Case Number: 3202029/2019

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EMPLOYMENT TRIBUNALS

Claimant: **Ms S Yildiz**

Respondents: **(1) The London Borough of Barking and Dagenham**
(2) Ms F Taylor

Heard at: **East London Hearing Centre**

On: **15 and 16 October 2020**

Before: **Employment Judge Russell**

Representation
Claimant: **Ms L Prince (Counsel)**
Respondent: **Ms L Chudleigh (Counsel)**

JUDGMENT

The judgment of the Tribunal is that:-

1. **The Claimant cannot compare herself with Mr David Lawson under Section 79, Equality Act 2010.**

2. **The Claimant cannot compare herself with Mr Skeates, Mr Ferguson, Mr Green, Mr Mather or Mr Hursthouse under Section 79, Equality Act 2010.**

3. **The Claimant can compare herself with Mr Skeates, Mr Ferguson, Mr Green, Mr Mather or Mr Hursthouse for the purposes of Article 157, Treaty of the Functioning of the EU.**

REASONS

1 The claim was listed for a two-day open Preliminary Hearing to determine the preliminary issues of:

1.1 Can the Claimant compare herself with her chosen comparators under Section 79, Equality Act 2010?

1.2 If not, can the Claimant compare herself with her chosen comparators under Article 157, Treaty of the Functioning of the EU because their pay is attributable to a single source?

2 In the course of submissions, Ms Prince clarified the Claimant's case relies on:

2.1 Section 79 of the Equality Act 2010 for the five Be First comparators: Mr Ed Skeates (Development Director); Mr Ian Ferguson (Commercial Director); Mr Ben Green (Senior Development Manager); Mr Tom Mather (Construction Director); and Mr Stephen Hursthouse (Senior Development Manager);
2.2 Section 79 interpreted in line with Article 157 in respect of the Thurrock Borough Council comparator (Mr David Lawson, assistant Director of Law and Governance and Monitoring Officer); and
2.3 Article 157 alone for the same five Be First comparators.

3 The parties have very helpfully provided a list of agreed facts and issues to be determined which is attached as an Appendix to this Judgment.

4 I heard evidence from the Claimant on her own behalf and from Ms Taylor on behalf of the Respondent. I was provided with an agreed bundle spreading over some four lever arch files. I had oral and written submissions and was provided with a number of authorities to which I refer below.

Findings of Fact (in addition to the agreed facts)

5 The Claimant was employed by the Respondent as Deputy Head of Legal Services providing it with legal advice and services. She was initially based at the Dagenham Civic Centre before moving with the legal team to Roycroft House in Barking and, from May 2018, Barking Town Hall. Her job was essentially to provide legal support to the Respondent in achieving delivery of its regeneration agenda both through its own work and that of arms-length companies created for that purpose.

6 The Claimant worked closely with Mr David Lawson her counterpart at Thurrock Borough Council. From as early as 2011 when the Thurrock head of legal services joined the Respondent, the legal departments at the Respondent and Thurrock shared services under an informal arrangement. The arrangement was formalised and extended beyond legal services from 2012, when the Chief Executive from Thurrock took over as Chief Executive of the Respondent, and lasted until approximately late 2017 or early 2018. Section 113 agreements were implemented to enable employees of one authority to provide services and/or act on behalf of the other authority. It was agreed that the section 113 agreements took the arrangements no further than the shared service arrangements agreement which included the following principles:

> **"Employees occupying shared posts will remain the employee of their original employing authority. Therefore employment status will not change – there will only be one employer for each post. This will apply whether an employee is appointed/assimilated to a shared post through a restructure or applies for a job through a recruitment exercise.**
>
> **Particulars of employment will be issued from the employing authority which will include a clause that outlines that the post involves working across LBBD and TC. This will also be made clear in the job profile.**
>
> **The terms and conditions of employment will not be harmonised across the two authorities. The terms and condition in place for each authority will remain unchanged as employees remained employed by only one authority the salary scale and terms and conditions of only**

