than that of the sample claimants'. Second, the ET thought it could best decide what the work was by considering the work '(1) task by task, and (2) by first considering what were the things which the comparators had to do as part of their work for the purposes of section 65(6)…using as our factual source the bundles currently before us, and only then, secondly, considering the parties' factual assertions in relation to those tasks' (paragraph 60).

104. In the course of making its factual determinations, the ET had reached some general conclusions on nine issues of principle, which it described in paragraphs 62-81. I did not detect in Tesco's submissions any criticism of those general conclusions.

*The appendices*

105. In the event, it is not necessary to summarise the appendices in this judgment.

*EAT (1)*

106. The EAT recorded that Tesco now agreed with the Joint Note. The EAT held that the general grounds, which (in brief) related to the ET's general directions in law (A1G1, A1G2, A2G1, A2G2 and A2G3) were arguable and did not limit them. It also held that A1G3, A1G6 and A1G7 were arguable and did not limit them. It limited A1G5 and A2G4-11 to the specific examples pleaded in the notice of appeal. The grounds which the EAT limited, with the possible exception of A1G5, all related to factual disputes about the work done by claimants and/or their comparators.

*EAT (2)*

107. The EAT handed down its judgment on 31 July 2025. It allowed some of Tesco's grounds of appeal but not others. The EAT dismissed A2G2 (paragraphs 80-95), A1G1 (paragraphs 96-99), A1G2 (paragraphs 100-109), A2G3 (paragraphs 110-121), A1G8 (paragraphs 143-152) in part and A1G7 (in so far as it related to Mrs Worthington). It allowed A2G1 (failure to find 'obvious facts') and A2G8 in part. It also allowed A1G6, A2G4, A2G5, A2G6, A2G7, A2G9, A2G10 and A2G11. The EAT's judgment is long and thorough. I will only summarise it in what follows to the extent which is relevant to the grounds of appeal in this court.

108. The EAT had a further two-day hearing on 14 and 15 October 2025. The EAT remitted various matters under A2G1, A2G4, A2G5, A2G6, A2G7, A2G8, A2G9, A2G10 and A2G11. As a result EAT (1) is only now relevant to A2G1 limb 1, ground (c) (failing to incorporate obvious facts), and A2G11 (excluding mental arithmetic). It is also potentially relevant to grounds 3 and 4 of this appeal against EAT (2).

109. In paragraphs 16-19 of its order after the disposal hearing the EAT required the parties to do a significant amount of further work to identify and articulate the facts found by the ET in judgment 2 in a table, to agree what they could about the findings of the ET,

so that the ET could record what it thought it had decided in a final column of the table. That work will not start until this appeal has been decided.

*The grounds of appeal in this court*

*EAT (1)*

110. There is one ground of appeal against EAT (1). It is, in short, that the EAT was wrong to hold that 'where an error of law identified in the grounds of appeal' led to a wrong factual determination, each such factual determination had to be specified in the grounds of appeal.

*EAT (2)*

111. There are five grounds of appeal against EAT (2). Some have sub-grounds.

1. The EAT erred in paragraphs 80-109 of EAT (2) (and in particular in paragraph 95) in holding that the ET had correctly understood the meaning of 'work' in the 2010 Act. Tesco relies on paragraphs 2 and 14.2 of judgment 1. The ET was wrong to hold that the question was what the employer required the employee to do, rather than what they did every day, and to focus on generic rather than individual jobs, to decide that the training documents were 'key documents' and that it would only depart from them in the light of 'cogent evidence' to show that the training documents were not 'determinative'. These errors are not outweighed by the ET's occasional correct directions.
2. The EAT erred in law in holding that the ET had decided the relevant factual disputes between the parties by incorporating the training documents instead of finding facts, contrary to rule 6 of the Rules. The ET had not decided all the disputed elements of the JDs, but, instead, had decided what the work was by referring to or incorporating about 19,000 pages of generic training and similar documents. The ET had erred in law in producing an outcome which frustrated the legislative purpose because it was a not a 'reasonable basis for future stages of the process'. The EAT erred in law in not upholding this ground of appeal despite its conclusion, in paragraph 134 of its judgment in A2, that there were 'real doubts that the tribunal's findings were sufficiently clear for the parties to understand them and thus failed the intelligibility and transparency requirement…'.
3. The EAT erred in law in holding that, contrary to rule 6 of the Rules, the ET was entitled to depart from, and/or to make findings of fact which were inconsistent with, facts which the parties had agreed.
4. The EAT erred in law in holding in paragraphs 165-171 that the ET was entitled to decline in paragraphs 87-88 of judgment 1 to make findings of fact about the training which the job holders had actually received (other than in specific circumstances such as the training necessary to drive a fork-lift truck) and in holding that any failure by the ET to apply its own reasoning to such cases could be remedied by an application for reconsideration (paragraphs 170 and 171 of the judgment in A2).

