EMPLOYMENT TRIBUNALS

Claimant: Mrs S Brierley & others

Respondent: Asda Stores Limited

Stage 2 Equal Value Hearing (Batch 2)

On:	At:	Cloud Video Platform
22 June 2021	Site visit to Didcot Ambient Distribution Centre	Not used
23 June 2021	Site visit to Rawtenstall Superstore	Not used
24 and 25 June 2021	Manchester Civil Justice Centre (CJC)	Observers and non-speaking representatives only
28 June 2021	CJC	Observers, non-speaking representatives and leading counsel for the claimants
29 June 2021 and 30 June 2021 (morning)	CJC (Tribunal members and transcribers only)	All other participants
30 June 2021 (afternoon)	CJC	Observers, non-speaking representatives, independent experts and leading counsel for the claimants
1 July 2021	Fully remote	Tribunal members only
6 and 9 September 2021	Manchester Employment Tribunal	Observers and non-speaking representatives only
10, 27 and 30 September 2021 and 1 and 7 October 2021	Fully remote	Tribunal members only

Before: Employment Judge Horne

Sitting with members: Mr A J Gill
Ms J K Williamson

Representatives

For the claimant: Mr A Short, Queen's Counsel
Ms N Cunningham, counsel
Mr P Livingston, counsel

For the respondent: Mr B Cooper, Queen's Counsel

Independent experts in attendance

Ms Spence
Mr Walls
Mr Holt (22 and 23 June 2021)

RESERVED JUDGMENT

1. This judgment concerns the Batch 2 lead claimants named in the reasons for this judgment and the Batch 2 comparators also named in those reasons.

2. The tribunal makes a determination of facts upon which the parties cannot agree, relating to the question of equal value. Those determinations are set out:

   2.1. Where indicated, in narrative form in the reasons for this judgment; and

   2.2. In Annexes A and B to this judgment.

REASONS

Introduction

1. This judgment follows the second Stage 2 equal value hearing in this long running equal pay litigation. It concerns Batch 2 of the claimants' and comparators' job descriptions.
2. The first batch was the subject of a Stage 2 hearing in 2019, before a tribunal consisting of Employment Judge Ryan and the same two non-legal members as made up the tribunal for this hearing. Judgment and reasons for Batch 1 were sent to the parties on 15 January 2020. In the concluding paragraph of those reasons, EJ Ryan expressed that tribunal's gratitude to the parties' representatives for the considerable assistance that they had provided. It is a sentiment which we echo. Litigation on this scale simply would not be possible without the degree of focus and preparation that both parties have put into this hearing. For their part, the parties' leading counsel acknowledged in a preliminary hearing that the Batch 1 judgment had helped the parties narrow the issues for Batch 2. This is an exercise from which we have also benefited. If parts of these reasons appear critical of the parties, they should not let those criticisms detract from our general appreciation of the help that we have received.

3. We should in particular pay tribute to the flexible way in which the parties adapted to an unfortunate development on 28 June 2021. Mr Short, leading counsel for the claimants, found himself having to self-isolate at short notice as a precaution against the spread of Covid-19. As a result, we had to make some contentious case management decisions, including re-listing part of the hearing for September. (These decisions are set out in a separate case management order.) We were, however, able to continue with a hybrid hearing and make substantial progress before we adjourned part-heard. Again, that would not have been possible without the parties' cooperation.

The Batch 2 lead claimants and Batch 2 comparators

4. The Batch 2 lead claimants each worked in a different role. Here are the roles in which they worked. In this table we use the formal title of Shop Floor Assistant (SFA). Elsewhere in this judgment, we use the abbreviation SFA interchangeably with "colleague".

Lead claimant	**Role**	**Store location**
Pauline Trickett	SFA Process	Rawtenstall
Julie Willby	SFA Produce	Hull
Janet O'Donovan	SFA Clothing and Footwear ("George")	Aintree
Adrienne Hutcheson	SFA Warehouse	Hamilton
Catherine Gardner	SFA Bakery in Store	Hamilton

5. The Batch 2 comparator role is known as Warehouse Colleague, based at Didcot Ambient Distribution Centre (ADC).

Issues

6. As with Batch 1, the purpose of this Stage 2 hearing was to determine facts relating to the question of equal value, to the extent that the parties were unable to reach agreement as to what those facts were. The factual disputes were many and varied, but essentially fell into two categories:

   6.1. Rival assertions which the parties wished us to record in narrative findings; and

   6.2. Disputes about the precise wording of the lead claimants' and comparators' job descriptions. These disputes were presented to us in tabular form, with the parties' rival factual contentions set out in separate columns. Helpfully, the parties grouped together similar disputes into broader overarching "issues", which were then set out in a numbered list. That list is reproduced in Annexes A and B. Each issue retains the number it was originally given. Readers of this judgment will notice that the numbers are not consecutive. This is because, happily, the parties were able to resolve many issues between first drafting the list of issues and the end of the hearing.

7. Many of the issues were not about whether or not particular asserted facts were *correct* or not, but, rather, whether or not those correct facts were appropriate for inclusion in the job descriptions (JDs). The points of principle appeared to be:

   7.1. Whether or not certain facts were at all related to the question of equal value;

   7.2. If they were, how were they related, and were they related in the same way as their inclusion in a particular part of the JD might suggest; and

   7.3. Whether or not the inclusion of those facts in particular places in the JD would tend to present a misleading overall impression of the demands of the work.

