

ENGLAND AND WALES / JUDGMENT

Tesco Stores Limited v K Element & Ors

COURT

Judgment approved by the court

BEFORE

THE HONOURABLE MRS JUSTICE STACEY

Source: caselaw.nationalarchives.gov.uk · Research copy typeset by Esheria. Not court-issued or certified.

Source record

Judgment approved by the court

Ms Element & Ors v Tesco Stores Ltd

Neutral Citation Number: [2025] EAT 159

EMPLOYMENT APPEAL TRIBUNAL

Case No: EA-2023-000927-AT
EA-2023-000928-AT
EA-2024-001071-AT
Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 October 2025

Before: THE HONOURABLE MRS JUSTICE STACEY

Between: TESCO STORES LIMITED
-and-
MS K ELEMENT & OTHERS
(All Claimants represented by Leigh Day and Harcus Parker)
Appellants
Respondents

David Reade KC, Mathew Purchase KC and Louise Chudleigh (instructed by Freshfields) for the Appellant
Keith Bryant KC and Stephen Butler (instructed by Harcus Parker) for the Respondents
Sean Jones KC, Rachel Barrett and Andrew Blake (instructed by Leigh Day) for the Respondents
Hearing date: 14 - 15 October 2025

JUDGMENT

© EAT 2025 Page 1

[2025] EAT 159 Judgment approved by the court Ms Element & Ors v Tesco Stores Ltd SUMMARY Equal Pay, Practice and procedure Orders on disposal on remittal back to the same tribunal seeking to assist the tribunal in the laborious task of finding facts at Stage 2 of an equal value case. © EAT 2025 Page 2

[2025] EAT 159 Judgment approved by the court Ms Element & Ors v Tesco Stores Ltd THE HONOURABLE MRS JUSTICE STACEY 1. This matter comes before the Employment Appeal Tribunal to decide disposal and consequential matters following judgment given on 31 July 2025 in these three linked appeals (“the Stage 2 EV EAT Judgment,” to help distinguish it from the many other appeals and judgments in these proceedings). 2. As previously, I have been provided with a wealth of submissions and authorities by all counsel who appeared in the appeal before me and I am grateful to all parties for their hard work. I am also grateful for their attempts to narrow the disputes between them on disposal. 3. At the parties' request the independent experts (“IEs”) appointed appeared remotely at the hearing and it was agreed that I should hear from them on matters relevant to the preparation of their report required for the eventual final hearing. I am grateful to them for their attendance and contributions. 4. By way of brief recap and update on recent procedural developments specific to the equal value question for the tranche 1 sample claimants and comparators in this case, there are now five relevant decisions on stage 2 equal value that have been produced by the Employment Tribunal:

- (a) the first ET judgment of 12 July 2023;
- (b) the case management order of 26 July 2023;
- (c) the second decision of 5 July 2024 (which were the subject of the appeal before me which took place on 18 and 19 June 2025 resulting in the Stage 2 EV EAT Judgment); © EAT 2025 Page 3

[2025] EAT 159 Judgment approved by the court Ms Element & Ors v Tesco Stores Ltd

- (d) the first reconsideration decision of 30 May 2025 after the Tribunal had invited the parties to apply for reconsideration of its decisions second decision (“the First Stage 2 EV Reconsideration Decision”); and
- (e) The second ET reconsideration decision of 28 July 2025 after the Tribunal invited further applications from the parties (“the Second Stage 2 EV Reconsideration Decision”) I shall refer to the five documents together as the “ET Stage 2 Equal Value Decisions”. There has since been a third application to the Employment Tribunal by the respondent to 5. 6. reconsider its Second Stage 2 EV Reconsideration Decision. That application has not been considered by the tribunal as I ordered the tribunal and the IEs to pause further work on EV

in my order of 31 July 2025. 7. There has been no appeal from the First Stage 2 EV Reconsideration Decision, but on 8 September 2025 all three parties lodged appeals against the Second Stage 2 EV Reconsideration Decision. I granted permission to appeal to all parties on all grounds earlier today at a preliminary hearing listed to consider whether there were arguable grounds sufficient to allow any or all parts of any or all of the three proposed appeals to a full hearing (“the Second Stage 2 EV Reconsideration Decision Appeals”). 8. Permission has been given by the Court of Appeal to appeal the judgment of His Honour Judge Tayler concerning the scope of the grounds of appeal that resulted in the Stage 2 EV EAT Judgment and permission has also been given by the Court of Appeal to appeal the Stage 2 EV EAT Judgment itself and both appeals have been expedited and listed to be heard in the Court of Appeal in early March 2026. © EAT 2025 Page 4