5. The EAT erred in law in limiting the scope of appeal in accordance with the decision in EAT (1).

*Discussion*
*Initial points*

112. I will make four initial points about this case before I consider the grounds of appeal.

113. I have the greatest sympathy, first, for the ET's conscientious battle to understand and to marshal the virtually intractable factual arguments in this case. There was a vast number of disagreements about the jobs. Many of the disputes which the ET had originally been asked to decide seem to have been arguments about angels and pinheads. The ET was clearly worried, in judgment 1, about the reliability of some of Tesco's evidence, and accepted the claimants' submissions about Tesco's attempts to 'overegg' the work of the comparators and to minimise that of the claimants. It was concerned about slanted, subjective and evaluative elements in the evidence. I can well understand that the objective and detailed quality of the training and related documents, in the context of these highly prescribed jobs, seemed to be a fixed point in an otherwise unstable universe.

114. The second point is related to the first. The six sample claimants and eight comparators are individuals. Each does her or his job, and the ET had to 'make a determination of the facts on which the parties cannot agree which relate to the question' (that is whether the work of a claimant was of equal value to that of a comparator). There is nevertheless a tension at the heart of this litigation, as Sir Nicholas Underhill remarked in the course of argument. There are tens of thousands of other employees in the background, and, to the lay observer at least, and at least superficially, they, the claimants and their comparators, all seem to be doing generic, standardised jobs with detailed instructions and prescriptions. The appeal of relying on training and related documents to 'determine the facts' is obvious.

115. The third point is, that, as Mr Bryant pointed out in his submissions, the determinations by the ET, after a stage 2 equal value hearing, of the 'facts on which the parties cannot agree which relate to the question' are not the same sort of outcome as a decision on a particular claim, such as a claim for unfair dismissal or for whistleblowing detriment. In the case of the latter, it is relatively straightforward to decide, if an error of law has been shown, whether or not that error of law was immaterial to the outcome of the claim.

116. It is difficult, when there are hundreds of 'facts' on which the parties disagree, to say whether or not an identified error of law in the determination of one, or even of several, of those 'facts' is immaterial (or material) to the determination of each of the other facts, including to the determination or determinations in which the error can be found, or immaterial (or material) only to the determination of that fact or of those facts. A stark example, at one extreme, is the instances when the ET refused to accept facts which the parties had agreed (either before, or in the course of, the stage 2 equal value hearing). As I will explain below, that is a clear error of law. But it is obvious that it could only be material to the ET's mistaken determination of those facts, (that is, to its failure to accept facts agreed by the parties). It is not material to any of the ET's hundreds of other

determinations. None of those other determinations is in any way undermined by this error of law. This point is reinforced by the general nature of judgment 1 and by the structure of judgment 2. Judgment 2 is divided into the judgment, which carefully distinguishes between statements about the law which the ET applied, and the nine general points of principle which the ET decided, and the detailed factual determinations which it made in the eight appendices.

117. Tesco greatly stressed the ET's refusal to adopt the claimants' joint note on the law. The fourth point concerns the ET's mild dissent from that note. The fact that Tesco did not agree that note until EAT (2) is not, of course, an answer to this criticism, if the note was a complete and accurate statement of the law. I will consider this in more detail in paragraphs 122-124, below. At this stage, it is only necessary to make two further points. First, the agreed note is not a statute; nor are the three most relevant authorities. Second, the correct legal approach to the determination of facts in a stage 2 equal value hearing will very much depend on what those facts are and on, for example, the different kinds of work, workplace and/or workplaces in question. The authorities give useful guidance, but they are not an infallible or conclusive oracle. In particular the fact that none of them gives a role to training documents is irrelevant, because the issues in those cases did not concern workplaces like these, or training documents as detailed and specific as these.

*The appeals*

118. As Mr Reade explained in his submissions, the general grounds of appeal in EAT (1) and in EAT (2) overlap significantly. The decision in EAT (2) means that the complaints about the EAT's decision to limit some of the grounds of appeal to the specific examples in the notice of appeal are, in effect, residual grounds. I will nevertheless consider EAT (1) first, as it raises an issue of principle about appeals against determinations after stage 2 equal value hearings.

*EAT (1) and ground 5 EAT (2)*

119. The underlying question raised by EAT (1) and by ground 5 of EAT (2) is what the targets of the relevant grounds of appeal were.

120. There is a difference in principle between (a) general decisions of law which underpin and permeate judgment 1 and judgment 2 (such as the ET's understanding of the meaning of 'work') and which are central to its approach to the determination of the disputes, and (b) the ET's determinations of the thousands of factual disputes about the work of the claimants and of their comparators. If the ET is said to have erred in law in the determination of a particular factual dispute, and the EAT finds that it did so, the EAT must set aside that factual determination and remit it to the ET for the ET to remake the determination of that factual dispute. The existence of an error of law in the determination of one factual dispute about the work of one job holder does not, in and of itself, undermine the ET's determination of other factual disputes relating to that job holder, still less its determination of factual disputes about the work of other job holders. Errors of law in other determinations can only undermine different determinations if those different determinations, and the errors of law in those different determinations, are identified to the EAT, and the EAT then sets them aside. If the argument that challenges to determinations of factual disputes can be mounted in a general way is correct, it would create intolerable uncertainty for the parties and the ET. Tesco could,

on remission, point to other determinations which are said to be flawed and invite the ET to reconsider them, even though they had not been considered or set aside by the EAT.

