

ENGLAND AND WALES / JUDGMENT

Next Retail Ltd v M Thandi & Ors

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Next Retail Ltd v M Thandi & Ors

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EMPLOYMENT APPEAL TRIBUNAL

Case No: EA-2024-001280-KSD

Rolls Building

Fetter Lane, London, EC4A 1NL

Date: 07 September 2026

Before : THE HONOURABLE MR JUSTICE BOURNE

Between : 1) Next Retail Limited
2) Next Distribution Limited
-and-
Miss M Thandi and others

Appellants
Respondent
Patrick Green KC, Kathleen Donnelly KC, Chloe Campbell, Thomas Mallon
(instructed by
Eversheds Sutherland International LLP) for the Appellant
Andrew Short KC, Gus Baker (instructed by Leigh Day) for the Respondent
Hearing dates: 16 – 17 June 2026

JUDGMENT

Summary Sex Discrimination & Equal Pay In respect of the employer's appeal against the Employment Tribunal's finding that it had not made out the material factor defence under section 69(1)(b) of the Equality Act 2010 with regard to the difference between the claimants' and the comparators' basic pay (and some other benefits):

- (1) The Employment Tribunal did not err in finding that the claimants had shown particular disadvantage because of the statistical differences between the claimant and comparator groups together with its other findings of fact.
- (2) However, it erred in finding that the employer did not pursue a legitimate aim when setting different rates of pay. The aim, taken as a whole, of paying higher rates to warehouse staff included recruitment and retention factors which did not apply to the © EAT 2026 Page 1 [2026] EAT 130 Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors claimant group. It was not necessary for the employer to justify not increasing the claimants' pay to the same level.
- (3) Its alternative finding that the employer's reliance on a material factor was not a proportionate means of achieving a legitimate aim therefore could not stand, and in any event it erred in the assessment of proportionality when analysing the market forces factor, and in focusing on the reasons for the claimants' lower pay and the affordability of increasing it rather than on the reasons for the comparators' higher pay.
- (4) There was no error of law in the Employment Tribunal's analysis of some of the other pay benefits. In respect of the claimants' cross-appeal, the Employment Tribunal did not err when finding that there was no direct discrimination contrary to section 69(1)(a) of the 2010 Act. In particular:
 - (1) It is not the case that direct discrimination must always be found where an employer relies on a material factor of market forces and does not adduce evidence to prove that those market forces do not disadvantage those of either sex.
 - (2) There was a sufficient evidential basis for the findings as to the employer's reasons for its decisions despite the employer not calling evidence from a Board member or adducing documentary evidence stating the reasons. THE HONOURABLE MR JUSTICE BOURNE:

Introduction

1. This judgment deals with an appeal and a cross-appeal against a decision of the Leeds Employment Tribunal (Employment Judge Jones, Mr Roberts and Ms Fleming, "the ET") which was sent to the parties on 22 August 2024. 2. I shall refer to the parties respectively as "the claimants" and "Next", the latter term referring interchangeably to the two respondents to the ET proceedings.

3. The claims were brought by 3,540 retail sales consultants working in Next's shops. In 2018 they brought claims under the equal pay provisions of the Equality Act 2010 ("the 2010 Act"), complaining that they were paid less than the comparators, all of whom are © EAT 2026 Page 2 [2026] EAT 130 Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors operatives in Next's warehouses where goods are processed and sent to stores for sale or to customers who have made purchases online.
4. By an earlier decision dated 2 June 2023 the same ET had ruled that the work of three lead claimants was of equal value to that of four named comparators, and that decision is binding on all parties.
5. Next relied on what is known as the "material factor" defence. The ET hearing of that issue, relating to a period from 2012 to 2023, occupied 15 days in May and July 2024. The ET considered whether the defence was established in relation to 20 distinct contractual pay terms or categories. The most important is basic pay. The others are various entitlements including certain bonuses and premiums.
6. The ET decided that Next's defence failed in respect of basic pay and six other terms or categories. In the case of four terms or categories it decided that there was no difference between the pay of the claimants and the comparators. It decided that the defence succeeded in respect of the other nine terms or categories. Statutory framework
7. Chapter 3 of the 2010 Act is entitled "Equality of Terms".
8. Section 64 applies the relevant provisions where "a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does".
9. The word "equal" in that context is defined by section 65. Under section 65(1) it covers three types of case, namely cases where A's work is "like B's work" or is "rated as equivalent to B's work" or, materially for the present case, it is "of equal value to B's work". In that regard the section provides: "(6) A's work is of equal value to B's work if it is—
 - (a) neither like B's work nor rated as equivalent to B's work, but
 - (b) nevertheless equal to B's work in terms of the demands made on A by reference to factors such as effort, skill and decision-making."
10. The mechanism adopted by the legislation in section 66 is, in effect, to insert a "sex equality clause" into "the terms of A's work", so that: "(2) Where this section applies by virtue of section 64(1), a sex equality clause is a provision that has the following effect—
 - (a) if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;
 - (b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term."

11. So, if A is paid less than B for work of equal value, the sex equality clause operates to give A a legal entitlement to be paid the same as B. That entitlement is enforceable by the Employment Tribunal under section 120 of the 2010 Act.
12. However, the entitlement is subject to section 69 which is the key provision for this appeal. It provides so far as material: “(1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which—
 - (a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and
 - (b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.
- (2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's. ...
- (6) For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's.”
13. The “responsible person” by section 80 includes A's employer. Successful reliance by the employer on section 69 is what is referred to as the “material factor” defence. The issues before the ET
14. Having established that the claimants were paid less than the comparators and that the work was of equal value, the ET was charged with applying section 69 as a matter of fact and law. That meant answering the following questions:
 - (1) Was the difference in pay because of a material factor?
 - (2) If so, did Next's reliance on the material factor involve treating the claimants less favourably because of their sex than it treated the comparators?
 - (3) If not, could the claimants show that, as a result of the factor, they and persons of their sex were put at a particular disadvantage when compared with comparators of the opposite sex?
 - (4) If so, was reliance on the factor a proportionate means of achieving a legitimate aim? © EAT 2026 Page 4 [2026] EAT 130 Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors
15. Next relied on some or all of six material factors to explain the difference in respect of each term:
 - (1) Market forces and market price, which the ET found to mean, in essence, “paying the going rate”.
 - (2) Recruiting and retaining sufficient warehouse labour.

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- (3) Maintaining 24/7 work in the warehouse, including night shifts, overtime, Sundays and public holidays.
 - (4) Incentivising high productivity within the warehouse, generally and during peak periods of demand.
 - (5) Incentivising consistent and high attendance in the warehouse, in particular during peak periods of demand.
 - (6) Business viability, resilience and performance of the NEXT Group and subsidiaries.
 16. In order to apply section 69 to the factors, the ET adopted a (more or less) agreed list of issues which addressed the questions listed at paragraph 14 above in more detail.
 17. First the ET considered whether reliance on the factors involved treating the claimants less favourably because of their sex than the comparators. That question has been paraphrased as meaning whether there was direct discrimination on grounds of sex by Next, e.g. by knowing that the retail work was perceived as “women’s work” and the warehouse work was “men’s work” and being content to take advantage of that perception and of its impact on the pay differential.
 18. The ET then considered in the alternative whether reliance on the factors was shown by statistical evidence to put the claimants at a particular disadvantage compared with the comparators. This is sometimes referred to as Enderby discrimination. I shall return to the Enderby case below.
 19. The claimants also had originally mounted a case based on showing that indirect discrimination arose from provisions, criteria or practices (“PCPs”) associated with each type of work which put women at a disadvantage, but that case was not pursued.
 20. If any factor was found to put the lead claimants at a particular disadvantage, Next then contended that each factor was justified as a proportionate means of achieving a legitimate aim, those aims being:
 - (1) Viability, resilience and successful business performance.
 - (2) Maintaining 24/7 warehouse work. © EAT 2026 Page 5 [2026] EAT 130 Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors
 - (3) Incentivising warehouse productivity.
 - (4) Incentivising consistent and high warehouse attendance.
 21. In the list of issues, this yielded the following “key factual issues”: “8.9 Was the market price for the lead claimant and comparator roles different and specifically was it higher for comparator roles? 8.10 Was it necessary to pay the market price for comparator roles in order to recruit and retain sufficient warehouse labour? 8.11 Was it legitimate and proportionate not to pay sales consultants a rate which was above that required to
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sufficiently staff retail stores? 8.12 Does the rationale for paying premium pay to warehouse operatives who work night shifts, Sundays and public holidays apply in the same way to sales consultants? 8.13 Were the bonuses paid to the comparators linked to the productivity of the recipient? 8.14 Are the matters alleged by the claimants as to the market rates being affected by gender breakdowns of the relevant job groups and being 'sex tainted' and allegedly 'inherently discriminatory' 'differentials' relevant considerations as a matter of law and if so how do they affect the legitimacy or proportionality of any of the matters relied on by the respondents in respect of objective justification?" The background facts

22. Having heard very extensive evidence, the ET in its clear and thoughtful judgment identified relevant facts including the following.
23. In 2012/13 Next operated 540 shops in the UK, selling clothing and in some stores home and garden items. By 2023 the number of shops had fallen to 466.
24. The number of sales consultants was 32,351 in 2013 (working 23 million hours annually) and had fallen to 22,873 by 2023 (working 16.5 million hours).
25. Retail sales were £2,191 million in 2013, falling to £1,865 million in 2023. Retail profits grew from £331 million to £402 million between 2013 and 2016, then fell to £164 million by 2020. In 2021 there was a loss of £206 million. Retail profits were £107 million in 2022 and £241 million in 2023. © EAT 2026 Page 6 [2026] EAT 130 Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors
26. Next operates nine main warehouses, all of which are in Yorkshire. The four comparators worked at the Elmsall complex or DVB. These locations variously serve the retail parts of the business and mail order and online orders.
27. The number of warehouse operatives was 3,550 in 2013 (working 6.5 million hours), rising to 6,478 today (working just over 10 million hours in 2023). Agency workers accounted for different percentages of the work at different times ranging from 16% in 2013 to 8% in 2023.
28. Between 2013 and 2023, online sales rose from £1,193 million to £3,007 million and online profits rose from £302 million to £467 million.
29. Each year, proposals for retail pay rates were included in a retail budget which would be established by the Head of HR for Retail and the senior management team in retail. This would be submitted to the Finance Department which would prepare budgets for the year, including remuneration proposals, for approval and sign off by the Board.
30. Pay rates were also discussed by an "influential" body known as the People Focus Meeting which included Next's CEO Lord Wolfson, the Director of HR, the Retail Sales Director and/or Head of HR for Retail and the Retail Finance Manager. It was attended by Next's principal witness on the retail side, its Group HR Director Lionel Mason.

31. In the years 2012-2015 a pay review took place each February. Rates would be introduced in Autumn to take account of changes in the National Minimum Wage ("NMW") which took effect in October. In 2015 and 2016 the review date was moved to October and April respectively to align with the changing dates when increases to NMW took effect.
32. For warehouse operatives, there was a formal recognition agreement with USDAW as the sole trade union for employees below supervisor level at the second respondent's distribution centres. It provided for Next to negotiate with USDAW in respect of basic pay, weekly hours of work and holidays at specifically convened meetings.
33. The Director of Warehousing set the operating budget and pay levels, and set the optimum target pay rates for any annual increase in conjunction with the Head of HR and the Head of Finance. Agreement with the CEO and the Group Operations Director was then obtained with respect to the budget and target level of remuneration increase before the meetings with the USDAW negotiating committee commenced. These would typically take between 2 and 4 days, before a Joint Statement was agreed and voted upon by the union membership.
34. Sales consultants were primarily recruited via Next's careers website, with others coming from other websites where Next posts vacancies or from direct contact with a store, referrals or social media. Next calculates the number of staff required by an analysis of the demand for work. Agency staff were not required. Business needs were met by permanent and fixed time staff who would cover additional shifts through a © EAT 2026 Page 7 [2026] EAT 130 Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors facility known as Shift Market Place which operated until February 2022 and which allowed staff to manage their own shifts on a week by week basis.
35. For the relevant period up to 2015, there were between 28 and 30 applications per vacancy for retail store workers. In 2019 the average number of applicants per vacancy was 33. There were wide variations between stores, ranging from two in St Peter Port, Guernsey to 258 in Oxford Street. After the Covid lockdown there was a significant increase in the number of applications per vacancy.
36. During the relevant period Next used recruitment platforms and spent much greater sums to recruit a sufficient number of warehouse staff. It also used agency workers to fill work demands, these accounting for approximately 10% of warehouse operative hours.
37. At the Elmsall and DVB sites, warehouse staff hours increased from 2.9 million in 2012 to 5.6 million in 2023, and the numbers of agency staff rose from 741,909 to 836,792 in 2023. Significant numbers of workers were recruited from EU countries, particularly Poland, though these had a high attrition rate.
38. Financial incentives were introduced to aid recruitment of warehouse operatives.

39. The difference between the hourly rate of basic pay of sales consultants and warehouse operatives was £0.92 in 2012. The differential was reduced by the introduction of the national living wage in 2017. By 2023 it had reduced to £0.38.
40. There was a difference between the gender profile of the retail and warehouse workforces.
41. Over the relevant period 77.5% of retail consultants were female and 22.5% were male, with small variations between years and particular locations.
42. Over the relevant period an average of 47.22% of warehouse operatives were female and 52.78% male. At the Elmsall Complex an average of 48.25% of operatives were female and 51.75% male. At DVB, an average of 47.13% of employees were female and 52.87% were male. For most periods at Elmsall and DVB the gender split has been within 5%, for many years within 3% and in some years within 1%.
43. There was also a difference between the profile of part-time workers in the two workforces. On average 96% of retail staff were contracted to work fewer than 30 hours, and the average number of weekly hours per retail worker was 14 over the relevant period.
44. Conversely, over the relevant period 53.65% of warehouse operatives worked part-time and 46.35% full-time. From 2016, more warehouse operatives had part-time roles than full-time roles (ranging from 51.92% to 61.31% throughout the period 2016 to 2023). Within those, 36.8% of warehouse operatives were working fewer than 30 hours and 26% fewer than 20 hours. © EAT 2026 Page 8 [2026] EAT 130 Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors
45. The ET identified a document produced by the second respondent in 2018 which included a breakdown of part-time and full-time work by gender for one day. According to that document, 47% of the female workforce worked part-time compared with 21% of the male workforce. The ET's findings on the issues
46. The ET's judgment addressed basic pay first and then returned to the other contested terms, and it is convenient to take the same approach here.
47. Having found that the basic pay of the comparators was at all times higher than the basic pay of the lead claimants, the ET found that the factors explaining the difference were factors 1 and 2 and the more generic factor 6. It was clear that pay generally was set by reference to the prevailing rates in the respective markets for sales consultants on the one hand and warehouse operatives on the other, which were very different marketplaces that had attracted different rates of pay for various reasons. In particular (paragraph 201), it was clear that "there were specific pressures in the market for warehouse operatives, particularly in the area of recruitment, which did not arise in the marketplace for sales consultants".