[2025] EAT 159 Judgment approved by the court Ms Element & Ors v Tesco Stores Ltd 9. The parties very much hope that it will be possible for the Second Stage 2 EV Reconsideration Decision Appeal to be expedited so that a judgment can be given and there still be time, if necessary, for any further appeal (if there is to be one) to catch up in time for the Court of Appeal hearing in March 2026. 10. As before, I will continue to refer to the parties as they are before the tribunal and, where necessary to distinguish between the two sets of claimants, I will refer to them as either the Leigh Day or the Harcus claimants. General approach 11. At the outset of the hearing the parties confirmed that they were all of the view that the matters that need to be considered or reconsidered in light of the Stage 2 Equal Value EAT Judgment should be remitted back to the same tribunal for continuity and they all expressed confidence that, with the guidance provided, a decision setting out the agreed and decided facts relating to Stage 2 on the correct legal principles was achievable by the assigned tribunal in accordance with the EV rules of procedure.

12. My conclusions on the disputed points will be apparent from the terms of my order, which will follow. The principles I have applied in reaching my conclusions are to have regard to the overriding objective and to ensure, insofar as it is possible, that this case can progress as efficiently as possible, with minimal further delays. All parties and this Tribunal stressed the importance of trying to “get the case back on the rails” in those exact words, at various points during the hearing: to lay the foundations to assist the tribunal to achieve its laborious task of arriving at a clear set of comprehensive facts, as required by the Stage 2 Equal Value Procedure, which will then enable the © EAT 2025 Page 5

[2025] EAT 159 Judgment approved by the court Ms Element & Ors v Tesco Stores Ltd independent experts to complete their independent report without unnecessary further delay or risk of further interlocutory matters requiring resolution by the Tribunal. 13. I have also sought only to remit back those parts of the decisions under appeal that properly fall within the grounds of appeal that were successful before me and which were permitted by His Honour Judge Tayler to be within the scope of the appeal before me. The Principal Areas of Disagreement Format 14. The respondent and Leigh Day claimants considered that the most effective way to avoid further protraction of the proceedings

would be for the parties to revise their records of dispute (RoDs) and EVJDs (Equal Value Job Descriptions) and use the same format the parties had agreed be used in preparation for the original hearing that was rejected by the Tribunal. In this way it would enable the Tribunal to have a clear picture of what the parties have agreed in order to enable the Tribunal to focus on the decisions it is required to make in light of the Stage 2 EV EAT

Judgment.

15. The considered that utilisation of the excel spreadsheet format already devised, with a couple more columns as discussed during the hearing, would best assist the Tribunal, which could then just insert their findings and very brief reasons in a designated box, similar to a Scott Schedule or a costs schedule, against each disputed point. It will result in a document which best assists the IEs to prepare their report. This is a tried and tested formula used in other comparable cases (see appendix A to the Stage 2 EV EAT Judgment). © EAT 2025 Page 6

[2025] EAT 159 Judgment approved by the court Ms Element & Ors v Tesco Stores Ltd 16. They also agreed that this exercise should start as soon as possible as soon as possible, after judgment is given in the Court of Appeal, if not before. 17. The Harcus claimants disagreed. Mr Bryant KC submitted that insofar as possible the IEs should prepare their report as best they can from the ET Stage 2 EV decisions thus far as they had previously indicated they could do, albeit with a number of caveats. He considered that the IEs would be able to get on with it and could refer back to the Employment Tribunal with any questions or clarifications required as permitted by the EV Rules of Procedure. 18. The IEs were asked about this during the hearing and they were certain that they would need clear findings of fact in order to prepare their report and that the formula adopted in previous cases had worked well or reasonably well and no-one has yet come up with a better alternative. 19. I find that a revised comprehensive record of dispute/EVJD is the far better option. It will:

- (a) enable the Tribunal to be clear what decisions and facts need to be reconsidered, where the appeal was successful because of an error of law in approach, for example when the Tribunal had made findings by reference to what a hypothetical reasonable employer might require of their hypothetical employees, rather than by reference to what the claimants and comparators were in practice required to do by the respondent.
- (b) Clearly identify to the tribunal the disputed facts on which it needs to make findings where there has wrongly been an absence of a required finding.
- (c) Clearly identify to the tribunal the points of disagreement between the parties about what the Tribunal had decided and so that the Tribunal can clarify; and © EAT 2025 Page 7

[2025] EAT 159 Judgment approved by the court Ms Element & Ors v Tesco Stores Ltd

(d) Identify and isolate the specific points of dispute where the approach of the Tribunal of incorporating training documents into the decision has led to confusion and disagreement so that the Tribunal can set out what it had decided. (There may be other ways in which the excel spreadsheet table format will make the task of the tribunal easier that I have missed and the above is not to be taken as a non-exhaustive list.) 20. The respondent and Leigh Day proposal will be the best way to simply the task for the tribunal and assist it to make the clear findings of fact needed to progress the claim. Marcus' proposals were fraught with difficulties and would inevitably result in further litigation and complication and disagreement between the parties. It also risked passing the fact-finding responsibility to the IEs when, as prescribed by the EV Rules of Procedure, it is for the parties to agree as much as they can and the Tribunal to decide the facts at Stage 2. 21. To the extent that the format proposed by the respondent and Leigh Day involves a reorganising of determinations already made into a different format, I find it falls squarely within the statutory powers open to this Tribunal under Section 35(1)(a) of the Employment Tribunals Act 1996 for the purposes of disposing of an appeal in order to promote effective case management going forward (see *Gillani v Veezu* [2025] EAT 97). 22. I have therefore largely adopted the respondent and Leigh Day wording in paragraphs 12 to 21 of the draft order. Work task findings from the training materials 23. The Leigh Day claimants had already produced a sample of the table proposed which I approve. I also agree that the preferred approach where the Tribunal made findings by reference to © EAT 2025 Page 8

[2025] EAT 159 Judgment approved by the court *Ms Element & Ors v Tesco Stores Ltd* the training materials it is for the parties to summarise succinctly the work tasks set out in those materials as Leigh Day have done in the sample in paragraph 66(i): "Displays products in accordance with the merchandising plan". 24. If Tesco or the Marcus claimants consider it to be a materially inaccurate distillation, they may put in alternative wording of their preferred summary and the Tribunal will then have to decide between the two competing summaries. But I would remind the parties to try to avoid arguing about distinctions that have no actual difference and of their duty to assist the Tribunal to achieve the overriding objective. The parties must distinguish between the trivial semantic differences and the substantive areas of disagreement between them. 25. It is hard to think of a polite term for the respondent's alternative proposal that every part and every word of the training materials (which included some videos) referred to in the ET Stage 2 Equal Value Decisions be set out verbatim in the table. It was utterly unworkable and would involve the parties and the Tribunal in many, many hours of extra unnecessary work. 26. I have also kept the timetable as tight as realistically possible, noting that some of the work can be started in advance of the Court of Appeal judgment after the March 2026 hearing, for those parts that are not the subject of the appeal to the Court of Appeal, should the parties wish to do so. Disputes on whether specific paragraphs in appendix 8 comparators' EVJD fell to be reconsidered as a consequence at the Stage 2 EV EAT Judgment 27. I shall again start with some general points. 28. Part of the dispute between the parties was about how narrowly or broadly the grounds of appeal that led to the Stage 2 EV EAT Judgment should