121. This approach is supported by the Rules. At the stage 2 equal value hearing the ET is not deciding a discrete claim or claims. The ET is, instead, making a determination of the facts on which the parties do not agree and which relate to the question. As is clear from these appeals, there are hundreds, if not thousands of potential factual determinations in an equal value claim. Those factual determinations are logically independent of each other. Unless, therefore, they are linked by a structural error of law (such as a misunderstanding of the nature of work) a successful challenge to one factual determination has no effect on the ET's other factual determinations. That means that, if a stage 2 equal value hearing has led to such a determination, a party who wishes to challenge several factual determinations (all of which are said to be flawed by the same error of law) must separately identify each such determination in the notice of appeal. The EAT is therefore not only entitled but obliged to limit the scope of an appeal to the factual determinations which the appellant has specifically identified in its notice of appeal. I would therefore dismiss EAT (1) and ground 5 of EAT (2).

*EAT (1) and EAT (2): general grounds of appeal*

122. The most important general ground of appeal argues that the ET misdirected itself about the meaning of 'work' in sections 64 and 65 of the 2010 Act. I consider that Tesco's argument was based on a false dichotomy between what an employee does in practice and what the contract of employment requires him or her to do. That dichotomy is, I think, a product of transposing a literal reading of the decision in *Shields* into all equal value cases. The essential issue in *Shields* was whether the IT had misdirected itself by giving decisive weight to a requirement in his contract of employment which had no effect on the work which Mr Rolls did in practice. *Shields* is not authority for a wider proposition that the only thing that matters or the thing that mostly matters in an equal pay claim is what an employee does in practice, rather than what his contract of employment requires him to do. As Mr Jones pointed out, the 'work' which an employee does is a product of the wage/work bargain. In that regard the ET was right to say that an employee does not decide what his work is, and cannot change his work, unless the employer agrees to that change. I broadly agree with what Lavender J said in *Beal*, with one potential caveat. As Mr Jones pointed out in oral argument, referring to Lavender J's first point in paragraph 32 of *Beal* (see paragraph 30, above), an employer is entitled to give an employee lawful instructions, and if so, an employee must obey them. An employee can refuse to obey an unlawful instruction, but it is difficult to see how an unlawful instruction, whether obeyed or not, could ever be part of an employee's work. The word 'entitled' in that first point must therefore be understood in that way.

123. This case is significantly different from *Shields* or *Beal*, as the ET well understood. The work of the representative claimants and of their comparators is highly regulated. Some of its elements are repetitive. Thousands of people work in stores, and thousands in distribution centres. The reality is that Tesco wants those jobs to be done efficiently and in a precise way and wants them to be done in the same way throughout its organisation. They are, in that sense, generic jobs. The ET was dismayed by the way in which the parties had framed and argued their various disputes, many of which were semantic

quarrels, for example, over the extent to which one or the other was smuggling evaluative words into hundreds of pages of what were supposed to be factual job descriptions. As the ET realised after the first stage 2 equal value hearing, when it tried to decide the factual disputes in the light of the evidence it had heard, and started to look at Tesco's training materials, the training materials spell out in great and objective detail what Tesco requires the claimants and the comparators, and the thousands of others who work in similar jobs, to do. There were no equivalent documents in *Shields* or *Beal*. In this different context, the ET did not err in law in deciding that the training materials were a more reliable starting point for its factual determinations about the work than the parties' witness statements, to the extent that that evidence had survived the scrutiny of cross-examination. It also expressly acknowledged that that starting point could be displaced by what it called 'cogent evidence', so it did not make the mistake of treating the training materials as decisive. It acknowledged that it did not, by doing that, set itself or the parties an easy task, but that is not the issue.

124. I would dismiss ground 1. The EAT came to the same conclusion, for broadly similar reasons. Like the EAT, and as I have said, I do not understand why the ET thought that *Prest* is important. I have read it carefully. Its relevance to the issues in this case is not obvious to me. I will assume for the sake of argument that *Prest* is irrelevant and that the ET erred in law in thinking otherwise. That error of law is immaterial if the ET's understanding of what 'work' entails is right; and I consider that it was, for the reasons I have given, and for the reasons given by the EAT. Similar reasoning applies to other immaterial misdirections by the ET. For example, it analysed *Shields* correctly in judgment 1, and realised that it was relevant. In judgment 2, however, it appears to some extent to have distinguished *Shields* on some grounds which are unconvincing. That is an immaterial misdirection because, in my judgment, the ET nevertheless correctly understood what 'work' is in this context.

*Ground 2*

125. The EAT considered ground 2 in paragraphs 130-134, having taken the trouble to work through one example, in Mrs Worthington's case, by reference to the relevant training materials and the relevant part of the JD. The EAT accepted that this was 'a very laborious process', but concluded that 'it looks to me as if it is possible to marry the two up'. It was, by putting the documents side by side and by reading the training materials, 'possible to divine the findings' (paragraph 130). The EAT did not underestimate how hard this was. The fact that it is hard does not show that the ET erred in law. I have not been as industrious as Stacey J, and have not tried to 'divine' the ET's findings from the documents. But in this respect I would respectfully defer to her expertise as a specialist judge of the EAT.