48. The ET found that factor 6 must be applied carefully and not too liberally, but that (paragraph 202): "... the setting of basic pay during the relevant period was intended by the respondents to maintain both sectors of the business. This included managing a reduction in high street sales because of changes in shopping habits in the retail marketplace with a corresponding increase in warehouse provision".
49. The claimants had argued that the pay of retail consultants was "suppressed" for historically discriminatory reasons, including the appeal of store work to female workers and the preponderance among them of part-time workers who earned a secondary income to support the main household breadwinner, and that Next had not shown that it had not been influenced in any way by these factors. However, the ET found (paragraph 208) that the difference in pay did not involve less favourable treatment because of the sex of the lead claimants: "The evidence of Mr Mason, Mrs MacIntyre and Mr Kelly was compelling. It was all about cost. Gender did not enter into the equation. Historic reasons for imbalances in pay for work which is equally valued fall into indirect discrimination considerations. There was no conscious or subconscious influence of gender which affected the basic rates of pay. The drive and imperative was to reduce cost and enhance profit. That would have happened regardless of the gender split in either market, even had there been more men than women sales consultants or women than men warehouse operatives. The renegotiation of the warehouse contracts in 2017, such that new starters had less beneficial rates © EAT 2026 Page 9 [2026] EAT 130 Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors than existing staff, was reflective of that state of mind. In that market, men were in the majority."
50. The ET therefore ruled that there was no "direct discrimination", i.e. section 69(1)(a) was satisfied. The ET turned to the "indirect discrimination" question under section 69(1)(b).
51. To establish that as a result of the material factors, they and other women doing equal work were put at a particular disadvantage, the claimants relied on statistics. In *Enderby v Frenchay Health Authority* [1994] ICR 112 ("Enderby"), the European Court of Justice ruled at paragraph 19 that: "Where significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men, article 119 of the EEC Treaty requires the employer to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex." 52. The ECJ explained the point in its judgment: "16. If the pay of speech therapists is significantly lower than that of pharmacists and if the former are almost exclusively women while the latter are predominantly men, there is a prima facie case of sex discrimination, at least where the two jobs in question are of equal value and the statistics describing that situation are valid."
17. It is for the national court to assess whether it may take into account those statistics, that is to say, whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant."

53. The ET referred to *Home Office v Bailey* [2005] ICR 1057 (“Bailey”) for the proposition that “significant” is not a high hurdle, though it recognised that the question of whether the statistics were sufficient was “not entirely straightforward” in this case. It noted that pay levels had been set by benchmarking against a market which did not differentiate between warehouses which were predominantly male and those in e-commerce fulfilment centres where, as here, there was a smaller difference or no difference. It held that the statistics, together with the benchmarking point and the gender balance of part-time workers of whom there were many among the sales consultants (and the discussion in *Dobson v North Cumbria Integrated Care NHS Foundation Trust* [2021] ICR 1699 (“Dobson”) about the convenience of part-time work for many female workers) satisfied section 69(2). There was therefore a finding of “particular disadvantage” and Next was required to justify its reliance on the material factors as a proportionate means of pursuing a legitimate aim. © EAT 2026 Page 10 [2026] EAT Judgment approved by the Court for handing down *Next Retail Ltd v M Thandi & Ors*
54. The relevant aim was the first in the list at paragraph 20 above: “Viability, resilience and successful business performance”.
55. Having found (at paragraph 245) that factors 1, 2 and 6 were an “appropriate means” of achieving the aim, the ET asked itself whether paying the unequal basic pay was “reasonably necessary”, balancing the business need against the discriminatory effect. It found that paying the market rate to warehouse workers was necessary and that Next “could not reduce this without a risk of jeopardising the required service from warehouses” (paragraph 247).
56. However, it went on: “248. Mr Short says that does not justify paying the lower rates to the sales consultants. The impact upon the retail staff was that they were not receiving a similar level of remuneration in their basic pay for doing equal work. Although the hourly difference was less than a pound and reducing over the relevant period, the marginal purchasing power of such sums should not be underestimated for pay rates at this level.”
57. The ET noted Next’s response, that it was working within a budget to maintain efficiency and the fact that the NMW paid to the retail workers was itself above what the market rate would otherwise have been, and also that retail workers benefited from certain non-wage amenities such as higher staff discount, a wardrobe allowance and the convenience of Shift Marketplace to which I have referred, which were not available to warehouse staff.
58. It did not give weight to Next’s further point that any claimant could choose to transfer to one of its warehouses and that there had been very low take-up of a redeployment opportunity to do precisely that, though it noted certain “positive aspects” of the retail work.

59. The parties' positions were crystallised at paragraph 260 of the ET's judgment: "Paying a higher rate of basic pay to sales consultants which was not necessary from a commercial perspective would come at a cost to the business and impact on the profitability of the first respondent and the NEXT Group. The claimants say cost cannot be advanced as an excusable defence to discrimination and if market forces prevailed in such cases it would defeat the purpose of the legislation."
60. The ET directed itself to case law on the question of whether and when reliance on market forces is a proportionate means of achieving a legitimate aim, notably *Heskett v Secretary of State for Justice* [2021] ICR 110 ("Heskett"), to which I return below, and extracted the principle that adopting a measure "solely to avoid increased costs" will not, without more, amount to achieving a legitimate aim. The ET used the phrase "costs alone" to describe that impermissible approach, and to its converse as "costs © EAT 2026 Page 11 [2026] EAT Judgment approved by the Court for handing down *Next Retail Ltd v M Thandi & Ors* plus", though it acknowledged that the Court of Appeal in *Heskett* cautioned against an inappropriately mechanistic approach which could arise from using those terms.
61. In the key passage for present purposes, the ET concluded: "269. There is no real scope for any costs plus ingredient, when the whole drive was about cost saving, a consistent theme of the relevant witnesses. We recognise in the broadest sense that business decisions in this industry were not just about making profits. High street shopping has been on the wane leading to the closure of stores and the loss of retail jobs over a sustained period. The claimants pointed out in closing submissions that there was no evidence the reduction in stores was the reason retail wages were held at or near national living wage rates. But the first respondent has survived where many other retailers have gone to the wall. This was achieved by careful management, particularly in the field of budget planning. Difficult decisions made by businesses are not made with full foreknowledge of the headwinds and so what may appear to be ungenerous wage settlements yesterday may transpire to have avoided business failure today. The fact that the first respondent has made sustainable profits throughout the period, save for the year after lockdown, and could absorb the cost of the same basic pay for work of equal value is a judgment the Tribunal can pass with the merciless wisdom of hindsight. All that said, we are satisfied that with respect to basic pay the legitimate aim of viability, resilience and successful business performance [aim 1], fairly characterised, falls on the wrong side of the demarcation line, of costs only, with no element of costs plus.
270. Even were we wrong, and this were a permissible aim, the payment of different sums of basic pay, for the factors, was not reasonably necessary to meet it. The business need was not sufficiently great as to overcome the discriminatory effect of lower basic pay, having regard to all the considerations we have explained above, including the financial headroom and having given all due allowance for the non-wage amenities in retail. Mr Short is correct to say that for market forces to be a trump card in this way would defeat the objective of the legislation; lower pay in particular sectors due to indirectly discriminatory practices could

then be lawfully sustained in perpetuity. There must usually be a more compelling business reason for such arrangements to be justifiable, such as with the incentivised productivity bonuses we consider below.”

62. For those reasons the section 69 defence was not established in respect of basic pay.
63. The ET then turned to the other terms. The section 69 defence succeeded in respect of some of them. In brief:
- (1) Payment of an additional 10% for about 11 weeks to workers who returned to the warehouse early from furlough after Covid (term 1) was justified, where there was no equivalent need to incentivise a return by retail workers who returned two months later in sufficient numbers.
 - © EAT 2026 Page 12 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors
 - (2) Payment of a “peak premium bonus” to warehouse workers for 3 months (also term 1) was justified when this was to fend off a crisis arising from Amazon offering significantly higher pay to new warehouse operatives in the same area, and there was “no comparative crisis” arising from competition for retail workers.
 - (3) Payment of an attendance bonus of £1,000 to warehouse workers at Elmsall for 100% attendance in a three month period in 2021 (term 3) was justified. This again was paid because of “aggressive competition” from Amazon in that location and “no comparable problem arose in the retail sector”.
 - (4) Under terms 6, 7 and 8, “sophisticated” bonus schemes for warehouse workers, which mostly rewarded enhanced productivity, were justified. They achieved a type of “cost incentivisation” which could not be applied to the different duties of the retail workers and there was no duty on Next to devise some other scheme to equalise their pay.
 - (5) It was justified to pay public holiday premium i.e. enhanced rates for working on public holidays to warehouse operatives with a start date before 1 February 2017 (terms 11 and 12), given the difficulty of finding sufficient warehouse staff to work on those days and the lack of comparable difficulty in attracting sales assistants on those days.
 - (6) It was justified to pay an Additional Hours Premium (term 13B) to warehouse staff at Elmsall only, around Christmas 2021 (the busiest time of the year), following operational disruption caused by Covid. There was no business need for such payment at DVB. Nor was there such a need in respect of the retail staff.
64. The ET found no material difference between the terms of the claimants and the comparators, and therefore no need to decide the section 69 issues, in the case of holiday bonus (term 9), bank holiday bonus (term 10), holiday entitlement (term 14) and holiday pay (term 15).

65. The section 69 defence was not established in relation to the following (in addition to basic pay):
- (1) Unconsolidated Awards (term 2) were lump sum payments to warehouse staff negotiated with USDAW to conclude deals. These enabled Next to preserve lower rates of basic pay. Although the collective bargaining context did not apply to retail staff, the aim was found to be “essentially ... cost saving” and therefore not legitimate. Had it been legitimate, factors 1, 2 and 6 would have been a proportionate means of achieving it. © EAT 2026 Page 13 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors
 - (2) Historically, warehouse and retail staff had received a Sunday Pay Premium at varying rates (term 4). It was removed from warehouse workers for new starters from 2017 onwards but those entitled to it under their existing contracts continued to receive it. It was removed from retail workers for new starters from October 2008 onwards, and from all retail workers from June 2015. This reflected a move in the market away from enhanced Sunday pay. Following that market trend was a legitimate aim. However, the evidence did not support a difficulty in attracting warehouse staff to work on Sundays, so the business need was not sufficient to outweigh the discriminatory effect of the differential pay.
 - (3) Both warehouse and retail staff could earn a Night Time Premium (term 5) for working at night. This was key to warehouse operation and the premium was paid for work from 10pm to 6am. The shops were not open at night but during sale periods they opened from 5am. From November 2012, hours worked between midnight and 5am, rather than 6am, were classified as night time, and that difference was just to save costs which was not a legitimate aim. The differences also were not proportionate, not being justified merely by differences in operational requirements.
 - (4) Overtime Premium (term 13A), where applicable, was more generous for warehouse staff. Although there was no business need for overtime in retail, proportionality required that the terms should be equivalent “to cover the eventuality that overtime might, exceptionally, be required in retail”.
 - (5) Paid rest breaks (term 16) were provided for warehouse staff. For retail staff they had been removed following the introduction of NMW. Although unpaid rest breaks might be an “industry standard” in retail, the payments were removed for an aim which was “solely about cost” and therefore was not legitimate. Nor would the removal have been found proportionate as it was not reasonably necessary.
 - (6) Long Service Awards (term 17) were more generous for warehouse staff than for retail staff. The differences arose from negotiation with USDAW on an overall pay package for the warehouse staff. Although they arose from a legitimate aim of meeting business need, there was no good reason not to equalise the payments and so the difference was not justified. The grounds of appeal Next’s appeal © EAT 2026 Page 14 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors

66. As was explained in the skeleton argument of Patrick Green KC (with Kathleen Donnelly KC, leading Chloë Campbell and Thomas Mallon)¹, the “essence” of the appeal is: “... that the Employment Tribunal wrongly found that NEXT should have paid Retail Sales Consultants the same Basic Pay as Warehouse Operatives, to whom a completely different rationale for paying more applied, effectively because NEXT could afford to do so”.
67. There are, nevertheless, 16 discrete grounds of appeal. That reflects the searching and detailed analysis to which Next’s counsel have subjected the ET’s decision, though it must be said that it has not made this Tribunal’s task easier.
68. Grounds 1-15 are grouped under the headings of Legitimate Aim (grounds 1-7), Particular Disadvantage (grounds 8-10) and Proportionality (grounds 11-15).
69. Those grounds contend that there were errors of law under those headings in relation to basic pay, and that some of the same or similar errors were made in respect of some of the other pay benefits in respect of which the claim succeeded.
70. By ground 16, Next further contends that the ET made specific errors of approach in respect of pay terms 4, 5, 16 and 17.
71. The pleading of the 16 grounds occupies 23 pages. Rather than lengthening this judgment by reproducing them, I shall attempt to identify the core of each ground in the discussion below. The claimants’ cross-appeal
72. The cross-appeal is directed only against the ET’s finding under section 69(1)(a) that the difference in pay was because of a material factor reliance on which “does not involve treating A less favourably because of A’s sex than the responsible person treats B”.
73. By ground 1, Andrew Short KC (leading Gus Baker) contends that the ET erred by limiting itself to a consideration of the internal conscious or subconscious attitudes, intentions or mental processes of Next’s decision makers and should instead have found that the market forces relied on were themselves affected by stereotypes which were discriminatory on grounds of sex.
74. By ground 2, they contend that the ET’s finding that there was no conscious or subconscious influence of gender on the setting of basic pay was perverse because there 1 In this judgment I shall attribute submissions to the counsel who made them orally, though in fact many of my references are to written submissions of which all counsel on each side were joint authors. © EAT 2026 Page 15 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors had been no evidence from the relevant decision-makers and the relevant documents were not produced. Appeal grounds 8-10: Particular disadvantage
75. I take these grounds first because, under section 69, the issue of particular disadvantage is a hurdle which a claimant must clear before the tribunal is required to consider whether the material factor is a proportionate means of achieving a legitimate aim. Next’s submissions