be read, with the respondent arguing for a © EAT 2025 Page 9

[2025] EAT 159 Judgment approved by the court Ms Element & Ors v Tesco Stores Ltd wide interpretation which led them to seek reconsideration of a greater number of specific paragraphs in respect of each comparator, whilst the claimants argued that the respondents' proposals went far beyond the respondent's successful grounds of appeal. To now widen the remit would give the respondent yet another bite of the much bitten cherry. 29. I find that the remittal back shall only be on the specific examples cited in the respondent's grounds of appeal that were successful, unless the challenge is self-evidently to a matter of principle that has application across the board without the need for further argument and encompasses a wider point. There is a further exception, where it is crystal clear from a reading of the grounds of appeal, the Stage 2 EV EAT Judgment and the Stage 2 ET Decisions, that the error in a finding in relation to the anchor comparators, (Mr Wayne Jones on assembly and Mr Hornak on loading 1), also infects comparable findings or omissions in relation to other comparators. Clause by clause conclusions. 30. It is necessary to address only very briefly the remaining contested wording in the respondents' own brand draft order which has been used as a travelling draft and on which both sets of claimants have tracked their proposed changes and indicated their agreement to other parts. The precise wording has been fully discussed in court with a degree of drafting by committee in the helpful and co-operative way adopted by the parties today. 31. Starting with the proposed recitals, I agree with the intention in the recitals to stress to the Tribunal the importance of providing a single document containing a comprehensive set of findings and record of agreed facts in the format ordered. But it is best expressed in the body of the order to stress its importance and the parties agreed to draft and agree appropriate wording, which may perhaps be conveniently added to paragraph 12 which I can then approve (or amend). 1 Mr Pratt is also an anchor comparator but does not feature in this appeal. © EAT 2025 Page 10

[2025] EAT 159 Judgment approved by the court Ms Element & Ors v Tesco Stores Ltd 32. Paragraph 2(b), which refers to paragraph 325 of the second ET decision of 5 July 2024 and appeal ground A2G1. I agree with the respondent that the grounds of appeal and the nature of the successful challenge under this head includes the comparators, so I have added their suggested paragraph for 2(b). There was some movement between the parties during the course of the day about the specific paragraph numbers in the EVJDs that fall within this category and when you receive the draft of my order which I hope encapsulates the paragraphs that the respondent agreed should be deleted please do check it carefully and confirm. Please not that this is not an opportunity to reargue anything or make any further submissions. 33. On paragraph 3, which is appeal ground A2G4, I find that this ground of appeal is limited to performance index or PI rates as per the wording of the grounds of appeal and paragraph 154 to 156 of the Stage 2 EV EAT Judgment. The proposed additions that are not agreed by the claimants thus fall outside the scope of the appeal and the EAT's remission powers under s.35(1) Employment Tribunals Act 1996 and are thus refused. As I understand it, these are paragraphs 8.4, 8.6

and 8.7 of Mr Todd's EVJD and for Mr Young, paragraph 9.47. The parties can check and confirm. 34. Paragraph 5, A2G6, excluding the impact of faulty equipment, the parties have enthusiastically taken me up on my rash offer in paragraph 186 of the Stage 2 EV EAT Judgment to raise arguments at the disposal hearing about the scope of the remission back. I agree with the respondent's submissions that their grounds of appeal identified an issue of principle that applies also to the comparators. As with paragraph 2(b) please check if all the specific paragraph references proposed by the respondent stay in, in light of the discussion between the parties to narrow the issues, (much of which I was not party to as it took place outside the Tribunal) and confirm. Again this is not an opportunity to make further submissions but to ensure that the order properly reflects my ruling. © EAT 2025 Page 11

[2025] EAT 159 Judgment approved by the court Ms Element & Ors v Tesco Stores Ltd 35. Paragraph 9 was also hotly contested. I agree with the claimants that in appeal ground A2G9, management and surveillance, falls outside of the scope of the wording in the grounds of appeal. I remind myself that it is important to restrict matters to the grounds relied on and only the grounds that were successful. 36. A2G9 was a perversity challenge, where it is even more necessary to be all the more rigorous in requiring specificity (see *Yeboah v Crofton* [2002] IRLR 635 at [92] and the EAT PD). I have rejected the disputed paragraphs put forward by the respondent. 37. The remaining paragraphs are not subject to disagreement given my finding in principle to reject the Harcus proposal in relation to disposal. I have split the difference between you on timing in paragraphs 2-11. 38. I thank the parties for confirming that there are no other decisions that they are expecting of me today and that I have dealt with all the matters in dispute in the draft disposal order. This concludes my ruling on the disputed matters on disposal of this appeal. © EAT 2025 Page 12

[2025] EAT 159

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://caselaw.nationalarchives.gov.uk/eat/2025/159>

CASE PAGE <https://chat.esheria.ai/case-law/england-and-wales/tesco-stores-limited-v-ms-k-element-others-leigh-day-claimants-EqualPay-court-unknown--6a3ea4ef3b1caa91297f8923>

Prepared on 24 October 2026 · Esheria