126. Moreover, rule 12(2) of the Rules permits the ET to have more than one stage 2 equal value hearing in any case. It is clear from the procedural history up until the lodging of EAT (1) and EAT (2) and from what has happened since that neither the ET nor the parties thought or think that judgment 1 or judgment 2 was the final outcome of the stage 2 equal value hearing in this case. A premise of ground 2 is that judgment 2 is the finished article. It clearly is not, as the ET's invitation to the parties (in judgment 2) to apply for reconsideration shows. It is a staging post only. The essential question therefore is not whether the ET made factual determinations by quoting and incorporating training documents, but whether its plan that that was the basis on which

such factual determinations could and should be made (subject to 'cogent evidence' to the contrary) was open to it. It must be remembered that it had invited the parties to do work which it considered necessary and they had not, in its view, done it. In the light of this point and of the EAT's view that what the ET proposed was do-able, albeit difficult (see the previous paragraph), I would dismiss ground 2. That is all reinforced by the orders which Stacey J made after the disposal hearing, which, in effect, require the parties to do the work which she did in relation to that one example, with a view to the eventual endorsement of that work (or not) by the ET.

*Ground 3*

127. The ET is a creation of statute. Its powers to conduct a stage 2 equal value hearing are conferred by the Rules. The Rules are a code for this purpose. The ET does not have any powers, in the field occupied by the Rules, to do things which are, either, not authorised by the Rules, or which contradict the Rules (cf *Hazell v London Borough of Hammersmith v Fulham* [1992] 2 AC 1). Rule 6(1)(a) only gives the ET power to 'make a determination of facts on which the parties cannot agree which relate to the question', to enable the IEs to 'prepare a report on the basis of facts which have (at any stage of the proceedings) either been agreed between the parties or determined by' the ET. This rule treats facts which have been agreed by the parties and facts which have been determined by the ET as two mutually exclusive classes. The ET does not have any power to make a determination of facts on which the parties have agreed, or it follows, to cast aspersions (of uncertain effect) on such agreements (the subject matter of the example referred to in paragraph 5.3(c) of Tesco's skeleton argument for this appeal).

128. There might be one qualification to that. Whether a fact is 'relevant' is, as the ET recognised, a question of law, not of fact. There is an argument, therefore, that even if the parties agree that a fact is 'relevant' but the ET disagrees, it is not bound by that agreement. That is not, as far as I can see, an issue on these appeals. For what it is worth, I agree with the EAT that 'relevant' and 'relates to' mean the same thing, and both phrases refer to what is relevant to the question (as defined in rule 1(2)), not what might 'reasonably be viewed as relevant' to that question (paragraphs 149-152). Like Stacey J, I agree with the close reasoning of HHJ Auerbach on that topic (in paragraphs 13 and 15-23 of his judgment on the preliminary hearing), which she quoted in paragraph 151 of her judgment.

129. This ground of appeal is academic in so far as it relates to paragraphs 283-295 of Appendix 8 to judgment 2, because in paragraphs 98 and 99 of its first reconsideration judgment the ET accepted that it had got this wrong. I accept Tesco's argument, however, that neither the availability of, nor successful resort to, an application for reconsideration is in principle a reason for holding that the ET can re-visit agreed facts. If it has no power to revisit agreed facts, it should not do it, and the parties should not be put to the time, trouble and expense of asking the ET to reconsider a finding which it had no power to make. If the EAT thought that reconsideration was the answer, or part of the answer, it erred in law. I would allow the appeal on ground 3. I hope that, if the question arises, the parties can agree, for the purposes of any remittal to the ET, the implications of this part of my reasoning.

*Ground 4*

130. There was some to-ing and fro-ing at and after the hearing about whether Tesco did or did not maintain this ground of appeal. The upshot was that it does so. It might be thought that there is a tension between an argument that the ET erred in law by giving too much emphasis to Tesco's very detailed and intentionally prescriptive training materials and an argument that it also erred in law in not making findings about the training which the job holders actually received, as Sir Nicholas in effect suggested to Mr Reade in argument. The best source for ascertaining the training requirements for a job holder, as per *Brunnhofer*, might be thought to be those very materials.

131. The EAT's reasoning on this point was in paragraphs 164-170. It quoted from paragraphs 87 and 88 of judgment 1. It commented in paragraph 165 that '[r]ead in isolation' paragraph 87 seemed 'not only surprising, but wrong'. But the position was 'more complex' than that. For the reasons the EAT had given in relation to 'A1G2' (the ground of appeal which attacked the ET's focus in the training materials), in the particular context of these jobs, which the ET had described, 'it is not for [the EAT] to interfere with a finding of fact made by [an ET] which has spent as much time considering the evidence' as had the ET in this case. The 'finding of fact' to which the EAT referred here must be its earlier conclusion, in paragraph 107, that 'the training materials were relevant to the job'. That, said Stacey J, 'is not a finding that I am able to disturb'. Stacey J explained this further by saying that the ET had 'concluded that on the particular facts of this case and given the nature of [Tesco], the strict requirement for everyone to follow and apply all the training materials to the letter was what this employer required the sample claimants and comparators, in practice to do, in fulfilment of their duties, unless there was evidence to the contrary. It was therefore 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'.

132. In paragraph 167 the EAT held that the distinction on which Tesco relied between using training materials to make findings of fact about the work done by job holders and the separate training which each had actually received was, 'on close analysis …a distinction without a difference on the particular facts of this case'.