76. By ground 8, Next contends that the ET “was not entitled to ‘make good the claimants’ case under section 69(2)’ as it purported to do”. That is on the premise that the ET had rejected the claimants’ expert evidence on this issue and had “implicitly held” that the claimants could not establish particular disadvantage by statistics alone.
77. By ground 9, Next essentially contends that the ET erred by confusing the warehouse market against which it had benchmarked pay (e-commerce fulfilment centres in Yorkshire) with the national warehouse market within ONS Code 9252, characterising this as “a warehouse market with a largely male workforce” (judgment paragraph 239).
78. By ground 10, Next contends that the ET erred in its consideration of what has been called the “childcare disparity” and its application of Dobson, making a speculative finding that the childcare disparity was the reason why many workers had chosen to work as sales consultants and failing to assess the causal relationship between the disparity and the pay differential.
79. Mr Green KC submitted that caution was necessary when the ET decided whether the statistics were sufficient to establish particular disadvantage. At paragraph 234 its observation that the question was “not entirely straightforward” was correct, but Mr Green criticised the next part of that paragraph: “However, the fact the respondents repeatedly set their remuneration levels by benchmarking against the market is significant. That market did not differentiate between those warehouses which were predominantly made up of men, and those in ecommerce fulfilment centres in which the differential was more finely balanced or there was no gender difference at all. Taking the market as a whole, there is a significant imbalance favouring men. The ONS data for 2012 to 2021 shows over 80% of men worked in elementary storage occupations. The setting of pay by that means therefore reflected a predominantly male based labour market.”
80. Mr Green submitted that the finding that Next benchmarked pay against the market and did not distinguish between warehouses with different gender profiles was conjecture, and that the ONS warehouse code was wrongly treated as relevant when it included © EAT 2026 Page 16 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors data about many types of workers – such as fish lumpers and cold storage workers – whose work was completely different from that of Next’s warehouse employees. The latter point gives rise to ground 9.
81. Mr Green then objected to paragraph 239 where the ET concluded: “We are satisfied the statistics, the fixing of pay by benchmarking in a warehouse market with a largely male workforce, the gender make-up of those who did part-time work, as above, together with the considerations in Dobson make good the claimants’ case under section 69(2). The influences Mr Green has drawn attention to, whilst material, are not of comparable weight or significance. But they remain relevant to issues of proportionality to which we return.”

82. Here, he said, the ET had disregarded factors to which he had drawn its attention, such as the fact that there was a higher proportion of female managers in Next's warehouses and, regardless of the fact that the claimants had the burden of proving particular disadvantage, had impermissibly "made good" their case for them. That was ground 8.
83. Furthermore, Mr Green submitted that the ET wrongly applied the case of Dobson, giving rise to ground 10. Instead of merely taking notice of the fact that part-time work is often more convenient for female workers because of childcare responsibilities ("the childcare disparity"), it made an incorrect and unfounded assumption that female workers would have a strong preference for a working week of 14 hours (the average in the shops) over a working week of 20 hours (the ET found that from 2016, 36.8% of warehouse workers worked less than 30 hours and 26% less than 20 hours). The over- ready inference of particular disadvantage from the childcare disparity was something against which this Tribunal warned in Dobson itself at paragraphs 50 and 51 (to which I return below). The claimants' submissions
84. In response, Mr Short reminded me that particular disadvantage can be found in a case of the Enderby type where there is "a sufficiently substantial disparity in the gender breakdown of the two groups": *Newcastle upon Tyne NHS Hospitals Trust v Armstrong* [2010] ICR 674 ("Armstrong no.2") per Underhill P at paragraph 20. Such a disparity, he submitted, existed in this case. The key point is the difference between the make-up of the two groups, whereas Next in this case has chosen to focus on the proportions of men and women in the comparator (warehouse) group only. He cited the example of *Grundy v British Airways plc* [2008] IRLR 74 where a disparate impact was found even though both claimant and comparator groups were predominantly female (66% in the advantaged group, 95% in the disadvantaged group).
85. Mr Short also reminded me of *Bailey*, where the Court of Appeal rejected the idea of a "high threshold" for a disparity which would establish a *prima facie* case of indirect © EAT 2026 Page 17 [2026] EAT Judgment approved by the Court for handing down *Next Retail Ltd v M Thandi & Ors* discrimination, bearing in mind that it would remain open to the employer to justify the disparate impact on the basis of a material factor.
86. In summary, Mr Short submitted that the ET directed itself correctly as to the law and arrived at conclusions of fact which were, at the very least, open to it on the evidence. As to the facts, he pointed out that the evidence showed Next regularly benchmarking the pay of warehouse workers by comparison not only with similar types of warehouse involving "picking" e-commerce items, but also with more traditional types of warehouse, especially those of large supermarket chains. Mr Short accepted that the ONS categories to which the ET referred included some activities which were different from those in Next's warehouses, but noted that those categories had nevertheless been relied on for comparison purposes by Dominic Miles, an expert witness called by Next in the ET to give an opinion on market rates for the two roles, who in cross-examination had said: "... when we looked at the description under the ONS SOC codes for what those were, they appeared to align reasonably well with

job adverts, descriptions of the role. So to that extent we thought they were reasonably representative.”

87. In respect of the childcare disparity and Dobson, Mr Short submitted that the ET did not make the error of just assuming that gender disparity translated into particular disadvantage. Instead, it examined the relevant working hours and commented on the evidence before drawing rational conclusions.
88. Accordingly he submitted that the ET’s factual conclusion was not perverse and contained no error of law. Discussion
89. Bailey was a claim under Equal Pay Act 1970 (“the 1970 Act”) by administrative and executive staff in the Prison Service. They claimed equal pay with comparators in other grades such as prison officers and governors. The claimants’ employee group contained roughly equal numbers of men and women whilst the comparator group were predominantly men. Statistics showed that only 9% of men, compared with 51% of women, were in the disadvantaged group. The ET held that the statistics made out a prima facie case of indirect discrimination, placing a burden of justification on the employer. The EAT allowed an appeal, holding that where there was no barrier to women becoming members of the advantaged group, there was no prima facie discrimination unless the disadvantaged group was predominantly female. The Court of Appeal allowed the claimants’ appeal, holding that the statistical approach was valid and that it was not necessary to show a barrier to entering the advantaged group (a “requirement or condition”).
90. The Court of Appeal held that the Enderby statistical approach applied equally to cases where indirect discrimination was said to arise from a requirement or condition and © EAT 2026 Page 18 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors those where there is simply a disparity in pay between two groups of workers. At paragraph 30 Peter Gibson LJ said: “I can see no justification for the imposition of a high threshold for satisfying the test of prima facie discrimination. Where, as here, there is one group of employees of an employer which contains a significant number, even though not a clear majority, of female workers whose work is evaluated as equal to that of another group of employees of the employer who are predominantly male and who receive greater pay, it would be very surprising if an employment tribunal were to be precluded by the presence in the disadvantaged group of a significant number of men from holding that that disparity in favour of men required justification by the employer. In the present case it may well be that, as the Home Office suggests, there is a genuine material factor which is not the difference of sex and which justifies that disparity. Whether there is such factor is for further determination.”
91. At paragraph 39 Waller LJ added: “... the above leads me to the view that section 1(3) cannot demand a high threshold for the establishment of a disparity which prima facie is due to sex. Thus where a difference in pay is established, and statistics seem to indicate a possibility of a disproportionate impact on women when looking at both the advantaged and

disadvantaged groups as a whole, those statistics must provide sufficient evidence to get those carrying the burden over the hurdle of placing the onus on the employer to show that there were material factors which were not the difference in sex. For the reasons given by Peter Gibson LJ in my view the employment tribunal was entitled to reach the conclusion it did.”

92. Mr Green urged me to be cautious in applying Bailey, which of course predated the 2010 Act. It seems that an appeal to the House of Lords in Bailey would have considered the question of the evidential threshold for showing prima facie discrimination but the case settled. See the discussion in Villalba v Merrill Lynch & Co Inc [2007] ICR 469 at paragraph 123 per Elias P.
93. Be that as it may, grounds 8-10 do not put forward any submission that Bailey was wrongly decided.
94. Meanwhile, I do not agree with Mr Green that the ET in paragraph 239 made an implied finding that the statistics in the present case were not sufficient to show particular disadvantage. The ET said that it was persuaded by those statistics plus other factors, and it is a moot point whether it would have been so persuaded in the absence of the other factors.
95. I therefore reject ground 8. The phrase “make good” does not mean that the ET embarked on some impermissible exercise of supplementing an inadequate case advanced by the claimants. © EAT 2026 Page 19 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors
96. Instead, I agree with Mr Short that it was open to the ET to be persuaded by the statistics. The statistical case was not of the overwhelming kind, as the ET acknowledged at paragraph 234. But there was a clear difference, of the kind identified in Armstrong no.2, between the gender profiles of the advantaged and disadvantaged groups.
97. In the event, the ET did not rely on the statistics alone, as I have said. Its conclusion was bolstered by the findings relating to benchmarking and those relating to part-time work.
98. So far as benchmarking is concerned, I am not persuaded that the ET’s reference to ONS data bears the weight which Mr Green sought to place on it. The ET did not suggest that the work in Next’s warehouses is closely comparable to the work in the national warehousing sector considered as a whole. Instead, it found that Next’s pay rates were influenced, to an unspecified extent, by benchmarking against a market in which no clear distinction was drawn between e-commerce fulfilment centres and other warehouses of a male-dominated kind. The fact that the latter sector contains fish lumpers and others whose work is very different from that of Next’s employees is not the point. The point is that the benchmarking exercise “reflected a predominantly male based labour market” (judgment paragraph 234).

99. The finding that that benchmarking took place was a finding of fact. Although ground 9 alleges “irrationality”, it does not allege that the finding of fact was perverse. And, as Mr Short said, the evidence clearly did show that the benchmarking exercise did not confine itself to e-commerce fulfilment centres.
100. I therefore reject ground 9.
101. Turning to ground 10, Dobson was a claim for indirect discrimination on grounds of sex. The claimant was subjected to a PCP requiring her to work flexible hours including at weekends. The ET found that although this disadvantaged her, there was no evidence of disadvantage to women as a group. Allowing her appeal, the EAT ruled that (1) the ET had wrongly identified the relevant pool of workers among whom to make the comparison and (2) it should have taken judicial notice of the fact that women bore a greater burden of childcare responsibilities than men and that this could limit their ability to work certain hours. On that basis the case was remitted for rehearing. However, Choudhury P added: “... taking judicial notice of the child care disparity does not necessarily mean that the group disadvantage is made out. Whether or not it is will depend on the interrelationship between the general position that is the result of the child care disparity and the particular PCP in question. The child care disparity means that women are more likely to find it difficult to work certain hours (e g nights) or changeable hours (where the changes are dictated by the employer) than men because of child care responsibilities. If the PCP requires working to such arrangements, then the group disadvantage would be highly likely to follow from © EAT 2026 Page 20 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors taking judicial notice of the child care disparity. However, if the PCP as to flexible working requires working any period of eight hours within a fixed window or involves some other arrangement that might not necessarily be more difficult for those with child care responsibilities, then it would be open to the tribunal to conclude that the group disadvantage is not made out. Judicial notice enables a fact to be established without specific evidence. However, that fact might not be sufficient on its own to establish the cause of action being relied upon. As is so often the case, the specific circumstances will have to be considered and one needs to guard against moving from an ‘indisputable fact’ (of which judicial notice may be taken) to a ‘disputable gloss’ (which may not be apt for judicial notice) Taking judicial notice of the child care disparity does not lead inexorably to the conclusion that any form of flexible working puts or would put women at a particular disadvantage.”
102. It does not seem to me that the ET simply jumped from a finding that many retail workers worked part-time to a finding that paying lower rates to that group placed women at a particular disadvantage. Instead, when deciding whether the statistical difference between the two groups demonstrated particular disadvantage, it found (1) that the breakdown of hours (in judgment paragraph 235) justified an inference that women have been attracted to the working hours available in the shops and (2) that this, to an unspecified extent, supported the finding of particular disadvantage based on the statistics.