> **that authority will apply. This is applicable for all employees – both newly appointed, external candidates and internal transfers. Advertisements for new posts will make clear the joint working arrangements, employment status and terms and conditions of the employing authority.**
>
> **Salary level for new posts will be determined by evaluating jobs through both the LBBD and TCJE schemes. If there are any major differences in the result this will be explored further with the evaluating bodies with a view to achieving an equitable pay structure wherever possible. The final salary applicable will be in line with the salary structure in place at the employing authority.**
>
> **"[**if the sharing arrangement should come to an end**] assimilation/redeployment across authorities will not be possible as it would result in a change of employer. However, TC/LBBD employees at risk of redundancy will be offered the chance to apply for a vacant post within the related structure of the other authority prior to the vacancy being advertised to the general public."**

7 It is an agreed fact that the Respondent's employees are employed on NJC terms and conditions unless otherwise indicated in the statement of their employment particulars. The Claimant's contract of employment dated 11 July 2016 is on NJC terms and conditions. It is also agreed that Thurrock Borough Council no longer employ their employees on NJC terms and conditions. Despite the shared service agreement, each is an independent local authority each responsible for generating its own council tax receipts. Each local authority operates independently in deciding how to spend their revenue and deciding its own public policy priorities.

8 Between 28 October 2017 and 10 November 2017, the Claimant and Ms Taylor exchanged a series of emails about the structure of the legal services team and the Claimant's job role within it. On or around 20 September 2017, she and Ms Taylor had discussed the possibility of creating a new role within the legal structure. In the emails, the Claimant expressed concern that Ms Taylor had subsequently suggested that both the Claimant and Mr Marks, her Thurrock counterpart, may be interested in applying for the possible new role. The Claimant observed that Mr Marks was not employed on the Respondent's terms and conditions and stated that she naturally expected that she would be properly and fully consulted about the new role. In response, Ms Taylor stated that there was never any definite suggestion of a new role and, specifically about Mr Marks' position, *"***there was an agreement during shared services that for the purposes of assimilation officers working for either borough could apply for roles in each respective council."**

9 Be First is a limited company registered at Companies House which began trading on 1 October 2017. The Respondent is the 100% shareholder. The aim of Be First is to accelerate the regeneration of the Borough, to deliver increased revenues and returns to the Respondent and to manage delivery of the Respondent's housing and regeneration plans. Prior to the establishment of Be First, such activities would have been delivered by the Respondent as part of its wide-ranging obligations as a local authority. Whilst local authorities are generally required to award certain contracts after fair and transparent competitive tendering, this applies only to external contractors and a public authority is able to procure relevant goods and services from its own resources. As a result of case-law from the CJEU, this includes provision of services from a separate legal entity where the local authority exercises over that entity *a control which is similar to that which it exercises over its own departments and, at the same time, the entity carries out the essential part of its activities with the controlling local authority* (this is referred to as "the *Teckal* exemption)". It is an agreed fact that Be First is a *Teckal* company.

10 It is an agreed fact that Be First and the Respondent are associated employers for the purposes of s.79 of Equality Act 2010.

11 Clause 4 of the shareholder agreement dated 29 September 2017 between the Respondent and Be First provides that with the exception of the matters requiring shareholder consent pursuant to clause 7, the day-to-day management of Be First is vested in its directors. The directors are also responsible for determining the general policies of the company and the manner in which the business is to be carried on, even in relation to those reserved clauses 7 matter. The intention as expressed in sub-clauses 4.11 and 4.12 is that the company should carry on and conduct its business and affairs in a proper and efficient manner for its own benefit in accordance with good business practice and transact all its business on arms-length terms.

12 Clause 7 lists those matters which require the consent of the Respondent as shareholder. These reserved matters do not include pay, save in two limited respects. Firstly, in establishing the maximum permissible ratio between the highest paid employee and the lowest paid employee. Secondly, in establishing any profit sharing, share option, bonus or other incentive scheme. The adoption or amendment of an approved business plan are also reserved matters requiring the Respondent's consent.