133. If, the EAT continued, there were points about mandatory certificates and licences which the ET had overlooked, they were the sorts of points which could be raised on reconsideration. Stacey J understood that the ET had considered this in appendix 7 of a reconsideration judgment; if not, it could be raised at the disposal hearing (paragraph 170). I should say immediately that I accept Mr Reade's submission that if the ET was required, as a matter of law, to make findings of fact about the training which the job holders had actually had, it is not an answer to this criticism to say that the ET could have dealt, after the event, with any failure in this respect by way of reconsideration.

134. Mr Reade started his oral submissions on ground 4 by referring to what the IEs had said about the relevance of any training which the job holders had actually had. He acknowledged that the ET might have been concerned about the fact that there were no training records for Mrs Worthington. That did not lead to unfairness or asymmetry because the same was true of one of the comparators. The ET had erred in law in drawing a distinction in judgment 1 between the training of those whose training led to a decision that they were competent to do the job, and other job holders. Moreover, it

had also erred in law in judgment 2 in making no findings at all about the training which any job holder had in fact received, having said that it would. If a person had not had the relevant training, then that was not a demand of his or her job, whereas if he or she had, then it was. Mr Reade submitted that the ET had to make findings about the training which the job holders had received because that was relevant to the demands of the work, as *Brunnhofer* makes clear. It was necessary to distinguish between the training documents, and any role which they might have, and the training which the job holders had actually had. The second point was that the ET had recognised that it had to make findings about any training which was, in effect, mandatory, such as training to drive a fork-lift truck. Yet the ET had, in the event, made no such findings.

135. Mr Jones accepted that the ET had not made the findings about training which Tesco wanted it to make, but submitted that the ET had not erred in law by not doing that. He did not accept that, on the ET's approach to the training documents, it was necessary for it to find that a job holder whose work was described in a training document had in fact had the specific training which the document described. The training documents described the content of the job. He also accepted that the training documents might describe particular skills or knowledge which the job holder had to have; that is, the demands of the job. But it was not necessary, he submitted, for a party to show that a job holder had had the training in order to enable the ET to decide what skills or knowledge the work required. Nor was there any difference in principle between the work generally, and work for which specific training was mandatory (like driving a fork-lift truck). He did not therefore accept that the ET had been right to say that it had to make findings, exceptionally, about the training which fork-lift truck drivers had or had not had. If the parties agreed that a comparator could not drive a fork-lift truck without having had the mandatory training, that was all the IEs needed to know. They did not also need to know if or when the comparator had had that training. Findings to that effect by the ET 'would add nothing'.

136. He confirmed during the course of Mr Reade's reply that the claimants' position was that whether the job holders had had training was irrelevant; what mattered was the training which Tesco expected job holders to have done. He was not in a position to say whether or not the job holders had in fact 'in relation to hundreds of instances of training' had that training. The claimants did accept that it was the training which they were expected to have and that it could be taken into account, and that it was taken into account in assessing what the job holders did, and that it was part of what they were expected to do.

137. The issue on ground 4 is whether, as a matter of law, it was necessary, on the facts of this case, for the ET to distinguish between the content of the training documents, and the training which the claimants and the comparators had actually received. The ET decided that the best way of making determinations about the facts relating to their work was to base such determinations on the training documents, unless there was cogent evidence to displace the training documents. The training which the claimants and the comparators actually received was irrelevant at this stage of the analysis. The ET's view was that it could be assumed, in this regulated and prescribed context, unless there was evidence to contradict this assumption, that the training documents described the work. At this stage, therefore, it was not necessary for the ET to make findings about the training which an employee had actually had.

138. The authorities show that training and qualifications are relevant to the demands of the work. The next issue, therefore, is whether, if training is required for doing the work, a finding about the exact training which has in fact been received by a job holder is, as a matter of law, an essential component of the findings which the ET had to make about the demands of the work in this factual context.

139. The point about mandatory training, for example for fork-lift truck drivers, or for those who operate manual handling equipment like low-level order pickers is that a job holder will not be allowed to do that part of his work unless he has had that training. It can therefore be assumed, without a specific finding to that effect, that those employees have had that training. Similar reasoning applies to the other sorts of training evidenced in the training materials. Even if that training is not mandatory in the same way, because it is not a legal requirement for the job, it is, nevertheless, a fair factual assumption in this particular context that the job holders will also have had that training. I therefore agree with Mr Jones that express findings about exactly what training the job holders had actually had, and when, were not an essential component of the findings which it was necessary for the ET to make in this case.

*Conclusion*

140. For these reasons I would allow the appeal against EAT (2) on ground 3. I would dismiss it on the other grounds of appeal. I would also dismiss the appeal against EAT (1).

**Sir Nicholas Underhill:**

INTRODUCTION

141. I agree with Elisabeth Laing LJ's proposed disposal of these appeals, essentially for the reasons given by her. There are nevertheless a few points which I wish to add about the procedural history of this case and on the substantive grounds.