103. The question is whether that finding involved a misdirection or error of law. In my judgment it did not. The ET had regard to the “specific circumstances” as required by Dobson, making a comparison between the working hours of the two groups, having regard to the gender profile of the two groups and also considering other potentially relevant factors (in paragraph 236). Whilst it was not bound to draw an inference that childcare responsibilities will have been a relevant factor, in my judgment it was justified in doing so.
104. It seems to me that requiring much more by way of evidential foundation for the inference would blunt the force of the ruling in Dobson, and requiring much more by way of granular explanation of the inference would risk overstepping the role of this Tribunal in reviewing ETs’ factual findings.
105. I therefore also reject ground 10, and do not overturn the finding of particular disadvantage. Appeal Grounds 1-7: Legitimate Aim Next’s submissions
106. The ET found that the aims pursued by Next in paying the claimants less than the comparators were not legitimate aims because they amounted to the saving or © EAT 2026 Page 21 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors avoidance of costs alone. Mr Green submitted that in this regard it failed to apply the correct approach which was identified by the Court of Appeal in Heskett. This is the foundation for grounds 1-3 in particular.
107. Heskett was a claim for unlawful indirect discrimination on grounds of age contrary to section 19 of the 2010 Act, arising from a pay progression scheme which was more generous to employees aged over 50 than to younger employees. The claimant’s case was (inter alia) that the employer’s policy had been determined by cost and therefore did not pursue a legitimate aim. The claim was dismissed, as were appeals to the EAT and the Court of Appeal. The Court of Appeal ruled that the ET had been entitled to treat the employer’s need to observe constraints imposed by government funding cuts as a legitimate aim, and to find that a temporary reduction in the rate of pay progression for younger employees for that purpose was justified.
108. Mr Green relied in particular on the following passage from the judgment of Underhill LJ, with whom McCombe and Macur LJ agreed: “81 I turn to the fundamental question, which is what is meant by the phrase ‘solely [to avoid] increased costs., and more particularly what is the effect of the word ‘solely’. On this, it seems to me that we are bound by the guidance given by Rimer LJ at paras 66–67 of his judgment in Woodcock [2012] ICR 1126; but even if we were not, I would respectfully agree with it. He says in para 66 that the CJEU’s language ‘cannot mean more than that the saving or avoidance ‘amount to the achieving of a (my emphasis) of costs will not, without more “legitimate aim”’. In other words, to take the paradigm case of discriminatory pay, an employer cannot ‘justify the discriminatory payment to A of less than B simply because it would cost more to pay A the same as B.’ 82 That might seem too trite to need saying – ‘unsurprising’, as Rimer LJ puts it – but it is not difficult to understand why the CJEU thought it important to spell it out. It is the same

obvious but important point that the Supreme Court makes at several points in O'Brien [2013] ICR 499: see para 67 of its judgment ('very different from deliberately discriminating against part-time workers in order to save money'), para 69 ('a legitimate aim other than the simple saving of cost') and the example given at the end of para 74 ('it would not be legitimate to pay women judges less than men judges on the basis that this would cost less'). 83 It follows that the essential question is whether the employer's aim in acting in the way that gives rise to the discriminatory impact can fairly be described as no more than a wish to save costs. If so, the defence of justification cannot succeed. But, if not, it will be necessary to arrive at a fair characterisation of the employer's aim taken as a whole and decide whether that aim is legitimate. The distinction involved may sometimes be subtle (to adopt the Supreme Court's language in O'Brien) but it is real. The nature of the distinction can be illustrated by reference to some of the cases. © EAT 2026 Page 22 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors 84 I start with Woodcock [2012] ICR 1126 itself. In one sense the Trust's aim could indeed be said to be to avoid the cost of having to pay the claimant the enhanced benefits to which he would become entitled if he were still employed when he reached 50. But that was not the whole story because it omitted the fact that those were benefits which he had no legitimate entitlement to expect. It was for that reason that Rimer LJ held at para 67 that it would not be correct to characterise the trust's aim as being 'no more than treatment aimed at saving or avoiding costs'. 85 In Bainbridge [2008] ICR 249 likewise it might be said that the Council's aim in not making the same temporary pay protection payments to employees in the predominantly female jobs as were being made to employees in the predominantly male jobs was to save the cost of having to do so. But, again, that was not the whole story, because the reason why payments were being made to (for short) the men was to provide a temporary cushion against a loss of earnings which the women were not suffering. It is legitimate for a public authority (or indeed any employer) to seek not to make payments to employees to whom the rationale for those payments does not apply (and for whom it would indeed, in the language of Woodcock (underlining indicates emphasis by counsel), be a windfall)."

109. In short, Mr Green submitted that the ET in describing Next's aim(s) as "costs only" failed to make a fair characterisation of them taken as a whole and, more fundamentally, disregarded the last words in the passage quoted above and failed to recognise that higher pay for warehouse staff was based on a rationale which did not apply to the retail staff. The fact that Next at all times had regard to cost – effectively paying staff in both groups as little as possible – accordingly was not relevant. Nor was the fact, found by the ET, that Next could have afforded to pay the retail staff the same basic pay as the warehouse staff.
110. In support of that submission Mr Green cited *Rainey v Greater Glasgow Health Board* [1987] 1 AC 224. That case arose when the Government decided to set up a prosthetic service within the Scottish NHS to replace an arrangement where prosthetic services were provided by private contractors. Those contractors, who were all male, were allowed to continue at their existing pay rates. New starters including the female claimant were given the lower rate

determined by the Whitley Council scales which applied to all NHS employees. Her claim under the 1970 Act, seeking an entitlement to the same pay as her male comparators earned for identical work, was unsuccessful. It was found that the reason for the difference was the fact that the new service could not have been established within a reasonable time if the existing prosthetists had not been offered remuneration at their existing rate. The House of Lords rejected an argument that, whilst that was a good and objectively justified ground for offering the comparator that rate, it was not a good and objectively justified ground for paying the claimant a lesser rate. Lord Keith (with whom the other law lords agreed) found that there were © EAT 2026 Page 23 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors “sound objectively justified administrative reasons” for placing prosthetists on the Whitley Council scale and it would have been anomalous and inconvenient for them to have different pay arrangements from the rest of the NHS. Lord Keith continued at 239H: “It was not a question of the appellant being paid less than the norm but of [the comparator] being paid more. He was paid more because of the necessity to attract him and other privately employed prosthetists into forming the nucleus of the new service.”

111. Although the ET’s judgment referred to Rainey, Mr Green submitted that it was wrong to distinguish it from the present case because both are cases of a comparator being paid more, rather than a claimant being paid “less than the norm”, for reasons which applied to the comparator but not to the claimant. Mr Green further pointed out factual aspects of Rainey which made the employer’s case weaker than Next’s case, such as the fact of the two workers being engaged on identical work and the much greater size of the pay differential.
112. To similar effect, Mr Green referred me to *West Midlands Police v Blackburn* [2008] ICR 505, a judgment of the EAT which was upheld by the Court of Appeal [2009] IRLR
135. A claim under the 1970 Act was brought by female police officers, challenging special payments to other officers for working night shifts. The claimants were not rostered for these shifts because of their childcare responsibilities and there was therefore a disparate impact on them. The ET had ruled that although the shift system corresponded to a real need, the same objective could have been achieved without discrimination by paying them as if they had worked the full shift pattern and that the difference in pay could not be objectively justified. The employer’s appeal against that ruling succeeded. Mr Green referred to the following passage from the judgment of Elias P: “40. ... The purpose of the scheme adopted by the chief constable is to single out and reward those working nights; we find it difficult to see how that objective is achieved if those who do not work nights are also paid the same amount. Those doing the work are not then being marked out for special treatment, which is the very purpose of the payment.

41. More fundamentally, we consider that the approach of the tribunal misunderstands the principle underlying indirect discrimination. The premise is that the predominantly male group is paid more than the predominantly female group for some reason other than sex. The question is whether it can be justified to make that payment.
 42. It can be justified if it is in pursuance of an objective which is legitimate and where the means chosen are proportionate to that objective. To say that the employer can afford to eliminate the difference in pay simply fails to engage with the defence at all. It is no answer to a defence of © EAT 2026 Page 24 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors justification for a difference in pay to say that there is no need for the difference in the first place. If the employer had made these payments to the claimants, as the tribunal suggested that they should, then the issue of justification would not have arisen at all because there would have been no pay differential to justify.
 43. The error is akin to that pointed out by the Employment Appeal Tribunal in Redcar and Cleveland Borough Council v Bainbridge (Note)
- [2008] ICR 249, para 62. The assumption appears to be that the employers should do their utmost to ensure that women and men on equal work are paid the same. That is not what the law requires. As the appeal tribunal observed: 'The right is to equal pay unless there is a genuine material factor explaining the difference; it is not a right to the same pay even where the genuine material factor continues to explain and justify the difference.'
44. The tribunal's conclusion is that the employer cannot justify because he can secure equalisation by deeming the women to have done what they have, in fact, not done. This is in truth a conclusion of staggering consequence. Taken logically, it would mean that in all cases of indirect discrimination the employer would have to satisfy the tribunal that, notwithstanding that he has a legitimate objective in differentiating between the pay given to the predominantly male and female groups, he is acting reasonably in not paying the women on the basis that they can be taken to have done the same work as the men.
 45. As Ms Gill accepted, if the argument is right then logically there would be no reason in principle why a woman who is working part-time, and whose employer has specifically accommodated her to be able to do that, could not say that she should be paid the same as the full-timer, the employer paying her for the hours she was not able to work because of her domestic responsibilities. Tribunals would be making judgments as to whether an employer could really be expected to bear the cost of indirectly discriminatory treatment. That is not their function. Paradoxically, it would also mean that the more severe the indirect discrimination, the greater the cost to the employer of eradicating it, and the greater the likelihood of his being able in those circumstances to satisfy the tribunal that the cost would be disproportionate.

46. Nothing in the 1970 Act requires an employer to deem that women have done what they have not done. The payment of money to compensate for the economic disadvantages suffered by those who have child care responsibilities is not what the Act requires. Nor is the assessment of the employer's ability to pay sums of this kind a task which Parliament could conceivably have expected tribunals to do.
47. We agree with Ms Slade that the tribunal was wrong to say that © EAT 2026 Page 25 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors paying the claimants as if they had worked was simply a logical consequence of excusing the women from doing the work in the first place, and indeed Ms Gill did not seek to support the tribunal's observations on this point. It is highly desirable that employers adopt flexible work practices which will enable women to work part-time or at hours compatible with their child care, even if that involves incurring some cost in achieving that. But it does not follow at all that they should then pay the women on the basis of the work they would have done if they had not had the child care responsibilities."
113. Mr Green compared the observations at paragraph 47 of that judgment with the present case, where the retail workers benefited from the "shift marketplace" or "contract marketplace" systems which proved convenient to many, including those with childcare responsibilities.
114. Mr Green also referred to the judgment of Redcar and Cleveland Borough Council v Bainbridge and others [2008] ICR 249. This was a claim under the 1970 Act in which the EAT held on appeal that the employer had objectively justified instituting a productivity bonus scheme for one category of workers but not for another. Giving the judgment of the EAT, Elias P said: "57. We accept that in assessing the issue of proportionality it may be necessary to focus on the disadvantaged as well as the advantaged group and to ask why the disadvantaged group were not given the same benefits, or opportunities to benefit, as the advantaged group. The council has implicitly accepted as much by conceding that their GMF defence will not succeed if a similar productivity scheme could have been implemented for these claimants. Here, however, there was an obvious and vital difference between the situation of the claimants and their chosen comparators. The refuse collectors were employed in work which enabled a productivity scheme to be adopted and which, as a consequence, brought savings and greater efficiency to the work being carried out for the council. That opportunity did not exist in relation to these particular claimants. The comparators were fortuitously in posts where they could largely pay for their own bonuses by productivity improvements. These particular claimants could not. Mr Allen submitted that a merit based scheme might have resulted in greater efficiencies. However, the tribunal recognised in terms that they could not be formulated in a way which would save money or be self- financing for these particular groups.
58. It cannot in our judgment be the case that in order to seek to bring the pay back into equilibrium the employer should be under some obligation to adopt some other technique, be it a bonus scheme or some other way, of seeking to pay the claimants more. That is

simply adding costs to the employer without any corresponding benefits. That argument would always be available where a GMF had been established; if correct it would fundamentally undermine the scope of the GMF defence.” © EAT 2026 Page 26 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors

115. Another authority prayed in aid by Mr Green was *HM Land Registry v Benson* [2012] ICR 627. There the employer introduced a voluntary early retirement scheme to save money. Because the scheme had a fixed budget and was over-subscribed, a selection process was applied in which preference was given to those whose compensation would cost the least, and this put those in one particular age group at a particular disadvantage. The claimant brought a claim for indirect age discrimination. Allowing an appeal against a finding of liability, the EAT ruled that imposing the cost limit was for a legitimate aim (an employer being entitled to make decisions about the allocation of its resources) and that adopting the cost criterion was a proportionate means of pursuing it. The ET had found that the employer had failed to show a “real need” to limit its spending because it had not shown that payment of a higher sum was “unaffordable”, but Underhill P said: “37. ... In our view, to apply a test of unaffordability in that sense is to fall into the error of treating the language of ‘real need’, or ‘reasonable needs’, as Balcombe LJ put it in *Hampson v Department of Education and Science* [1989] ICR 179, as connoting a requirement of absolute necessity. It is well established that that is not the case: see the judgments of the Court of Appeal in *Barry v Midland Bank plc* [1999] ICR 319, 336A–B and in *Health and Safety Executive v Cadman* [2005] ICR 1546, and of Elias J in this tribunal in ... *West Midlands Police v Blackburn* [2008] ICR 505, paras 17–21 (pp 509–510). In *Cadman* Maurice Kay LJ said, at para 31(p 1559B–C): ‘The test does not require the employer to establish that the measure complained of was “necessary” in the sense of being the only course open to him. That is plain from *Barry* . . . The difference between “necessary” and “reasonably necessary” is a significant one . . .’ The effect of that principle, applied to a case like the present, seems to us to be that an employer’s decision about how to allocate his resources, and specifically his financial resources, should constitute a ‘real need’ or, to revert to the language of aim and means, a ‘legitimate aim’ even if it is shown that he could have afforded to make a different allocation with a lesser impact on the class of employee in question. To say that an employer can only establish justification if he shows that he could not make the payment in question without insolvency is to adopt a test of absolute necessity. The task of the employment tribunal is to accept the employer’s legitimate decision as to the allocation of his resources as representing a genuine ‘need’ but to balance it against the impact complained of.”
116. As an overall point, Mr Green emphasised that his complaint about the legal approach is based on the ET’s findings of fact, which he said were squarely in Next’s favour, especially the findings at paragraphs 245 and 247 that factors 1, 2 and 6 were an appropriate means of achieving “aim 1” and that Next could not pay the warehouse workers less than the market rate without a risk of jeopardising the required service. © EAT 2026 Page 27 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors

117. He sought to bolster that point by reference back to Enderby, where the third question put to the ECJ was whether or to what extent differential pay could be objectively justified by “the fact that part of the difference in pay is attributable to a shortage of candidates for one job and to the need to attract them by higher salaries”. The Court said: “26. The state of the employment market, which may lead an employer to increase the pay of a particular job in order to attract candidates, may constitute an objectively justified economic ground within the meaning of the case law cited above. How it is to be applied in the circumstances of each case depends on the facts and so falls within the jurisdiction of the national court.
27. If, as the question referred seems to suggest, the national court has been able to determine precisely what proportion of the increase in pay is attributable to market forces, it must necessarily accept that the pay differential is objectively justified to the extent of that proportion. When national authorities have to apply Community law, they must apply the principle of proportionality.
28. If that is not the case, it is for the national court to assess whether the role of market forces in determining the rate of pay was sufficiently significant to provide objective justification for part or all of the difference.”
118. Ground 4 alleges that the ET misdirected itself on facts and law when it characterised Next’s aim as “costs only” and not as “costs plus”. By ground 4.2 Next argues that it was irrational not to find a “costs plus” element in its “recruitment and retention” rationale for the differential pay, or in Next’s approach to the assessment of individual store viability.
119. On that last theme, ground 4.3 further alleges a failure to have regard to, or at least to explain any rejection of, evidence and submissions by Next to the effect that it actively managed its store portfolio on the basis of individual store profitability, such that increases in pay for sales consultants would be likely to threaten the viability of less profitable stores. While hearing oral closing submissions, the ET suggested that there was no evidence to that effect, but Next’s counsel then reminded the ET of where the evidence was to be found. Despite that, the ET’s judgment makes no reference to that part of Next’s rationale for controlling costs.
120. Accordingly grounds 1-6 can be summarised:
- (1) The ET failed to apply Heskett and Rainey and should have found that Next pursued a legitimate aim on the basis that the comparator’s higher pay was based on a rationale which did not apply to the claimants. © EAT 2026 Page 28 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors
- (2) The ET failed to apply the requirement in Heskett by making a “fair characterisation” of Next’s aim based on the whole picture, focusing only on cost saving and disregarding recruitment and retention and the maintenance of both sides of the business.