13 Clause 11 of the shareholder agreement states:

> "**In the event of any ambiguity or discrepancy between the provisions of this agreement and the Articles, then it is the intention of the shareholder that the provisions of this agreement shall prevail.**"

14 The Be First Articles of Association were adopted by a special resolution passed on 25 October 2017. They include the following relevant provisions:

> 14.1 Clause 4: the shareholder may by special resolution direct the directors to take, or refrain from taking, specified action.
>
> 14.2 Clause 18(4): notwithstanding any other provision of the Articles, the majority shareholder may at any time and from time to time (a) appoint any person to be a director or (b) remove any director from office.

15 The service agreement between the Respondent and Be First, dated 29 September 2017, includes an equality and diversity clause which acknowledges the Respondent's public sector equality duty under section 149 of the Equality Act 2010, and requires Be First not to discriminate unlawfully in the performance of its obligations under the agreement.

16 The Respondent established a shareholder panel to work as an advisory group supporting Cabinet in the discharge of their duties as 100% shareholder of its various arms-length companies, including Be First. The shareholder panel is responsible for the satisfactory performance of the arms-length companies by, amongst other things, reviewing proposed appointments or removals of directors. The panel makes recommendations for Cabinet consideration and approval to oversee and ensure compliance with all *Teckal* related obligations. It also reviews and monitors the long-term strategic objectives of arms-length companies via their business plan, including any

amendments proposed.

17 The role of the shareholder panel is advisory; it is the Cabinet which is the ultimate decision maker in respect of its arms-length companies. This can be seen from the minutes of the Cabinet meeting on 19 February 2018 at which the Be First 2018-2023 business plan was discussed and approved. These minutes record the intention that Be First would be a development vehicle intended to leverage commercial expertise but with additional freedom to trade beyond that traditionally available to a local authority. As recorded in the minutes, Cabinet recognised that Be First was operationally independent of the Respondent, operating in the same way as a commercial organisation but accountable through the shareholder panel for its performance and conduct.

18 The Claimant was involved in the establishment of Be First and provided internal training to the shareholder panel on 12 September 2017 to explain how it would work. The Claimant produced a number of slides to support the training (her slides start from page 344S of the bundle). One slide states that the intention of the shareholder panel was to provide measured and proportionate oversight allowing the company the independence and operational freedom to deliver as they see fit within a commissioning framework and agreed business plan set by the council.

19 On incorporation, the Respondent's Town Hall was the registered office for Be First. Be First did not trade from that office and subsequently move to Maritime House. Maritime House is not owned by the Respondent nor do any of its employees work from that address. Insofar as the Land Registry entry refers to the Respondent, it is a lease granted by the Respondent at a time when it did own Maritime House. I find on balance that the Respondent has no legal interest in Maritime House at all. Maritime House is in close geographic proximity to Roycroft House, where the Claimant worked, but it is neither adjoining nor part of the same premises.

20 Upon incorporation, a number of employees of the Respondent were TUPE transferred to Be First and they continue to be subject to the Respondent's terms and conditions, such as membership of the local government pension scheme. Subsequently recruited employees are employed on Be First terms and conditions, which do not incorporate NJC terms or members of the local government pension scheme. Without the restriction of collectively agreed local authority terms and conditions, Be First are able to pay employees higher salaries than would be permitted at the Respondent and can assist recruitment by offering salaries more in line with the private than the public sector. The entire senior management team and each of the five comparators relied upon by the Claimant are employed on Be First terms and conditions.

21 A key dispute between the parties is the nature and extent of any control exercised by the Respondent over Be First on matters related to pay. This ambiguity arises from the Respondent's theoretical power to control Be First as provided by clause 4 of the Articles and the actual, independent day to day operation of Be First as envisaged by clause 4 of the Shareholder Agreement. In other words, whether the Respondent has the legal ability to require changes in pay or whether it be acting ultra vires if it tried to do so, and whether it could or would ever in practice seek to enforce any legal power which it does possess. As a matter of fact, I accept that the Respondent has never sought to influence the level of pay set by Be First and has regarded pay as a non-reserved matter in which it has no say.