THE PROCEDURE

142. The extraordinary procedural history in the ET which leads to these appeals is set out clearly and in detail at paras. 1-67 of Stacey J's first judgment in the EAT and is economically summarised by Elisabeth Laing LJ at paras. 43-49 above (taken also with her summaries of the ET's decisions). I gratefully adopt that summary (and also some of her abbreviations). I will, however, briefly outline the key elements which are relevant to what I wish to say:

(1) For the purpose of the stage 2 hearing the parties proceeded, in what has become the conventional way in mass claims of the present kind, by preparing draft "equal value job descriptions" ("EVJDs") for each of the claimants and comparators – the former to be drafted by the claimants' solicitors and the latter by Tesco's – to which the other party responded, with the points of difference being presented in a series of "Records of Dispute" ("RoDs") in schedule form. The EVJDs were drafted in minute detail and were in consequence extraordinarily long; and the points of difference likewise condescended to minute particulars and were both numerous and very lengthy. That was in turn reflected in the length of the RoDs. For

example, as Stacey J records at para. 13 of her first judgment, the EVJDs for each of the Leigh Day claimants were between 122 and 175 pages long, and for each of the "ambient" comparators the EVJDs between 207 and 342 pages long; for each of the four "fresh comparators", there were 3,265 paragraphs containing one or more disputed points.[1] The RoD in the case of one of the claimants, Mrs Worthington, contained 1,427 points of dispute.

(2) It was anticipated that the ET would resolve the disputed points by recording its decision in the final column on the RoD for each claimant/comparator, which would enable a definitive EVJD to be produced: that is the conventional course and gives IEs a clear basis on which to prepare their reports (as to this, see paras. 45-46 of Stacey J's judgment). The hearing lasted 36 days and the ET heard very extensive evidence, again of an extraordinarily detailed character: for example, the witness statement of one of the Tesco managers, who gave evidence about the job of just one of the comparators, ran to some 187 pages.

(3) As recounted by Elisabeth Laing LJ at para. 45 above (and more fully by Stacey J at paras. 16-33), the ET in its first judgment ("ET1") was highly critical of the approach that the parties had taken. Its main concern was that they had eschewed any reliance on Tesco's training manuals and similar contemporary documentation which set out the requirements of the jobs being done by the claimants and comparators and had instead relied almost wholly on descriptions of the work actually done by each individual. It held that that approach reflected a misunderstanding of what the law required, but it also made the point that EVJDs were inevitably drafted for forensic purposes and thus contested: it was in particular very critical of the EVJDs and witness statements prepared by Tesco (as to this, see paras. 65-66 of Elisabeth Laing LJ's judgment). It held that the position in which it found itself "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". It declined to make any final determination on the basis of the materials thus far presented and required the parties to prepare fresh EVJDs, based on the training documentation. It also indicated that it would be presenting its eventual findings in narrative form rather than by reference to the RoD schedule.

(4) Subsequently, the ET rowed back on its requirement that the parties present new EVJDs and RoDs. Instead it in due course produced its second judgment ("ET2") on the basis of what it held to be the correct approach in law (succinctly summarised in the email quoted by Elisabeth Laing LJ at para. 47 above) and based primarily on the training materials. That judgment did purport to resolve the disputed issues but it did so in the form of eight elaborate and very lengthy appendices addressing the facts as regards the Claimants and their comparators.

(5) As explained at paras. 53-54 above, the ET has since produced 14 appendices containing "statements of work" for each claimant and issued two further reconsideration judgments.

143. As regards the appeal to the EAT, Elisabeth Laing LJ sets out the basics at para. 1 above and gives further details at paras. 106-109. It is important to emphasise that Stacey J

[1] I need not for present purposes explain the difference between ambient and fresh comparators.

was commendably anxious not only to resolve the actual issues before her, as she did in her main judgment dated 31 July 2025, but also to ensure that a course was set for the future conduct of the litigation in as efficient and expeditious manner as its troubled history permitted. That was what she endeavoured to do in the judgment and order which were the product of the two-day disposal hearing in October 2025, and, as Elisabeth Laing LJ holds in relation to ground 2 in EAT (2), I believe that that is what she has indeed done. I should say that I have found both her judgments invaluable when seeking to get to grips with the tangled procedural history and the issues to which it has given rise.

144. Although Stacey J found in favour of the Claimants on the most important of Tesco's grounds of appeal, she was critical of many aspects both of the ET's procedural case management and of its reasoning in its judgments. I am bound to say that those criticisms seem to me to have force. But it is important to appreciate the scale of the difficulties which the ET faced as a result of the extraordinary number of supposed disputes which it was being asked to resolve, and to recognise the conscientiousness with which it sought to resolve those difficulties. I respectfully endorse the observations made by Elisabeth Laing LJ at paras. 113-114 of her judgment, but I would like to amplify them a little.

145. As Mr Jones acknowledged in a helpful exchange with the Court, there has apparently developed a culture in mass equal pay litigation in which both parties feel obliged to draft EVJDs and adduce evidence, and to criticise the EVJDs and evidence advanced by the other party, in extraordinarily granular detail. Claimants' lawyers believe that they need to emphasise every feature, however small, of the work of the sample claimants which might possibly contribute to the IEs, and ultimately the ET, assessing it as more demanding; and employers' lawyers take the same approach in presenting the work of the comparators. Likewise both feel the need to challenge every detail of the other's EVJDs and evidence, including the language in which it is expressed. The perception is that even the most trivial detail, or adjective or turn of phrase, could in theory influence the assessment. The stakes are very high since the assessment of these sample cases may determine the eventual outcome of the litigation: as Mr Jones put it, points mean prizes, and the prizes in these cases potentially amount to billions of pounds.