- (3) The ET erred by requiring Next to establish separate and distinct aims for both the higher and lower levels of pay, rather than a single aim which was the reason for the difference in pay.
 - (4) The ET adopted an incorrect approach to “costs only” and did not ask whether the aim was “solely to avoid increased costs”, and/or wrongly disregarded recruitment and retention and the assessment of individual store viability (or ignored Next’s case or gave insufficient reasons).
 - (5) It was irrational to hold Aim 1 to be illegitimate in respect of basic pay (term 1), having found it to be legitimate in respect of other terms some of which were aspects of basic pay.
 - (6) The ET wrongly had regard to the affordability of increasing basic pay for the retail workers, which was not a relevant factor on the issue of legitimate aim. Its approach would require a test of absolute necessity or would deprive any profitable business of a material factor defence to an equal pay claim. It disregarded, or did not give reasons for not applying, the cited authorities of Bainbridge, Blackburn and Benson on this issue. It wrongly substituted its own views for those formed in good faith by Next’s directors to secure the business’s viability and resilience.
121. Ground 7 is a catch-all which, in my judgment, does not add anything and need not be addressed further. The claimants’ submissions
122. By way of introduction Mr Short reminded me that section 69 is a more structured provision than its predecessor provisions in the 1970 Act, and in a case such as the present the focus is on the material factor on which the employer relies. If that factor is the market, then a tribunal must decide whether the market puts workers of a particular sex at a disadvantage. So, although the difference between the contract terms of a claimant and comparator will be relevant, the essential question is whether reliance on the material factor is a proportionate means of achieving a legitimate aim. The only burden on a claimant is to show particular disadvantage.
123. Mr Short also emphasised that inequality in market rates or “going rates” paid to men and women is the reason why equal pay legislation is needed. For over 50 years now, there has been provision which enables tribunals to intervene and modify the operation of the market to prevent gender inequality. Without such intervention, the existence of © EAT 2026 Page 29 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors the going rates would provide a rationale for continuing the practice of unequal payment, and that rationale would always apply to the advantaged group but not to the disadvantaged group. Cases such as Rainey, Enderby and Bainbridge depended on their facts and did not illustrate a general proposition of employers being allowed to pay market rates.

124. On the issue of legitimate aim, Mr Short's headline submission was that where an employer treats the going rate as a ceiling, that can properly be characterised a desire to restrict costs. It should be distinguished from a situation such as the one in Rainey where there was a need to pay a specific enhancement e.g. to retain certain staff.
125. In the present case, he submitted, the ET was entitled to find that in respect of basic pay, Next simply used going rates as a ceiling in order to restrict costs.
126. The distinction, he said, can be seen in the ET's decision to uphold the material factor defence in the case of some of the terms other than basic pay, e.g. where Next was responding to effects of the Covid pandemic or to attempts by Amazon to entice staff away. Those were cases of enhancements which could be justified.
127. Mr Short submitted that, as the case law requires, the ET took a careful and nuanced approach and sought to reach a fair characterisation of the aim being pursued by Next. As Underhill LJ said in Heskett, that task which is entrusted to ETs may be difficult. Mr Short contended that the ET was right to distinguish Rainey whose facts were very different from the present case. It involved a small number of workers whose gender was a matter of chance, i.e. it was not a case where, as under section 69 today, a claimant shows that workers of the same sex as her is under a "particular disadvantage". There was a clear explanation for the comparator's higher pay and that was the focus in Rainey, perhaps because the "costs only" line of cases had not yet emerged.
128. In respect of Enderby, Mr Short submitted that the ECJ was not asked to determine whether a material factor based on market forces would always provide objective justification. Nor was it asked whether it would always do so irrespective of any balancing exercise. Instead it was only asked whether it was sufficient to justify part of the difference, or whether an employer needs to justify all of the difference (and what happens if only part is justified). The ECJ rejected an "all or nothing" approach to a material factor based on market forces, instead ruling that it is for the national court to decide the facts and decide whether reliance on the material factor was justified. There are no reported cases in which paragraph 27 of the ECJ's judgment has been treated as providing an absolute answer.
129. Turning to Heskett, Mr Short's overall submission was that the ET cannot be shown to have erred in its application of the principles and that it made findings that it was entitled to make. He submitted that the ET gave a correct self-direction on Heskett at paragraph 266 of its judgment and added, in any event, that the guidance given by Underhill LJ was not to be applied as if it were a statute, and that the characterisation of an aim when considered "as a whole" may be subtle. © EAT 2026 Page 30 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors

130. So far as the relevance of affordability is concerned, Mr Short pointed to paragraphs 98-101 of Underhill LJ's judgment in Heskett which explains that an ET may have to draw the difficult distinction "between a case where an employer simply wishes to reduce costs and cases where it is, in effect, compelled to do so". This shows that an employer can rely on the unaffordability of raising a claimant's pay and that, he submitted, shows that the affordability of doing precisely that must also be relevant.
131. Meanwhile at paragraph 100 of Heskett, Underhill LJ noted that even if a need to reduce costs was found to be a legitimate aim, the next issue would be objective justification, where proportionality would be the focus and the financial pressures on which the employer relied could be carefully examined.
132. On the issue about store closures, Mr Short submitted that the EJ was right to observe, during submissions, that although store closures were mentioned in the evidence, there was no evidence that one of the aims of any decision maker in setting the pay rates was to keep any individual store open.
133. Turning to each of the relevant grounds of appeal, Mr Short submitted in summary:
- (1) As can be seen from the findings in favour of the claimants on some issues and in favour of Next on others, the ET conducted a careful analysis which was obviously based on its own findings of fact.
 - (2) See (1) above. The ET made a fair characterisation of Next's aims, considered as a whole.
 - (3) Rather than erroneously requiring Next to prove distinct aims for paying the higher and the lower pay, the ET made a clear finding that Next pursued a single overall aim of paying as little as possible.
 - (4) The ET correctly directed itself by reference to Heskett and this ground of appeal is just a disagreement with its view of the facts (and an attempt to re- argue the facts regarding store closures).
 - (5) The different outcomes on different terms demonstrate that the ET took the necessary careful and subtle approach to the facts. Next won in those areas where decisions were influenced by something other than the paramountcy of minimising budgets.
 - (6) The ET had the authorities in mind and referred to the relevant paragraph of Bainbridge at paragraph 346 when dealing with bonus pay terms 6, 7 and 8. It performed its task of making a fair overall characterisation of Next's aim. Discussion © EAT 2026 Page 31 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors
134. In my judgment, the ET made some of the errors attributed to it by Mr Green when it decided that Next did not pursue a legitimate aim when setting the different rates of basic pay.

135. It is necessary to emphasize that legitimate aim and proportionality are two separate questions. The ET set out its decision on proportionality at paragraph 270 of its judgment to which I return below. But at paragraph 269, it concluded that Next's aim was fairly characterised as "costs only, with no element of costs plus".
136. The reason given, in summary, was that "the whole drive was about cost saving", in circumstances where Next "could absorb the cost of the same basic pay for work of equal value", that latter point being a judgment passed by the ET "with the merciless wisdom of hindsight".
137. It seems to me that this case illustrates a potential difficulty which is liable to arise when section 69 is applied in practice.
138. The purpose of the section is to determine whether the reason for a difference between A's and B's contract terms is discrimination (direct or indirect) on grounds of sex. The statutory route involves identifying (1) any material factor being relied on and (2) any legitimate aim being pursued by that reliance. It also involves deciding whether the reliance amounts to direct discrimination, whether the factor puts those of one sex at a particular disadvantage and if so, whether the reliance is a proportionate means of achieving the aim.
139. The potential difficulty is caused by tribunals (and the parties in their pleadings) having to distinguish between factors, aims and reliance on factors, treating those things as separate entities and subjecting them to separate tests, when in many cases the factors, aims and reliance will all just amount to one thing, namely the employer's reason for having different terms for different employees.
140. That in my view is reflected by the comment in Heskett about the need for a "fair characterisation of the employer's aim taken as a whole". In the present case at least, it was necessary to consider the "aims" and the "factors" together.
141. The ET found at paragraph 245 that setting pay rates on the basis of the factors of market forces, recruitment and retention and overall business viability, resilience and productivity were an appropriate means of achieving the aim of "viability, resilience and successful business performance", and at paragraph 247 that Next could not reduce the warehouse market rate without a risk of jeopardising the required warehouse service.
142. On the basis of those findings, it is inescapable that Next's aim in setting the warehouse rates, fairly characterised as a whole, encompassed the need to recruit and retain sufficient staff to maintain the warehouse service. © EAT 2026 Page 32 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors
143. At that point in the judgment, the ET referred to Mr Short's submission that this did not justify paying a lower rate to the retail workers and then went on to discuss proportionality. But at paragraphs 265-269, it homed in on the issue of legitimate aim and "costs only" versus "costs plus".

144. There, in my judgment, the ET fell into the error of requiring an employer to identify the aim of paying lower pay to the retail staff instead of identifying the aim of the difference in pay between retail and warehouse staff. Its approach was contrary to the guidance given in the last words of paragraph 85 of Heskett quoted above: "... It is legitimate for a public authority (or indeed any employer) to seek not to make payments to employees to whom the rationale for those payments does not apply ...".
145. On the ET's findings of fact, Next needed to pay the higher market rate for warehouse work, not because of gender but because of recruitment and retention factors. That rationale did not apply to the retail workers. So as in Bainbridge, whilst it "might be said" that the employer's aim in not evening up the pay of the disadvantaged group was to save the cost of having to do so, "that was not the whole story".
146. Another case taking a similar approach was Woodcock v Cumbria PCT [2012] ICR 1126, to which Underhill LJ referred in Heskett. The claimant was dismissed for redundancy and his employer timed the notice of dismissal to expire before his 50th birthday, when he would have been entitled to early retirement on an enhanced pension. On his claim for age discrimination, the Court of Appeal held that the employer had served the notice for the legitimate aim of giving effect to its genuine decision to terminate his employment on the ground of his redundancy, and not "with the aim, pure and simple" of saving expense. It was a legitimate part of the aim to ensure that the dismissal also avoided the extra expense which would have been incurred if it had not been timed as it was.
147. The same approach can be seen in Rainey and Blackburn which are summarised above and whose common theme is that although the employers saved the expense of giving the claimants treatment equal to that of the comparators, the aim of (or the reason for) the more favourable treatment of the comparators was something other than saving expense, and was something which did not apply to the claimants.
148. And, as the case of Benson shows, whilst financial considerations will be relevant in the analysis of proportionality at the next stage, the employer's aim of allocating its resources is not rendered illegitimate by the fact (if proved) that it could have afforded to allocate them differently.
149. For these reasons I have concluded that the ET was wrong to find a lack of legitimate aim. The error was as described in grounds 1-4 and 6. © EAT 2026 Page 33 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors
150. I am not persuaded that ground 5 adds anything. It is based on internal inconsistency, rather than on analysis of the ET's reasoning relating to basic pay. However, I agree that it is not altogether clear why the ET found the same aim to be legitimate in respect of some terms when it was not legitimate in respect of basic pay. Appeal Grounds 11-15: Proportionality Next's submissions

151. I have already quoted paragraph 270 of the ET's judgment where it ruled that the business need to rely on the material factors was insufficient to overcome the discriminatory effect of lower basic pay, having regard to matters including Next's "financial headroom". It accepted a submission that for market forces to be a "trump card" in this way would defeat the objective of the legislation, sustaining lower pay which existed in particular sectors because of indirectly discriminatory practices. Next had failed to prove the "more compelling business reason" which was present in the case of some of the bonus (etc) arrangements on which the ET found in its favour.
152. Mr Green began by submitting that the exercise of deciding whether Next's reliance on the material factors was a proportionate means of pursuing a legitimate aim was vitiated by the errors – set out above – in identifying and characterising that aim. If the aim was not correctly identified, or was wrongly characterised as confined to cost cutting, then the right proportionality question was not asked.
153. That, Mr Green suggested in his skeleton argument, "appears to have distracted the Tribunal, to select affordability or 'financial headroom' as the metric by which to assess proportionality".
154. Similarly Mr Green contended that the assessment of proportionality was vitiated by the errors identified in grounds 8-10 in respect of Particular Disadvantage, although I have now ruled against him in respect of those grounds.
155. Ground 11, therefore, is that the ET's approach to proportionality was vitiated by earlier errors.
156. By ground 12 Mr Green argued that the ET misdirected itself in its construction of section 69 and its conclusions about market forces being used as a "trump card".
157. He first referred to Enderby, where the third question put to the ECJ was whether or to what extent a pay differential can be justified where part of it is attributable to a shortage of candidates for one job and the need to attract them by higher pay. The Court at the very least recognised that reliance on market forces can be justified. See paragraphs 26- 28 of the judgment, quoted at paragraph 117 above, and the conclusion: "29. The answer to the third question, therefore, is that it is for the © EAT 2026 Page 34 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors national court to determine, if necessary by applying the principle of proportionality, whether and to what extent the shortage of candidates for a job and the need to attract them by higher pay constitutes an objectively justified economic ground for the difference in pay between the jobs in question."
158. In the present case, he submitted, the ET erred by assuming that because the statistics showed particular disadvantage, unlawful discrimination was made out in the absence of a "more compelling business reason" which could justify the differential, instead of considering whether the particular disadvantage could in fact be justified. That, he said, was

contrary to the guidance of Lady Hale in *Essop v Home Office* [2017] ICR 640 at paragraph 29 (dealing with the justification of indirect discrimination): “There is no finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question”