The Law

22 Section 79 of the Equality Act 2010 provides that an employee (A) may compare themselves with another person (B) as follows:

> **(3) This subsection applies if—**
> **(a) B is employed by A's employer or by an associate of A's employer, and**
> **(b) A and B work at the same establishment.**
>
> **(4) This subsection applies if—**
> **(a) B is employed by A's employer or an associate of A's employer,**
> **(b) B works at an establishment other than the one at which A works, and**
> **(c) common terms apply at the establishments (either generally or as between A and B).**
>
> **…**
>
> **(9) For the purposes of this section, employers are associated if—**
> **(a) one is a company of which the other (directly or indirectly) has control, or**
> **(b) both are companies of which a third person (directly or indirectly) has control."**

23 Despite the language of section 79, the controlling employer need not be a company, **Hasley v Fair Employment Agency** [1989] IRLR 106. Ms Chudleigh, on behalf of the Respondent, did not concede this point but suggested that for the purposes of this hearing, I was not constrained by the word "company" but elected not to put forward a positive case.

24 The concept of an "establishment" under the predecessor Equal Pay Act was largely directed to the place of work in a broad sense, **City of Edinburgh Council v Wilkinson and others** [2012] IRLR 202, Court of Session. I accept Ms Chudleigh's submission that it is clear that "establishment" does not mean the whole of a local authority's premises or operations, for example where it is a particular school or office building. Moreover, the fact that an employee's job involves visiting various locations, does not deprive their base from being the establishment at which they are employed.

25 It is not in dispute that Article 157 of the Treaty of the Functioning of the European Union is directly effective in this case. It provides that:

> "**Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work or equal value is applied.**"

26 A claimant may rely on Article 157 where both employees' terms and conditions are attributable to a single source and there is a single body responsible for the inequality which could restore equal treatment, **Lawrence v Regent Office Care Ltd** [2003] ICR 1092.

27 It is not necessary to show that a single body is responsible for creating the pay inequality, rather, it is sufficient that a single body is perpetuating the inequality in circumstances where it is able to rectify it, **North Cumbria Acute Trusts v Potter** [2009] IRLR 176.

28 In **Department for Environment, Food and Rural Affairs v Robertson** [2005]

ICR 75, the Court of Appeal held that although the claimant and the comparator were both ultimately employed by the Crown which by the contract of service was in control of the terms and conditions of employment including pay, there was not a single source. The Crown was not involved in negotiating pay rather it was the individual departments which fixed the terms and conditions of their own civil servants and who were responsible for equal treatment. The fact that the Crown retained a legal power, which had not in fact been exercised, over civil servants' pay and the fact that the Crown had the power to revoke the delegation of pay decisions to the departments, was not sufficient to make it responsible for pay differences or to constitute a single source.

29 In **Glasgow City Council & others v Unison claimants and another** [2014] IRLR 532, the Court of Session decided that a local authority and a *Teckal* company are associated employers for the purpose of section 79 of the Equality Act 2010. The Court of Session noted at paragraph 50 that it was arguably inconsistent to accept, on the one hand, that the company was sufficiently under the control of the local authority as to be the equivalent of an in-house organisation to benefit from the exemption whilst, on the other hand, not accepting that the local authority had sufficient control over the company to constitute it as a single source. The issue of whether the local authority is a "single source" for a *Teckal* company was remitted to the Employment Tribunal.

30 The most recent authority relied upon in this case is the Court of Appeal judgment in **Asda Stores Limited v Brierley** [2019] ICR 1118. It is worth noting that an appeal was heard by the Supreme Court on 13 and 14 July 2020 although at the date of the preliminary hearing, and indeed today, the Judgment of the Supreme Court has not yet been promulgated. The Court of Appeal was satisfied that on the facts of the case there was a single source because the claimant and comparator terms were set by the same employer, which had the power to equalise them despite there being different wholly different processes for setting retail pay and distribution pay. Underhill LJ approved the reasoning of Kerr J in the EAT where the latter described the **Robertson** case was wholly exceptional. It turned on the unique position in the civil service where the means of setting pay was enshrined in statutory and other instruments which would have to be expressly revoked in order for the Treasury to exercise central power over pay. By contrast, Kerr J said that Asda or its parent Wal-Mart could interfere at the "stroke of a pen or, more likely, the click of a mouse" to rectify pay inequality. Underhill LJ added that in his view it was enough that the Board as a matter of ordinary company law had the power to set or change terms and that **Robertson** turns on its particular facts.