146. This hyper-granular approach may be understandable, but it is wholly contrary to the over-riding objective, and it must be resisted. The problem is not simply that the task of the IEs and the tribunal is rendered unmanageable by a tidal wave of trivial factual and semantic disputes. Equally seriously, the drafting of the EVJDs and the evidence will inevitably be tendentious to a degree which makes objective evaluation much more difficult. Part of the answer is a better appreciation of what, as a matter of law, the evaluation of the work of the claimants and their comparators involves: I address this below in connection with ground 1 of EAT (2). But it is also important that tribunals should seek so far as possible to rely on the kind of objective contemporary evidence represented in the present case by the training documentation.

147. I would add, finally, that it is important that tribunals do not lose sight of the need for the eventual product of the stage 2 process to be in a form which IEs will find most helpful for the purpose of the preparation of their report.

## THE ISSUES

148. The issues which we have to decide are surprisingly few, given the history summarised above. As I have said, I agree with Elisabeth Laing LJ's decision on each of them, but I wish to say something of my own on three of the grounds of appeal.

### The Scope of the Appeal

149. This is the subject of EAT (1), though also raised as a ground in EAT (2). It was referred to in the argument before us as the "scope" issue and is addressed by Elisabeth Laing LJ at paras. 120-121 above. It arises from the fact that in its original grounds of appeal to the EAT Tesco took the course of pleading the alleged errors of law in the ET's second judgment in general terms and without attempting to identify comprehensively which of its particular factual conclusions were said to be vitiated by those errors.

150. At para. 21 of his judgment of 5 February 2025 giving permission to appeal Judge Tayler considered the legitimacy of that approach as follows:

> "Section 3.8 of the EAT Practice Direction requires generally that grounds of appeal should be 'short and focussed' and 'clearly assert errors of law'. Sections 3.9 and 3.10 require that grounds of appeal which assert 'perversity' or 'procedural impropriety' must provide 'full details'. Section 3.10 includes, under the heading 'procedural impropriety', 'any material procedural irregularity'. That requires particularity of each dispute rather than the provision of 'examples'. In any event, I consider where it is asserted that an error of law resulted in erroneous factual determinations it is important that [particulars] 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."

He applied that conclusion in giving permission in relation to all Tesco's grounds of appeal except those relating to the ET's approach to the nature of work and the related question of the relevance of training documents, specifying that permission was "limited to the specific examples [Tesco] gave in the ground of appeal, absent any successful application to amend". Tesco did in fact seek permission to amend the grounds of appeal in EAT (2) by adding a Schedule listing further "erroneous factual determinations, facts, examples and matters on which the Respondent relies", but permission was refused by Judge Tayler on 28 March 2025 ([2025] EAT 43) and that refusal was not challenged on the appeal to this Court.

151. Although I agree with Elisabeth Laing LJ that in the particular context of an appeal against a stage 2 determination it is necessary for the appellant to identify each particular factual determination which it is seeking to challenge (save where it is alleged that the entire exercise is vitiated), I was initially concerned whether in the circumstances of the present case it was necessary for Tesco to do so in its grounds of appeal and whether it was sufficient for it to raise the general criticism and provide particularisation at a later stage. But that concern is answered by the fact that although Judge Tayler required the impugned determinations to be pleaded as part of the grounds of appeal he gave Tesco the opportunity to apply for permission to amend in order to

do so. That is a case management decision of a kind which cannot reasonably be impugned.

152. That conclusion is not inconsistent with the EAT's general insistence on conciseness in the drafting of grounds of appeal. As sections 3.9 and 3.10 of the Practice Direction, to which Judge Tayler refers, make clear, it is well recognised that there are some grounds which of their nature may require detailed particularisation.

The Approach to Identifying "Work"

153. This issue is raised by ground 1 in EAT (2). As Elisabeth Laing LJ says, it is the only issue of some general importance raised by the appeal. The essential question is whether, when considering the "work" of the claimants and their comparators for the purpose of sections 64 and 65 of the 2010 Act, the ET was wrong to focus on the supposed generic requirements of their jobs, as shown by the training materials, rather than on what they did as individuals "on a day-to-day basis".

154. I respectfully agree with Elisabeth Laing LJ (see para. 122 above) that Tesco's case under this ground is based on a false dichotomy. Like her, I would accept Mr Jones's submission that the work with which the 2010 Act is concerned is essentially the product of the wage/work bargain – that is, the work which the worker is paid to do, or in other words the requirements of the job. But there will not normally be any divergence between what the worker does (even if not always "day-to-day") and what they are required to do. The authorities which emphasise the importance of considering what is done by the worker on a day-to-day basis were concerned with particular situations in which the contract of employment, or other documentation setting out the requirements of the job, was said not to reflect, or fully reflect, the reality of the work required, with the effect of potentially over-valuing or undervaluing it: that might advantage either the claimant or the respondent, depending on whether the work in question was the claimant's or the comparator's. Thus *Shields* is authority for the proposition that a contractual obligation which is merely notional, in the sense that it never arises in practice, should be disregarded for the purpose of identifying the work that has to be evaluated: that appears most clearly from the judgment of Bridge LJ at p. 1427F. Conversely, the passage from *Beal* quoted by Elisabeth Laing LJ at para. 30 above addresses the situation where a worker is said to have performed activities going beyond the requirements of the contract. But those particular qualifications, or refinements, do not undermine the general proposition that the "work" with which the statute is concerned is the work required by the job for which the worker is paid.[2] Although the ET said some confusing things, it is tolerably clear that that is the approach which it, correctly, took.