159. Accordingly, Mr Green contended that Next’s case did not involve market forces being treated impermissibly as a trump card. Whether reliance on market forces justifies a pay differential must always be decided on the facts, and the ET was wrong to assume that if market forces were a permissible material factor, then reliance on them would always make out the defence.
160. But, he submitted, paragraph 27 of *Enderby* (quoted above) makes clear that if the employer explains the whole of the differential by reference to market forces, and shows that it has a genuine need to pay what the market demands, the test is satisfied. That was the case here, where the ET found that Next paid no more than the market rate to the comparators and could not have paid less without jeopardising the service, while also paying the claimants the NMW which exceeded what would have been the market rate for their work.
161. Mr Green also contended that the ET’s rejection of market forces as a material factor justifying the difference in basic pay was irrational, given its acceptance that market forces did justify differential pay in respect of terms 1, 11, 12 and 13B.
162. By ground 13, he argued that the finding at paragraph 270 was irrational or plainly wrong in light of the ET’s findings of fact that there were specific pressures in the market for warehouse staff, the overall remuneration package was designed to assist the recruitment problems, the labour budget for warehouse staff was subject to cost control and the basic pay for Next’s warehouse staff was “in the lower quartile of the market”.
163. Ground 14 alleges a failure by the ET to assess the extent, if any, to which the difference in basic pay was caused by any discriminatory effect. © EAT 2026 Page 35 [2026] EAT Judgment approved by the Court for handing down *Next Retail Ltd v M Thandi & Ors*
164. Ground 15 alleges a failure to appreciate the difference between the relatively nuanced facts of this case and the facts of (1) a case like *Enderby* with more stark statistics or
(2) an indirect discrimination claim under section 19 where the 2010 Act requires that there be “no material difference” between the circumstances of each case or (3) an equal pay case under section 65(1)(a) which is based on “like work” rather than work which is not the same or broadly similar but has been found to be of equal value, or (4) a case based on a PCP where a barrier to entry to work is identified.
165. In support of those grounds, Mr Green referred to *Hardy & Hansons plc v Lax* [2005] EWCA Civ 846, [2005] ICR 1565. That case included a claim for indirect discrimination on grounds of sex by a female employee who, in pregnancy and after maternity leave, was not allowed to

switch to part-time work. The ET found that the employer's PCP in this regard would be to the detriment of a considerably larger proportion of women than men and was to her detriment, and that the employer had failed to justify it. Dismissing an appeal, Pill LJ (with whom Thomas and Gage LJ agreed), described the objective justification test: "32. ... The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the employers' submission ... that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.

33. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in *Allonby* [2001] ICR 1189 and in *Cadman* [2005] ICR 1546, a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal. In considering whether the employment tribunal has adequately performed its duty, appellate courts must keep in mind ... the respect due to the conclusions of the fact-finding tribunal and the importance of not overturning a sound decision because there are imperfections in presentation. Equally, the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification. © EAT 2026 Page 36 [2026] EAT Judgment approved by the Court for handing down *Next Retail Ltd v M Thandi & Ors*
34. The power and duty of the employment tribunal to pass judgment on the employer's attempt at justification must be accompanied by a power and duty in the appellate courts to scrutinise carefully the manner in which its decision has been reached. The risk of superficiality is revealed in the cases cited and, in this field, a broader understanding of the needs of business will be required than in most other situations in which tribunals are called upon to make decisions."
166. Mr Green submitted that in the present case the ET did not carry out the necessary "critical evaluation". It did not measure the actual disparate impact which fell to be justified (see also his submissions on Particular Disadvantage). It also did not discuss the implications of evidence that, for example, there were about 30 applicants for every store job, or the fact that the NMW being paid by Next to store workers was above what the market rate would have been. It did not mention the fact that some of Next's competitors insulate themselves

against this sort of claim by outsourcing their warehouse operation. And it did not comment at all on the important evidence which they had heard about Next fixing its budgets with regard to the viability of individual stores, as opposed to just assessing business needs at an aggregate level.

167. On that basis Mr Green invited me to carry out the necessary careful scrutiny of the ET's decision, having regard to a sufficient understanding of "the needs of business", and to find that the ET's evaluation was insufficient. The claimants' submissions
168. Here again, Mr Short submitted that the purposes of equal pay legislation include the overriding of market rates which are discriminatory, and that this has been confirmed by a consistent line of case law to which he referred in his skeleton argument when dealing with the claimants' cross-appeal:
- (1) In *British Coal Corporation v Smith* [1994] ICR 8102 at 858C-D, Balcombe LJ said that when an employer seeks to show objective justification under section 1(3) of the 1970 Act: "Nor does the employer show a 'material factor other than the difference of sex' if he has adopted a criterion which is itself discriminatory, i.e., tainted by gender. If 'market forces' are relied upon, he must show that these are gender-neutral if he is to succeed in establishing the defence."
 - (2) In *North Yorkshire County Council v Ratcliffe* [1995] ICR 833 ("Ratcliffe"), an employer re-engaged female employees on a lower rate, paying them less than it paid men for work of equal value, in order to compete with a commercial business which discriminated against women in its pay rates. Lord Slynn said at 841C-D that the reduction of an overwhelmingly female job group's wages in response to competitive pressures "was the very kind of discrimination in 2 The Court of Appeal's decision was approved by the House of Lords at [1996] ICR 515. © EAT 2026 Page 37 [2026] EAT Judgment approved by the Court for handing down *Next Retail Ltd v M Thandi & Ors* relation to pay which the Act sought to remove." It was not necessary for the applicants to show that the competitor consciously discriminated against women.
 - (3) In *Armstrong v Newcastle upon Tyne NHS Hospital Trust* [2005] EWCA Civ 1608, [2006] IRLR 124, Arden LJ referred to that passage in Ratcliffe: "It was not necessary for the applicants to show that the reason why competitors paid dinner ladies less than the applicants' comparators was because they consciously discriminated against women. As Lord Slynn observed, in the passage I have already cited, to permit employers to rely on market forces as the reason for reducing women's pay below that of their male comparators would be to permit the very kind of discrimination the 1970 Act sought to redress. In equal pay cases, it is necessary at all times to keep in mind the overarching social and economic purposes of the legislation."
 - (4) In *Middlesbrough Borough Council v Surtees* [2007] ICR 1644, Elias P held at

- [49] to [50]: “It is important to bear in mind the purpose of the legislation and in particular the fact that there are structural reasons causing unequal pay. There has historically been much stereotyping of jobs with assumptions being made both about what work is suitable for men and women and what pay is appropriate to those jobs. This has led to much de facto job segregation ... That history continues to leave its mark on pay structures. Tribunals must be alive to the very real possibility that where there is adverse impact, identified where necessary by sufficiently cogent statistics, that may be the result of factors which are sex tainted... .”
- (5) In *Armstrong No.2*, the EAT found that an employer had failed to justify a discriminatory pay differential which had continued after it had ceased to correspond to a real business need. At [65], Underhill P said that he had found applying decisions including *Ratcliffe* “peculiarly difficult”, but: “... we are prepared to say that we do not regard the outcome of the appeal as surprising. We agree with both Lord Slynn and Arden LJ that the 1970 Act might be expected to give a remedy in cases of this kind; and we see nothing odd in the conclusion that the trust had failed to justify a differential which had continued for so long after its initial rationale had disappeared.”
169. In response to ground 15 and to Mr Green’s point that a case involving work of equal value should be distinguished from one involving employees engaged on the same or similar work, Mr Short referred to *Dumfries and Galloway Council v North* [2013] ICR 993, where Lady Hale at [34] referred to work requiring physical strength having © EAT 2026 Page 38 [2026] EAT Judgment approved by the Court for handing down *Next Retail Ltd v M Thandi & Ors* traditionally been better paid than those requiring dexterity and noted that one of the objects of equality legislation is “to iron out those traditional inequalities of reward where the work involved is of genuinely equal value”, with no indication that any distinction should be drawn between the different categories of comparable work.
170. With that introduction, Mr Short reminded me that justification involves an evaluative exercise by the ET which should not be interfered with on appeal in the absence of a misdirection or other error of law or a perverse finding. He submitted that none of those things can be found in the ET’s judgment. Although the conclusion on proportionality was stated briefly at paragraph 270, it was supported by all of the findings and reasoning from paragraph 246 onwards. The ET, he submitted, reached conclusions which it was entitled to reach.
171. On that basis he invited me to reject the contention in ground 11 that there were errors which vitiated the proportionality exercise. As to ground 12, he submitted that there was no error in the reference to a “trump card”. As *North* and other cases show, equal pay legislation makes it unlawful to apply “going rates” which are themselves discriminatory. With respect to ground 13, *Next* could not surmount the high hurdle of showing perversity and, having explored the facts in great detail, the ET was entitled to find that there was no sufficiently compelling business need to justify the pay differential.

172. In answer to ground 14 – the alleged failure to assess the extent to which the difference in basic pay was caused by any discriminatory effect – Mr Short submitted that this ground misapplies section 69. The claimants showed particular disadvantage and thereby satisfied section 69(2). Thereafter the burden was on Next to justify the factor under section 69(1)(b). And, as is clear from the case of *McNeil v Revenue and Customs Commissioners* [2018] ICR 1529 (“*McNeil*”), if a claimant shows that a factor puts persons of their sex at a particular disadvantage, it is not open to the employer to seek to show that the disadvantage was not caused by their sex.
173. As for ground 15, Mr Short submitted that the ET made a proper and sufficient factual comparison between the advantaged and disadvantaged groups, that the same proportionality test applies to an “equal value” case as applies to a “like work” case and that the ET at paragraph 258 dealt with the fact that there was no absolute barrier to any of the claimants moving to warehouse work. Discussion
174. Ground 11 plainly succeeds in light of my ruling that the ET erred in finding that Next did not have a legitimate aim. That error unbalances the proportionality analysis. If that were the only error, the exercise would have to be re-done.
175. Turning to the other grounds, I make the general observation that the brevity of the ET’s analysis in paragraph 270 of the judgment makes the appeal against the proportionality ruling more difficult for the claimants to resist. All of the emphasis in the ET’s decision © EAT 2026 Page 39 [2026] EAT Judgment approved by the Court for handing down *Next Retail Ltd v M Thandi & Ors* was on the finding as to legitimate aim and, as a result, there is only the briefest analysis of proportionality. That is all the more striking in light of the comments in *Hardy* to which I referred above. On one view that brevity could make it harder for this Tribunal to carry out the necessary careful scrutiny of the ET’s decision. On another, it could mean that that careful scrutiny may itself be briefer or more briefly expressed.
176. Grounds 12 and 13, in my judgment, are well founded.
177. As I have already said, Next paid a higher market rate for warehouse work because of recruitment and retention factors which did not apply to the retail workers. Therefore this was not a case of simply paying more for what was perceived by the market as typically men’s work.
178. As Mr Green said, it is entirely clear from *Enderby* that a pay differential arising from a need to attract candidates to a role can be justified. It is a question in each individual case whether it is justified.

179. In paragraph 270 the ET said that reliance on market forces as a trump card would allow lower pay in particular sectors due to indirect discrimination to be sustained in perpetuity and, therefore, “there must usually be a more compelling business reason for such arrangements to be justifiable”. In my judgment, that approach was not in line with the guidance in *Enderby*. The potential for reliance on market forces was unduly restricted by the imposition of a “more compelling business reason” test.
180. In addition, some of the specific errors to which I referred above in respect of legitimate aim were relevant again. The reference to “lower basic pay” was not a fair reflection of what happened, i.e. the payment of higher basic pay to one group for reasons which did not apply to the other group. The reference to “financial headroom” again suggested that the ET was considering the affordability of equalising the pay instead of assessing the reason for the difference in pay.
181. For those reasons it seems to me that “trump card” was not a fair characterisation of Next’s case. This was not a case where warehouse workers were paid more simply because warehouse workers tend to be paid more. That sort of application of market factors no doubt could cause discriminatory practices to be embedded. But paying more to warehouse workers for recruitment and retention reasons – as per the ET’s finding at paragraph 247 – was different. It might coincidentally help to preserve higher levels of pay in a sector which at one time had been male-dominated, but the point is that that was not all that it was doing. And the fact (if it was a fact) that Next could have afforded to equalise the pay of the retail workers did not, in my judgment, mean that the business need for the higher pay was not sufficiently great to outweigh its discriminatory effect.
182. Instead, I conclude that the ET’s findings of fact including those at paragraph 247 led to the conclusion that the pay differential was a proportionate means of achieving a legitimate aim. Next paid the rates to warehouse staff which it needed to pay for sound © EAT 2026 Page 40 [2026] EAT Judgment approved by the Court for handing down *Next Retail Ltd v M Thandi & Ors* business reasons, and no more, and those business reasons did not apply to the retail staff.
183. In light of that ruling, I do not consider that anything is added by ground 14 and the alleged failure by the ET to assess any extent to which the difference in basic pay was caused by any discriminatory effect, if indeed that would be a legitimate area of inquiry following *McNeil*.
184. I am also not persuaded that there is merit in ground 15. Although I have disagreed with some of the ET’s conclusions of law, it does not seem to me that the ET failed to understand the essential facts of the case. It noted correctly that the effect of the statistics was not straightforward. There is no sign that it treated this case as if it were based on a PCP which created a barrier to entry to the advantaged group. And I am not convinced that cases based on “like work” and those, like this one, based on work of equal value, necessarily call for a different analysis. The other contract terms and Ground 16

185. It is convenient to take these term by term, grouping the submissions and discussion under a single heading in each case, though some themes will become repetitive.
186. Those submissions and discussion cover issues which were raised about legitimate aim and proportionality. Mr Green further submitted that the errors which he identified in respect of the finding of Particular Disadvantage also infected the ET's decisions on the other terms but, as I have already found against Next on that issue, I say no more about it here.
Unconsolidated Awards (term 2)
187. The ET found that at intervals during the relevant period, warehouse operatives were entitled to receive small payments ranging from £25 to £100. Sales consultants did not receive them. These one-off payments had been negotiated with the trade union to conclude deals. This enabled Next to avoid paying additional basic pay, providing a lower base for the next year's negotiations.
188. The ET ruled: "294. The character of the payment is so closely aligned to the underlying basic pay of warehouse workers that we are satisfied it falls on the wrong side of the costs only/costs plus demarcation line. The terminology of the aim as business performance and development and additional involvement of collective bargaining does not cloak the aim with legitimacy. © EAT 2026 Page 41 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors
295. Had we found the aim to have been legitimate, we would have considered the factors to have been a proportionate means of achieving the aim. No obvious lesser measure was identified."
189. Mr Green submitted that since the ET equated these payments so closely with basic pay, the errors identified above in relation to basic pay must also apply to this term.
190. In the alternative he submitted that on the ET's own findings, the purpose of unconsolidated awards was to keep the basic pay of warehouse staff down while still achieving a deal with the trade union (a reason which did not apply to sales consultants) and that combined aim was plainly legitimate. The decision was also inconsistent with the ET's decision on Long Service Awards (term 17), where they found that although the term was not proportionate, the aim of ensuring that a deal was reached with the union was legitimate.
191. In response Mr Short submitted, in addition to his submissions on basic pay which I have addressed above, that the ET was entitled to characterise Next's aim for unconsolidated awards as it did.
192. In my judgment the lawfulness of term 2 stands or falls with that of basic pay. These small payments were simply part of the pay package of the warehouse staff, paid in one way so that they would not have to be paid in another way.