Conclusions

Mr David Lawson – Thurrock Borough Council

31 Whilst section 79 requires that in order to establish control one of the employers at least must be a "company", I accept that when interpreted in accordance with Article 157, this should not be limited to Companies Act limited companies but is broad enough to extend to local authorities.

32 Ms Prince submits on behalf of the Claimant that the Respondent and Thurrock had a legally binding and reciprocal agreement to treat each other's employees as their own employees, for example for the purposes of assimilation. She relies upon the email exchange between the Claimant and Ms Taylor between 28 October 2017 and 19 November 2017 as evidence in support. I reject that submission. The shared services

agreement is clear that the employment status is not changed and that employees in shared posts will remain the employee of their original employing authority. Each authority set and issued its own terms and conditions which were significantly different and it was expressly recognised in the agreement that there would be no harmonisation. Ms Taylor's email is not an acknowledgement of assimilation rather it is a statement that employees could apply for roles in each respective council, in other words (and as expressly stated in the shared services agreement) they would not be automatically assimilated or redeployed across authorities upon termination of shared services but would be able to apply for the role. The benefit of being able to apply before the vacancy was made public falls far short of demonstrating sufficient control within section 79, even interpreted in a manner consistent with Article 157, to give rise to associated employer status.

33 Ms Prince further submits that control is sufficiently demonstrated by the fact that they are both local authorities under the control of central government. Again, even giving section 79 a purposive interpretation having regard to Article 157, I do not accept this submission. As Ms Chudleigh submitted, by extension, all NHS trusts would be regarded as associated employers as they are ultimately under the control of the Department of Health and operate common terms under Agenda for Change. The central government power to intervene is exceptional and its use is tightly prescribed in circumstances where local authorities that are failing to discharge their statutory duties. Each local authority is statutorily independent of each other and, in the ordinary course of events, of central government. Each is responsible for generating its own income and establishing its own political and social priorities for spending that income and the funds awarded to it from central government. As in **Robertson,** I do not consider it sufficient for the purposes of section 79 that both are local authorities ultimately under the control of central government.

34 As the Respondent and Thurrock Borough Council are not associated employers, the Claimant is not entitled to compare herself with Mr Lawson in a claim for equal pay.

Be First comparators

35 It is an agreed fact that the Respondent and Be First are associated employers within s.79(3) Equality Act 2010.

36 The Claimant's case is that she and the Be First comparators worked at the same establishment, alternatively if a different establishments, that common terms applied. Dealing first with establishment, the Claimant's base was the Town Hall, whereas her Be First comparators were based at Maritime House. No employees of the Respondent were located at Maritime House. The Claimant would on occasion work at Roycroft House but, although geographically proximate, the two buildings are physically and legally separate. The Respondent is responsible for Roycroft House. It has no legal involvement in Maritime House beyond its role as guarantor of the Be First lease by reason of its 100% shareholding. The owner and landlord of Maritime House is Dooba Investments Limited, Be First is the tenant pursuant to a free-standing lease dated 14 December 2017. The Claimant is mistaken insofar as she asserted that the Respondent was granted a lease of Maritime House. The Land Registry title clearly shows that in the past, the Respondent granted a 125-year lease of Maritime House to a separate commercial entity but had subsequently sold the freehold. The fact that upon incorporation and for a short period before it started trading, Be First was registered at the Town Hall is not sufficient to show a common establishment given the subsequently separate working arrangements.

37 Although the Claimant worked closely with her Be First comparators, the organisation of the two entities was separate. Each had its own management structure, reporting lines and policies. The Claimant's work was for the Respondent, even if it also supported the operation of Be First as well as other arms-length companies. Even adopting the broader sense of "establishment" as an organised body of persons as opposed to the premises at which they work, the establishments are separate.