155. In the present case, as Elisabeth Laing LJ points out at para. 123, we are concerned with jobs whose requirements are prescribed in great detail by the employer in its training manuals and similar documentation. There was accordingly everything to be said for taking those documents as the starting-point of the exercise of determining the disputed

[2] There are other issues about what may constitute "work" in this context which do not directly bear on the issue before us. The discussion at paras. 27-31 in *Beal*, in which Lavender J had the assistance of submissions from Mr Jones and from Mr Thomas Linden QC (as he then was), both of whom are exceptionally experienced in this field, is likely to be useful in other cases.

facts. They would not of course tell the whole story. Evidence was still necessary as to the context into which particular tasks fit, including how frequently they fell to be performed; and subjective evidence as to their demands might also be of some value. But the ET was fully entitled to treat the documents in question as the most objective evidence of the actual content of the work. Of course it had to be alive to the possibility that the documents might in some respects either prescribe obligations that do not in practice ever arise (as in *Shields*) or fail to reflect significant aspects of the work as done (as discussed in *Beal*), but it is clear that it had that well in mind.

156. An important benefit of the approach taken by the ET is that it conforms to the reality of the way in which remuneration is determined in a business like Tesco's and is thus more likely to produce a result which can be applied to the claimants as a group and to produce a workable outcome if the claims succeed. It is inevitable in such a business that terms will be set (whether unilaterally or as the result of collective bargaining where there is a recognised trade union) by reference to broad generically-defined jobs which are regarded as sufficiently similar to justify the same rate of pay: it is wholly impracticable to conduct nice evaluations of the work of every individual employee. Yet the mechanism of the equal pay legislation does not reflect this reality, since it appears to require the ET to proceed exclusively by comparing the work of each individual claimant and each individual comparator, with at least the theoretical potential to produce different outcomes in essentially similar cases depending on the idiosyncrasies of the evidence in each case.[3] This is the "tension" to which Elisabeth Laing LJ refers at para. 114 above. It is not resolved by the practice of determining sample claims: indeed it may even be exacerbated by it to the extent that unrepresentative claimants or comparators are chosen for tactical reasons. Potential problems of this kind are likely to be avoided or mitigated by an approach which allows IEs and the ET to proceed on the basis of findings based on the requirements of the generic job (provided always that those requirements do indeed correspond to the reality of what the claimant and/or comparator may be required to do).

157. I should add in this connection that I do not find the ET's reference to the decision of the EAT – in fact, of myself as President – in *Prest v Mouchel* quite as hard to understand as Stacey J and Elisabeth Laing LJ have done (see para. 124 above). The case concerned whether a claimant in mass equal pay litigation could be given leave to amend to substitute one comparator for another who was doing the identical job. In that connection I made some observations about the artificiality of the requirement to name an individual comparator in a case where the real complaint was about the rates of pay for generic jobs. In particular, I said that in such a case it was a matter of indifference which individual comparator was named – or, as Mr Jones neatly paraphrased it, that the comparators were fungible. I accept that that is tangential to the issues discussed above, and it does not justify the prominence that the ET gives it; but it is not wholly irrelevant.

Going behind the Parties' Agreement on the Facts

---

[3] This approach was described by Professor Sandra Fredman in an article in the Industrial Law Journal as "myopic" (see vol. 37, at p. 208), and the problems caused by it in other contexts have been referred to by the EAT on more than one occasion – see *Bury Metropolitan Borough Council v Hamilton* [2011] UKEAT 0413/09, [2011] ICR 655, at para. 15 and the decision in *Newcastle upon Tyne Hospitals NHS Foundation Trust v Armstrong* [2010] UKEAT 0069/09, [2010] ICR 674 there referred to, at n. 5.

158. This issue arises in relation to ground 3 of EAT (2), which challenges the ET's decision at a few points to make factual determinations contrary to what the parties had agreed. I can see no answer to Elisabeth Laing LJ's analysis at para. 127 above, and I accordingly believe that this ground must be allowed. It is possible to imagine circumstances where it appears to the ET that the parties' agreement on a point of fact relating to "the question" is mistaken and may create real difficulties for the IE or itself in making its eventual decision at stage 3 (or even possibly as regards a material factor defence). In such a case it would be entirely legitimate for it to point out the difficulty, and (though the point was not argued before us) if one or both parties acknowledge the problem I can see no reason in principle why they should not be allowed to depart from their previous agreement.

159. As regards para. 128 of Elisabeth Laing LJ's judgment, I am inclined to think that although the ET cannot go behind the parties' agreement about a particular fact it is not bound by any agreement by them that it is "relevant"; but, as she says, the point does not require to be decided. I agree with what she says in the remainder of the paragraph.

**Lord Justice Nugee:**

160. I agree with both judgments, and agree that the appeals should be disposed of as proposed by Elisabeth Laing LJ for the reasons that both she and Sir Nicholas Underhill give.