193. As with basic pay, what requires scrutiny is the difference between the treatment of the claimant and comparator groups. Whilst making these lump sum payments may have had the ultimate aim of reducing the wages bill for warehouse staff, that was not the reason why they were made to one group but not to the other. Next did what it did as a result of collective bargaining with the union which applied to warehouse pay but not to the pay of store consultants.
194. For the same reasons as apply to basic pay, with the additional element of collective bargaining, I find that the ET was wrong to characterise Next's aim as "costs only" and it could not be so characterised. Sunday Pay Premium (term 4)
195. The ET found that Sunday pay premium was paid at 25% to warehouse operatives who started before October 2006. For those starting between then and 2017 it was 15%. In 2017 it was removed for new starters but those already entitled continued to receive it.
196. For sales consultants starting prior to November 2001, Sunday pay premium was 50%. For those starting between November 2001 and June 2006, it was 25%. For those starting between June 2006 and 30 September 2008, it was 10%. For those starting on or after 1 October 2008, no Sunday pay premium was paid. In June 2015, Sunday pay premium was removed for all sales consultants previously receiving it at any rate. They © EAT 2026 Page 42 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors received a payment calculated at one quarter of any Sunday pay premium received in the previous 12 months.
197. The evidence was that benchmarking of warehouse pay revealed that some employers paid extra for Sunday work but many did not. Meanwhile, in 2016 and 2017 many employers funded the increase from NMW to national living wage by reducing Sunday pay rates. The reduction in the rate and the removal for new starters in 2017 were agreed with USDAW. The ET said at paragraph 308: "The second respondent was not in a position to remove the rates for Sunday pay for warehouse operatives recruited before this date, however reducing the rates for future employees represented a cost saving measure which would have increasing effect with the turnover of warehouse operatives each year."
198. On the retail side, the ET summarised the evidence: "Mr Mason said that the market drove the changes. He said no new starter could get a job in that market and receive a Sunday premium. By the time it was abolished in June 2015, only 1 out of 10 were still receiving it on a legacy basis and that seemed inequitable."
199. Having found legitimate aims, the ET ruled at paragraph 316 that paying higher Sunday pay to warehouse staff who had a legacy entitlement to it, but not to retail staff, was not proportionate because there was no business need for the payments. That was on the basis that after the premium was stopped for new starters in 2017, there was no evidence of an effect on Sunday attendance thereafter. As it had said at paragraph 315: "The respondents assert the proportionality arises from different occupational requirements for different labour markets without establishing on the evidence what they were: the reality is both

markets require staff to work on Sundays.”

200. Mr Green submitted that the ET in making that finding made the errors identified in grounds 11-15 or similar errors.
201. Under ground 16, he further submitted that the ET irrationally disregarded its own specific findings that (a) there had been a change in the market and expectations for Sunday pay in the period to 2017 (307, 308, 313) and (b) Next “was not in a position to remove the rates for Sunday pay for warehouse operatives recruited before this date”, and (c) the fact that all of the comparators were recruited before 2017.
202. In response Mr Short noted the ET’s careful analysis of the facts and finding of a separate legitimate aim of encouraging work in unsocial hours, and submitted that the ET was entitled to make its factual finding of a lack of proportionality.
203. In my judgment it was not Next’s case that there was a continuing business reason for a Sunday pay premium. That is inherent in its decision to stop the premium for all new © EAT 2026 Page 43 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors starters, in both sectors. Instead, the reason identified for continuing legacy payments to warehouse staff but not to retail staff was collective bargaining. At paragraph 315 the ET had said: “The effect of union representation may explain the better outcomes for warehouse workers in this area, but that is not really to the point.” But in my judgment it was to the point, the point being that Next was “not in a position” to remove the legacy payments.
204. In respect of this term I cannot reach a final conclusion as to what the right outcome on proportionality should have been, though it should be noted that reliance on collective bargaining outcomes for some other terms was judged to be proportionate. However, the ET’s explanation of its decision was not consistent with its findings of fact, and ground 16 succeeds in this respect.
205. Conversely, I am not persuaded that grounds 12 and 13 (which I have upheld in relation to basic pay) also apply to term 4. Night Time Premium (term 5)
206. Different rates for night-time working were paid to warehouse staff and retail staff at different times and the differences were not necessarily less generous to the retail staff. However, the ET focused on a change which took place on the retail side in November
2012. Previously night-time premium was paid for hours worked between 9pm and 7am for those contracted to work such hours prior to April 2002 and, in all other cases, for hours worked between 10pm and 6am. But from November 2012 it was paid only for hours worked between midnight and 5am for all sales consultants.
207. Meanwhile, night-time premium was paid to warehouse operatives for hours worked between 10pm and 6am throughout the relevant period.

208. Night-time work was held to be critical to the warehouse operation. That was not the case for the retail operation, but during sales periods the stores had heavy trade. They opened from 5am. At paragraph 321 the ET found, in respect of the sales consultants: “The change in the classification of night-time hours from up to 6am to 5am was designed to make savings because every employee would work two days a year during those sales period. The rationale was not that this was night-time work but starting earlier.”
209. The ET held that the change from 6am to 5am for retail staff was solely to save cost and this aim could not be legitimate.
210. Mr Green submitted that as with basic pay, the ET erred by looking solely at the reason for not paying the claimants more, rather than the reason for paying the night time hours for warehouse staff, having found that night-time work was critical to the warehouse operation. © EAT 2026 Page 44 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors
211. He further submitted that the ET made the same error in its approach to characterising Next’s aims as was characterised in grounds 2 (fair characterisation) and 11 (outcome vitiated by earlier errors).
212. He further submitted that in deciding that term 5 was not proportionate, the ET again made the errors identified in grounds 11-15 or similar errors.
213. By ground 16, Mr Green further contended that the ET’s approach to proportionality was also irrational because it disregarded the fact that the need to recruit and retain sufficient warehouse operatives willing to work night shifts was a rationale for paying a night shift premium between 5 and 6am in the warehouses which did not apply to retail staff, and it was not contended that the hours could not otherwise be filled.
214. In response, Mr Short emphasised that the analysis of Next’s aim as costs saving was based on very different facts from the analysis in respect of basic pay, and it does not follow either that the same mistakes were made in both exercises or that the outcome should be the same.
215. I agree with Mr Short. Until November 2012, night-time work extended until 6am for both categories of employee (save those warehouse operatives with a legacy entitlement to night-time premium up to 7am). The change was to the disadvantage of the store consultants and the reason for the change was to save money. That finding of fact and the characterisation of the aim as “costs only” were open to the ET on the evidence. In my judgment, the differences between the need for night-time work in warehouses and stores respectively, though expressly recognised by the ET, were not found to be the reason for any difference in treatment.
216. I therefore reject grounds 2, 11 and 16 in respect of term 5, and the other grounds based on proportionality do not arise. Overtime Premium (term 13A)

217. In the Grounds of Appeal and in counsel's skeleton argument it is submitted that the ET's findings on this term were subject to the errors of law identified in grounds 11 to
15. That contention has not otherwise been developed in submissions on either side. The question for me appears to be whether my findings on proportionality in respect of basic pay translate across to overtime premium.
218. The ET found that for additional hours above full-time equivalent, warehouse staff were paid either time and a half or double time depending on certain variables. Sales consultants, up to 12 October 2013, were paid a 50% premium for hours worked over 39 hours but after that date, no premium was payable.
219. Next's evidence was that in fact, no store consultants were earning the premium which was payable up to 12 October 2013. But in the warehouses there were peaks in demand © EAT 2026 Page 45 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors which were hard to predict, and overtime premium rates were offered to provide the necessary flexibility.
220. Having identified legitimate aims (aims 1 and 3), the ET held at paragraph 381: "In the one instance there was a business need for overtime and in the other there was none. The discriminatory effect was notional given that sales staff were not required to work in excess of 39 hours. Nevertheless, to cover the eventuality that overtime might, exceptionally, be required in retail, there should be equivalence of terms. It was not reasonably necessary to meet the aim to maintain the differential rates. The defence under section 69(1)(b) is not established."
221. I do not consider that ground 11 reads across to this issue. Nor does ground 12, which was concerned with the treatment of market forces. I have already rejected grounds 14 and 15.
222. That leaves the rationality ground 13, but that ground in respect of basic pay is strongly tethered to the recruitment and retention factors which led Next to pay higher rates to warehouse operatives. I am not persuaded that that ground can be read across to term 13A either.
223. The outcome on term 13A does leave a sense of unreality. Since there has for many years been no need for any overtime in the stores, it seems odd that it is unlawful not to have an overtime clause for retail staff. But I have not heard any technical argument which persuades me that section 66 of the 2010 Act – the section which reads a sex equality clause into a claimant's contract – does not have the effect which the ET found it to have, even if that ruling has no practical consequence. Paid Rest Breaks (term 16),
224. The ET found that during the relevant period, warehouse operatives were entitled to paid rest breaks based on the length of their shifts. Sales consultants were not paid for rest breaks. The evidence was that in the early 2000s, following the introduction of the NMW, paid rest breaks for retail staff were removed and working hours were modified as a trade-off. Next also adduced evidence that unpaid rest breaks were an industry standard in retail.

On the warehouse side, the evidence was that breaks were negotiated with the trade union and reflected the nature of the work, though the ET observed that that would not explain why they were paid or unpaid. It accepted that payment for rest breaks to warehouse staff achieved the aim of viability, resilience and successful business performance by reflecting the market standard, but not that it met the aim of incentivising warehouse productivity. It found that the aim of removing payments to the retail staff was solely about cost, to meet the increase in the NMW, and was not legitimate. In any event the proportionality test was not satisfied because it was not reasonably necessary to restrict payment only to warehouse operatives to meet the aim. © EAT 2026 Page 46 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors

225. Mr Green submitted that the ET erred by looking only at the desire to save cost on the retail side rather than the rationale for giving paid breaks to warehouse staff, namely the fact that they “were negotiated with USDAW and reflected the repetitive and monotonous nature of the tasks of warehouse operatives” (judgment paragraph 396). This repeated the errors in the treatment of basic pay, and it was also irrational to find reliance on ensuring a negotiated agreement with the trade union illegitimate for this term when it was held legitimate in relation to Long Service Awards (see term 17 below).
226. He further submitted that the ET made the same error in its approach to characterising Next’s aims as was characterised in grounds 2 and 11.
227. He further submitted that in deciding that term 16 was not proportionate, the ET again made the errors identified in grounds 11-15 or similar errors.
228. Under ground 16, Mr Green further contended that the approach to proportionality was irrational in light of facts established by unchallenged evidence i.e. agreement with the trade union, payment to reflect the nature of the warehouse work and the higher proportion of longer shifts in the warehouses, the trade-off between different terms for the retail staff and retail industry standards.
229. Mr Short responded that this is a very clear example of a “costs only” aim, where a benefit was removed from a group of employees in order to fund NMW. Here too the arguments are different from those relating to basic pay.
230. As in the case of Night Time Premium, I agree with Mr Short that the removal of the benefit from the retail staff overshadows the reason for continuing to provide it to warehouse staff. From the evidence the ET was entitled to conclude that its removal – and therefore the difference between the terms of the two groups of employees – was a costs saving measure. It was not bound to conclude from the evidence that the difference was because of the different business needs, though those differences existed. The appeal therefore fails in respect of this item. Long Service Awards (term 17)

231. During the relevant period Next had systems of awards for long service for both warehouse and retail staff. The sums were not large, and the differences between awards for warehouse staff and retail staff were small and narrowed further after some changes in January 2020, but the warehouse scheme was slightly more generous. The ET accepted Next's evidence that "the differences arose from negotiation with USDAW with respect to agreeing an overall package of remuneration" and that no such collective negotiations occurred with retail staff. It found that the payments were an appropriate means of meeting the business need of ensuring that a negotiated agreement with the union would be acceptable to its members, but that in the absence of a good reason for aligning the pay of the two groups earlier or completely, proportionality was not established. © EAT 2026 Page 47 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors
232. Mr Green submitted that in deciding that term 17 was not proportionate, the ET made the errors identified in grounds 11-15 or similar errors.
233. By ground 16, he further submitted that the ET in its balancing exercise did not have regard to the very small size of the difference in pay, or to the more favourable terms for long service which retail staff had enjoyed up to 2014, or to the fact that the small payments to warehouse staff had been negotiated with the trade union as part of the overall package.
234. Mr Short submitted that collective bargaining is a process, not an aim, and that the ET reached the right decision because the differences between the pay of the two groups were unexplained. He also pointed out that the partial equalisation of the schemes in 2020 showed that there was no good reason for it not having happened earlier.
235. In my judgment this is another example of the unhelpful nature of the distinction between factors, aims and reasons for reliance. Whilst section 69 requires that analysis to be made, the key question was why the two groups received different awards. The ET's answer was that Next needed to ensure a successful outcome to the negotiations with the trade union. That reason applied to the warehouse staff but not to the retail staff. Properly analysed, this was another instance of a decision to pay the warehouse staff more, rather than a decision to pay the retail staff less. It was therefore an error to require Next also to justify its omission to equalise the payments for retail staff (earlier or completely). Bearing in mind also the very small size of the differences (typically £5-10 per year in those cases where a difference occurred), I conclude that the ET's ruling on this term cannot stand. The cross-appeal: ground 1 The claimants' submissions
236. Ground 1 of the cross-appeal challenges the ET's rejection of the claimants' case on direct discrimination under section 69(1)(a), i.e. the finding that differences in pay were because of a material factor reliance on which "does not involve treating A less favourably because of A's sex than the responsible person treats B".
237. Mr Short does not contend that there was any error in the ET's finding that the internal conscious or subconscious attitudes, intentions or mental processes of Next's decision makers were free of any sex discrimination. Rather, he submits that the ET should have