38 The Claimant is not entitled to compare herself with the Be First employees within s.79 of the Equality Act 2010.

39 In submission, Ms Prince confirmed that the Claimant did not rely upon Article 157 in respect of Mr Lawson, the Thurrock comparator. The issue is therefore whether there was a single source responsible for pay inequality and which could restore equal treatment, applying **Potter.** The essence of the dispute is whether or not the Respondent was such a single source, in the particular circumstances of a *Teckal* company.

40 Prior to the creation of Be First, the Respondent discharged directly its regeneration work in the borough with employees whose terms and conditions it controlled. Part of the rationale for the creation of Be First was to enable the recruitment of employees at more commercially attractive salaries without the constraints of the local authority pay structure. Those employees of the Respondent who transferred continued to benefit from some of the Respondent's terms and conditions, those more recently recruited by Be First do not. It is common ground that the Respondent has not in fact involved itself in pay arrangements between Be First and its employees. Pay is regarded as an operational matter within the control of Be First and, as is clear from the Articles of Association and the Shareholder Agreement, pay is not a reserved activity which requires the Respondent's prior permission. The dispute at the heart of this argument is whether and to what extent the Respondent has a legal ability to intervene in matters of pay at Be First and was therefore responsible for subsequent pay inequality and could restore pay equality.

41 The Claimant's case is that **Robertson** should be confined to its exceptional facts and that **Asda** should be applied instead. Ms Prince submits that by virtue of the unique arrangements from which a *Teckal* company benefits, it is to be regarded as subject to similar control as that exerted over the Respondent's own departments. Moreover, she submits, the corporate structure of Be First gives the Respondent the theoretical and practical ability to remedy pay inequality – it is the 100% shareholder and can therefore fully set the direction of Be First, it exerts strategic control through Cabinet oversight of its business plans and policies, it has significant ultimate control over the Board as it can appoint or remove directors and can direct that they take (or stop) certain action. Ms Prince submits that it is not significant that pay is not a reserved matter: clause 7 simply identifies matters where Be First *must* get the Respondent's consent, it does not state that these are the only matters over which the Respondent shareholder has power.

42 The Respondent's submission is that the pay arrangements fall within **Robertson** rather than **Asda** – whilst there is a theoretical ability for the Respondent to have greater influence over pay at Be First, it is not a reserved activity and the facts of the case show that it is a long way from a "click of the mouse" situation, as Ms Chudleigh put it. Rather, as in **Robertson**, the Respondent has divested itself of the power to set pay for Be First employees and the strategic control it retains does not extend into operational matters

such as pay. Ms Chudleigh submits that use of a Special Resolution to remedy pay inequality would not be possible as it would encroach upon the Shareholder's Agreement clear statement that pay is a matter for the Board of Be First and that use of the power to remove Be First directors who did not agree to restore pay inequality would be ultra vires as a matter of company law. Unlike **Asda**, the effect of the Shareholder's Agreement and the Articles of Association is that the employer of the Claimant and the employer of the Be First comparators are separate legal entities and not a single corporate body where the Board could remedy pay inequality.

43 On balance, I prefer the submissions of the Claimant and conclude that it is the practical legal ability to influence pay rather than whether or not it has been or was intended to be exercised that is relevant for the purposes of establishing single source for Article 157. This is not a situation analogous to **Robertson** where the method of setting pay was enshrined in statutory and other instruments which would have to be expressly revoked in order for the Treasury to exercise central power over pay. Whilst not as straightforward as "a click of a mouse" as envisaged in **Asda**, the Respondent had the legal power to set the pay strategy of Be First as its 100% shareholder and as part of its Cabinet oversight of the business plan. It may be that the Respondent has not exercised this power to date but I conclude that this is not determinative, what is relevant to determining single source is that it could do so in a relatively straightforward exercise of its legal position as 100% shareholder. The Respondent has overall control of the Be First strategic objectives and I see no reason why equality of pay could not be a similar strategic objective falling within the scope of the Respondent's ultimate control and included in the business plan.

44 I accept Ms Prince's submission that there is a significant difference between a requirement to obtain the shareholders permission in some matters (the reserved activities set out in clause 7) and a prohibition on the Respondent exercising its overall shareholder control in respect of all other matters. As such, there is no ambiguity or discrepancy between clause 11 of the Shareholder's Agreement and clauses 4 or 7 of the Articles of Association. Whilst clause 4 recognises that day to day management of Be First is vested in its directors, it does not preclude the Respondent from exercising its strategic control by way of the business plan as set out above. Moreover, I conclude that remedying pay inequality generally by adopting a non-discriminatory pay structure is more a strategic activity than day to day management (for example setting the pay of a particular employee) in any event. This is consistent with the contrasting strategic decision by the Respondent that Be First should be able to operate a different pay scale from the local authority when the company was set up as a vehicle for regeneration work.

45 This is consistent with the status of Be First as a *Teckal* company. In order to benefit from the exemption from tendering requirements, the Respondent must exercise a decisive influence over the strategic objectives and significant decisions of Be First, similar, by way of a control similar to that which it exercises over its own departments. In **Glasgow City Council,** the Court of Session noted that it was arguably inconsistent to argue sufficient control for *Teckal* purposes whilst also arguing insufficient control for single source purposes. The Shareholder's Agreement and the Articles of Association for Be First were drafted and agreed in the knowledge that this was a *Teckal* arrangement. The power retained for the Respondent as shareholder within those corporate documents must therefore be consistent with the *Teckal* requirement for the Respondent to the necessary control. Interpreted in that light, and for the reasons set out above, I agree that it would be inconsistent to conclude that the same legal arrangements could have entirely

different effects for the purposes of European law (which is the source of both Article 157 and the *Teckal* exemption).

46 The Claimant is entitled to compare herself with the Be First employees under Article 157 as their pay is attributable to a single source.

47 I am grateful for the assistance provided by both Counsel and apologise for the delay in promulgating this Judgment due to pressure upon judicial time. A preliminary hearing listed on 2 February 2021 was postponed due to the parties' understandable desire to have sight of this Judgment and Reasons and due to the ill health of the Claimant's father, her caring responsibilities and the short time for preparation caused by earlier delays in the process caused by the Covid-19 pandemic. As Ms Chudleigh anticipated, there will also need to be a stage 1 equal value hearing in respect of the Be First comparators. Accordingly, there will be a Preliminary Hearing, to include stage 1 equal value, listed for the first available date having regard to the availability given by the parties.

Employment Judge Russell

12.02.2021

APPENDIX: LIST OF AGREED FACTS AND ISSUES TO BE DETERMINED

The Claimant is referred to as '*C'.*
The Respondent is referred to as '*LBBD'.*
Be First (Regeneration) Limited is referred to as *'Be First'*.

Be First

1. At all relevant times C was an employee of LBBD on LBBD terms and conditions.

2. At all relevant times C's Be First comparators were employees of Be First on Be First terms and conditions.

3. LBBD terms and conditions [D16-27] were materially different from Be First terms and conditions [D29-42] for the purposes of s.79 EqA.

4. Be First is a limited company incorporated under the Companies Act with registered number 10635656.

5. Be First is a 'Teckal company' which benefits from the *Teckal* exemption in its dealings with LBBD which means:- a. LBBD exercises over Be First a control which is 'similar' to that which it exercises over its own departments; and
b. That Be First carries out the essential part of its activities (i.e. 80 percent or more) with the LBBD.

6. Be First is a company which is wholly owned by LBBD who is a 100% shareholder.

7. Be First and LBBD are "associated employers" within the meaning of s.79(3) and (4) of the EqA.

8. Be First operates from 9th Floor, Maritime House, Barking (0.6 miles from Barking Town Hall). LBBD does not operate from Maritime House, Barking.