asked itself whether the market forces on which Next relied were themselves affected by stereotypes which were discriminatory on grounds of sex. This is relevant to the ET's decision in Next's favour in respect of basic pay and in respect of bonuses (terms 6, 7 and 8).
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238. The issue is whether that question properly arises under section 69(1)(a) or under section 69(1)(b).
239. Mr Short's starting point was the difference between section 13, the section which deals generally with direct discrimination on grounds of a protected characteristic, and the equal pay provision in section 69(1)(a) of the 2010 Act.
240. Section 13 outlaws direct discrimination where a person is treated less favourably "because of a protected characteristic", but section 69(1)(a) requires a tribunal to ask whether reliance on the material factor "does not involve treating A less favourably because of A's sex ...". Mr Short submitted that under section 69(1)(a), the focus is on the factor itself rather than the reason for the employer's treatment of the employee. Although case law recognises a broad equivalence between the concepts in the two sections, they are not identical. The employer has the burden of proving that the material factor itself was not discriminatory, and in that respect, he submitted, the reach of section 69(1)(a) is wider than that of section 13.
241. Mr Short relied on the cases such as Smith, Ratcliffe, Armstrong and Surtees, quoted at paragraph 168 above, which predated the 2010 Act but, he submitted, remain good law. He submitted that the ET erred by treating section 69(1)(a) as if it mirrored section 13 and by ruling at paragraph 210 of the judgment that "judicial explanations" following Ratcliffe had been "swept away by the clarity of section 69".
242. Mr Short submitted that to satisfy the burden of proof, an employer must not merely show that it was not consciously or unconsciously motivated by sex, but must also show that each material factor was not influenced by sex to a more than trivial degree. He accepted that that could be difficult for employers in a market forces case, but that difficulty would be no more than a consequence of their own choice to align their pay with the market, and the issue would only arise in those cases where different markets had different gender profiles. In this case, he submitted, Next relied on market forces but made no attempt to show that those market forces do not discriminate against women.
243. The problem extends to the ET's decision in Next's favour in relation to bonuses because market forces were found to be part of the reason for the differential treatment in those areas.
244. For those reasons Mr Short submitted that the ET was bound to find in the claimants' favour on that issue. To fail to proceed in that way would be to risk equal pay legislation being made less effective. Next's submissions

245. Next's oral submissions on the cross-appeal were made by Kathleen Donnelly KC. She submitted that the ET correctly directed itself that section 69(1)(a) requires the employer to prove the material factor that was relied on "and also that it is not because © EAT 2026 Page 49 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors of the sex of the claimant" (paragraph 170). It found expressly that there was "no conscious or subconscious influence of gender" (paragraph 208). That finding distanced this case from Ratcliffe, where decision makers were found to have been "willing to take advantage" of the market paying lower "women's rates" (as interpreted in Armstrong no.2 per Underhill P at paragraph 38), the ET having referred to that case as one type of direct discrimination.
246. Ms Donnelly submitted that ground 1 misstates or ignores the boundary between direct and indirect discrimination, which is all the more important because indirect discrimination can be justified but direct discrimination cannot. Ground 1 suggests that there is a difference between section 13 and section 69(1)(a) despite this Tribunal's ruling to the contrary in McNeil per Simler P: "Section 69(1)(a) mirrors the definition of direct discrimination in section 13 of the Act and subsections (1)(b) and (2) together mirror the definition of indirect discrimination in section 19. It is clear that they must be construed consistently (as was well established in relation to the predecessor legislation, and as emphasised recently by the Supreme Court in Essop/Naeem [2017] ICR 640)."
247. Construing section 69 in accordance with ground 1 would, Ms Donnelly submitted, subvert the statutory scheme, and would also impose on employers the impossible burden of disproving any discriminatory motivation in the decisions of other employers in the market – and that notwithstanding the ET's rejection, in almost all respects, of the claimants' expert evidence by which they had sought to prove that retail work is perceived as being women's work and warehouse work is perceived as being men's work and that this impacts market rates of pay.
248. In oral submissions Ms Donnelly focused on the ET's reasons for its decision on the bonuses. These emphasised the importance of performance and efficiency as reasons for the bonus schemes in the warehouse, making it harder for the claimants to show a causal link with market forces. The ET found that the overall package for warehouse staff matched the market but that Next's bonus schemes were atypical. Ms Donnelly also pointed to the ET's clear findings that equivalent bonus schemes could not have been implemented for retail staff. That being so, she asked, how could sex be the reason for the differential treatment? And if a sex equality clause were imported, how could it operate? She submitted that the cross-appeal in respect of bonuses is an impermissible collateral attack on those positive findings.
249. Meanwhile, she pointed out, there is no challenge to the ET's finding that the differential treatment, viewed as indirect discrimination, was objectively justified. That, she submitted, underlines the unreality of this ground of the cross-appeal.

250. Overall, Ms Donnelly submitted that the construction of section 69(1)(a) proposed by ground 1 is incorrect and is not supported by any caselaw. Instead the cases show that a finding of direct discrimination requires a mental element on the part of the employer. © EAT 2026 Page 50 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors Discussion
251. I am not persuaded that there is merit in ground 1 of the cross-appeal.
252. Although the words used in section 13 and section 69(1)(a) are not identical, it is clear, and well established by cases such as McNeil, that paragraphs (a) and (b) of section 69(1) are concerned with direct discrimination and indirect discrimination as consistently defined across the 2010 Act's various provisions. Section 69(1)(a) will not be engaged unless there is less favourable treatment "because of A's sex".
253. At paragraph 194 of its judgment the ET rightly noted that section 69 contrasts in that way with its predecessor, section 1(3) of the 1970 Act, which did not distinguish between direct and indirect discrimination.
254. The test, whether the unequal treatment was "because of A's sex", is one of fact. It could be satisfied in a case of the Ratcliffe kind where decision makers were found to be willing to take advantage of the market paying lower rates to female workers, as the ET recognised at paragraph 194.
255. Perhaps a borderline case might arise if, on the facts, the discriminatory effect of market forces was evident but the employer showed that it did not know or seek to take advantage of it. That, however, is not this case.
256. For these reasons I reject the proposition that direct discrimination must always be found where an employer relies on a material factor of market forces and does not adduce evidence to prove that those market forces do not disadvantage those of either sex.
257. Mr Short submits that this leaves a gap in the protection afforded by equal pay legislation. The answer to that, in my judgment, is the requirement for objective justification in all cases of particular disadvantage. As can be seen from Enderby, whilst an employer can rely on market forces, the ultimate question will always be whether that reliance is justified in the circumstances of the case.
258. Moreover, on the ET's findings of fact the direct discrimination claim could not have succeeded. At paragraph 206 it recorded Mr Short's submission that retail pay was "suppressed because it is historically discriminatory on grounds of gender" and his reasons for inviting an inference that such factors played a part in the setting of basic pay. At paragraph 208 it rejected those submissions, making the decisive findings of fact to which I have referred above.

259. It is true that in the same paragraph the ET said: “Historic reasons for imbalances in pay for work which is equally valued fall into indirect discrimination considerations”. This ground of cross-appeal challenges that proposition. But even if the ET’s proposition were too widely stated and “historic reasons” are capable of forming part © EAT 2026 Page 51 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors of a direct discrimination analysis, it does not seem to me that a real issue would arise on the facts of this case. Although the ET went on to find at paragraph 239 that Next had benchmarked “in a warehouse market with a largely male workforce” (see the discussion of Next’s ground 9 above), it did not make a finding that retail pay was suppressed by reason of historic discrimination on grounds of sex, and it had already substantially rejected the expert evidence adduced on the claimants’ behalf.
260. Ground 1 of the cross-appeal therefore fails. The cross-appeal: ground 2 The claimants’ submissions
261. Ground 2 of the cross-appeal is advanced in the alternative. The claimants had invited the ET to infer that decision makers knew that they were setting rates of pay which were historically discriminatory on grounds of gender. At paragraph 207 of its judgment the ET set out ten factual matters on which it was suggested that that inference could be based, of which the final two were: “207.9. The respondents have failed to call the relevant decision makers, specifically Lord Wolfson or other members of the Board to discount any influence the gender of the sales consultants played in the setting of pay and, the burden of proof lying on the respondents, direct discrimination has not been disproved. 207.10. A failure to disclose relevant documentation against a history of nondisclosure which led to an application to strike out the response, providing fertile ground for the drawing of adverse inferences.”
262. The ET rejected that invitation, finding the evidence of Next’s witnesses to be “compelling” and to prove that “it was all about cost” and “gender did not enter into the equation” (judgment paragraph 208). The drive to reduce cost “would have happened regardless of the gender split in either market”. At paragraph 209 the ET concluded: “In response, the claimants would say it does not matter what the respondents might have done, hypothetically, if the gender dimensions of the workforce were different. The fact was that a group of workers who were predominantly women were paid less for work of equal value than a group of other workers who were, albeit marginally, men. If the decision can in any part be attributed to taking advantage of a market rate which has historical sex taint the respondents have not established their defence. The answer to that is that we do not find that any part of the thought processes of Mr Mason and his colleagues when fixing the basic rate, or any aspect of, pay was that this was a group of workers who were in © EAT 2026 Page 52 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors receipt of lower rates of pay because they were women. The attention was on the national minimum wage and how to achieve the necessary number of staff to discharge the sales service by paying as little as they could.”

263. The ET said that it had given “careful consideration” to the absence of Lord Wolfson or a member of the Board, who was the “ultimate controlling force” (paragraph 214). It cited this Tribunal’s decision in *Scottish Water v Edgar* [2024] EAT 32 for the proposition that evidence to explain a difference in pay may not be direct but can be circumstantial or “taken at second hand from a person who was suitably knowledgeable” (paragraph 216). At paragraph 217 it explained why it considered Mr Mason to be “well positioned” to give the necessary evidence.
264. The ET reviewed the history of disclosure issues and explained why it did not draw an adverse inference from the absence of certain documents.
265. Mr Short submitted that the ET’s conclusion was perverse, in the absence of any evidence from the relevant decision-makers or disclosure of the relevant documents. The case of Edgar, he said, arose where it had not been possible to identify the decision maker, and also it concerned causation but not mental processes. Mr Mason’s evidence was not a sufficient basis for the ET’s conclusion because it dealt only with the point at which pay proposals went to the Board and he could not speak to what happened at Board meetings. Next bore the burden of proof and therefore could not succeed without evidence. Next’s submissions
266. Ms Donnelly emphasised the ET’s multiple, detailed and unappealed findings about the role of Mr Mason and his ability to give evidence about Next’s decisions on retail pay. See in particular paragraph 217: “Mr Mason was at the centre of the process for yearly setting of pay levels during the relevant period and was involved in all stages save for it being approved and signed off by the Board and any contact the Board might have had with the Finance department. He was well positioned to give evidence about those factors which did and did not influence the process in the extensive discussion he had with others, including Lord Wolfson, over the years. His explanations aligned with the evidence of Mrs MacIntyre and Mr Kelly, insofar as there were commonalities across the Group to setting pay by way of the use of benchmarking by market rates.”
267. In addition, paragraph 198 of Next’s skeleton argument contended: “Similarly the Tribunal made unappealed factual findings as to the limited role of the Board:
- (a) the retail budget established by Mr Mason was included in the budgets sent by the Finance Department to the Board ‘for approval and sign off by the Board of Directors’ (judgment 86);
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 - (b) pay levels were ‘approved and signed off by the Board’ at (judgment 217); and
 - (c) ‘The Board’s role did not involve revising the pay proposals when signing off the budgets’ (judgment 223).”

268. The ET noted the claimants' contention that Mr Mason's evidence was not sufficient, considered it carefully and decided that it could safely make findings on the evidence it had heard.
269. In those circumstances Ms Donnelly submitted that the claimants came nowhere near the high threshold for a perversity challenge. Discussion
270. I am also not persuaded by ground 2 of the cross-appeal.
271. There is no rule of law which states that an employer defending a decision must call the individual(s) who made the decision to explain it, or adduce documentary evidence which states or demonstrates the reasons for the decision.
272. Instead, the ET must decide the facts by weighing the evidence which the parties adduce. If there is no evidence from which a significant issue of fact can be resolved, then the party having the burden of proof on that issue will fail.
273. A party who does not adduce direct evidence from a decision maker therefore runs the risk of a negative outcome. That risk logically applies to any company which relies on a Board decision and does not adduce evidence from its Board.
274. However, it is permissible for the process of finding facts to include the drawing of inferences. An inference is a conclusion of one fact which can logically or reasonably be based on the evidence of another fact.
275. In this case the ET felt able to draw inferences about the reasons for the Board's decisions, based largely on the evidence of Mr Mason. Its judgment specifies numerous detailed reasons why it considered that Mr Mason was well placed to give evidence about the setting of Next's pay rates, including his being "at the centre of the process" and his having had "extensive discussion ... with others, including Lord Wolfson".
276. That inferential evidence had to be weighed against any positive evidence of direct discrimination. In this case there was none. From the ET's judgment it is clear that the balance was tipped by an abundance of evidence from Mr Mason and his colleagues which supported the conclusion that sex had nothing to do with Next's decisions on pay rates.
277. Logically there remained a possibility that the Board, behind closed doors, had engaged in direct discrimination. But there was no legal reason why the ET was bound to reject © EAT 2026 Page 54 [2026] EAT Judgment approved by the Court for handing down Next Retail Ltd v M Thandi & Ors Next's case that that had probably not happened.
278. This Tribunal will interfere with findings of fact only where it is absolutely clear that no reasonable ET could have made those findings. In my judgment the present case does not approach that threshold. Next relied on a detailed inferential case which the ET was entitled to accept, and it gave a detailed and convincing explanation of why it accepted it.

279. Nor do I consider that a lack of disclosure should have led to any different conclusion. A respondent which fails to preserve or produce a relevant document risks the drawing of adverse inferences or a failure to prove its case. But in this case the ET considered the claimants' disclosure objections in some detail at paragraphs 222-225 of its judgment. It decided that on the facts of this case adverse inferences should not follow from a lack of documentation, and it then set about the task of deciding the facts on the basis of the evidence before it. It made no error of law in that regard.

Conclusion

280. The appeal succeeds to the extent set out above.

281. The cross-appeal is dismissed.

282. Further submissions will be invited on disposal and consequential matters. © EAT 2026 Page 55 [2026] EAT 130

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