~~9. The freehold in Maritime House is owned by Dooba Investments III Limited. LBBD owns the superior lease of Maritime House registered under title number EGL28909 for a term of 125 years from 15 November 1973 [D57-D63].~~

10. However, Be First occupies its offices on the 9th and 10th floor by virtue of an underlease for a term of 10 years between Be First (the Tenant), Dooba Investments III Limited (the Landlord) and LBBD. LBBD is a guarantor by virtue of the underlease and under Clause 14 guarantees to Dooba that Be First will comply with all of its obligations and that LBBD will indemnify Dooba for any losses and costs (among others) [D107-170, D62].

11. A number of LBBD's staff TUPE transferred to Be First when it was created [A47]. However, none of C's Be First comparators TUPE transferred from LBBD to Be First or previously worked for LBBD. They were each recruited by Be First.

12. The aim of Be First is 'to accelerate the regeneration of the borough and deliver increased revenues and returns to the Council and to manage delivery of the Borough's housing and regeneration plans' [A45-46].

13. LBBD exerts strategic control over Be First through contractual and corporate governance arrangements within LBBD. For example, LBBD has contractually imposed upon Be First eight strategic objectives [Services Agreement – A320].

14. Under the Shareholder's Agreement between LBBD and Be First:

a. With the exception of specified matters requiring LBBD consent, to day-to-day management of Be First was vested in the Directors of Be First [A556].
b. Determining and setting employees' pay was not a specified matter which required LBBD consent (save for a decision by Be First to pay its highest paid employee more than 20 times the pay of its lowest paid employee and a decision by Be First to set up a bonus, share option or profit sharing scheme) [A558-A562].
c. LBBD has the following powers (amongst others):

i. To approve (or not) Be First's business plans [A532]
ii. To remove and/or appoint directors, a managing director and the Chair of the Board of directors of Be First [A535 and 538].

15. The Articles of Be First provide that the LBBD may by Special Resolution 'direct the Directors to take, or refrain from taking, specified action' [A623].

16. In the event of any ambiguity between the Articles and the Shareholder's Agreement, the Shareholder's Agreement prevails [A563].

17. Under the Services Agreement between LBBD and Be First:-
a. LBBD acting reasonably is entitled to require Be First to remove immediately from the provision of services a named member of staff.
b. Be First is required to comply with performance monitoring arrangements set by LBBD and LBBD has a 'Performance Board' established to oversee the operational performance of Be First.
c. Be First is required to comply with the Equality Act including the Public Sector Equality Duty [A146].

18. In practice, the Council has financed Be First's business activities and ensured it has sufficient working capital to maintain its day to day operations.

19. Be First fulfils public functions of and for the Council under the Services Agreement.

Thurrock BC

20. At the relevant time C was employed by LBBD on LBBD terms and conditions, however the C's grade and the terms were the subject of dispute between the C and Rs from January 2017 until termination, i.e. the majority of her tenure.

21. At the relevant time C's comparator, David Lawson, was employed by Thurrock Council on Thurrock Council terms and conditions.

22. Between 2016 and termination of the shared arrangements (the date being in dispute) Shared Services Arrangements operated between Thurrock Council and LBBD [A1-A2]. Under the Shared Services Arrangements, employees occupying shared posts remained employed by their original employing authority and terms.

23. LBBD's employees are employed on NJC terms and conditions, except as otherwise indicated in their statement of employment particulars and as supplemented by local collective agreements [B14, D19].

Issues to determine (mixed factual and legal issues)

Be First

1. Were C and her Be First comparators employed at the same 'establishment'?

2. If not, is LBBD the "single source of pay" for C and her Be First comparators? (i.e. is LBBD the body which is responsible for the alleged inequality and which could restore equal treatment)

Thurrock

3. Are Thurrock and LBBD "associated companies" within the meaning of the EqA?

4. If yes, did C and David Lawson work at the same establishment?

5. If yes, were C and David Lawson employed on common terms and conditions within the meaning of s.79(4) EqA?

6. If no, is LBBD the "single source of pay" for C and David Lawson? (i.e. the body which is responsible for the alleged inequality and which could restore equal treatment)