Imperfections in the judgment

8. Prior to promulgation of the Batch 1 judgment, the tribunal confidentially circulated the judgment in draft, so that the parties might have the opportunity to correct any errors. As a result, the final judgment was substantially modified, doubtless for the better, but was very considerably delayed. Our tribunal has not taken that step for Batch 2. The result is that it has been promulgated much more quickly. It also means that the parties are more likely to spot imperfections in the final version. Where these are minor (for example, typographical errors), we would encourage the parties to reach agreement on corrections. If, for any reason, a party considers it necessary for the tribunal to issue a certificate of correction, the appropriate application can be made. If there are perceived errors that cannot be resolved by agreement, a party can apply for reconsideration. We would, however, recommend to the parties that they concentrate as far as possible on preparing for the Stage 2 hearing in Batch 3 before making any detailed reconsideration applications. The tribunal will have regard to this indication when considering any application to extend reconsideration time limits.

Relevant law

9. Section 65 of the Equality Act 2010 provides, relevantly:

   (1) For the purposes of this Chapter, A's work is equal to that of B if it is…(c) of equal value to B's work.

   …

   (6) A's work is of equal value to B's work if it is—

   … 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. Schedule 3 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contain the Employment Tribunals (Equal Value) Rules of Procedure. These rules apply to proceedings involving an equal value claim. Relevantly, the rules provide, with our emphasis:

    "1 …

    (2) … in this Schedule… "the question" means whether the claimant's work is of equal value to that of the comparator;"

    6 Conduct of stage 2 equal value hearing

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

(a) **Make a determination of facts on which the parties cannot agree which relate to the question** and shall require the independent expert to prepare the report on the basis of facts which have (at any stage of the proceedings) either been agreed between the parties or determined by the Tribunal (referred to as "the facts relating to the question")…

(2) Subject to paragraph (3), the facts relating to the question shall, in relation to the question, be the **only facts** on which the Tribunal shall rely at the final hearing.

(3) At any stage of the proceedings the independent expert may make an application to the Tribunal for some or all of the facts relating to the question to be amended, supplemented or omitted.

11. In *Beal & others v. Avery Homes Ltd* [2019] EWHC 1415 (QB), Lavender J gave the following guidance about whether or not facts relate to the question of equal value:

"

29. The parties did not refer to any other authorities on the meaning of "work" in the present context. However, there were a number of issues as to what constitutes "work" and, if it is different (which I doubt), what it is to be "employed on work".

30. There was some common ground. In particular, it was agreed that it was appropriate to look at what the employee actually did, and not simply at documents (such as contracts, job descriptions or work manuals), even if they had contractual force. Such documents are relevant, but not necessarily determinative, when considering what constitutes someone's work. Likewise, what the employee actually did is an important consideration, but is not necessarily determinative. To take an obvious example, an employee who loafs around during work hours does not thereby convert loafing into part of their work. Likewise, as the parties agreed, if an employee refused or neglected to do something which they were supposed to do, that activity would remain part of their work.

31. Another relevant consideration is whether a particular activity was a "requirement or expectation". This was a term used by the [employer] but [counsel for the employer] denied the suggestion that he was seeking to elevate it to the status of a test for what constitutes "work".

32. Of course, where an employee is contractually required to do something (and that requirement has not fallen into desuetude or otherwise been varied), then that activity will form part of their work (even if, in practice, they neglect or refuse to perform it). But most of the issues in the present case concerned activities where the contractual position was not so clear-cut. On the whole, the dispute was not as to what the employee did, but as to whether it formed part of their work. I will deal with the individual issues later, but it may be helpful to set out in general terms what seems to me to be the appropriate approach. In general terms, therefore:

> (1) Where an employee is instructed by their manager to do something, then, if they do it, that is surely part of their work. Moreover, that is so, even if they might have been entitled to say, "But that is not something I am obliged to do."
>
> (2) The same is likely to be the case where the manager does not instruct, but requests or encourages, the employee to perform the activity in question. On the other hand, in such a case, it may be relevant to note for the expert's benefit (if it is the case) that the employee could not be required to perform that activity.
>
> (3) Where an employee does something which they have not been instructed, requested or encouraged to do, it may still constitute work if, for instance:
>
> > (a) it is simply a way of doing something which forms part of their work; and/or
> >
> > (b) their manager knows that they are doing it, but does not object and thereby tacitly approves of their doing it.
>
> (4) On the other hand, something may not be part of an employee's work if they have not been instructed, requested or encouraged to do it, their doing it has not been approved by their employer and it does not simply constitute a way of doing something which forms part of their work."

12. Both parties drew our attention to authorities on the question of whether a claimant's work was like her comparator's work. "Like work" is, of course, not what these claims are about, but the parties submitted that the authorities were nonetheless helpful. We have not found it necessary to cite the cases here. The parties appear to be agreed on the core propositions that they support. These are:

    12.1. The tribunal's focus should be on what the job holder does in practice, rather on what they can be contractually required to do; and

    12.2. A task which an employee does rarely is nevertheless part of their work, although the infrequency may be taken into account at the evaluation stage.

13. As will become clear, during the hearing we had to determine a number of points of procedural fairness. One of them can be put in this way: Should the claimants be permitted to assert various facts that were not raised in the list of issues, either because they were inconsistent with agreed text, or because they had not been explicitly challenged?

14. We considered that the law relevant to those questions were as follows.

    14.1. Rule 2 of the Employment Tribunal Rules of Procedure 2013 sets out the overriding objective of dealing with cases fairly and justly. The overriding objective includes, where practicable, placing the parties on an equal footing, saving expense, and dealing with cases in ways that are proportionate to the importance and complexity of the issues. Tribunals must seek to achieve the overriding objective in the exercise of any powers given to them under the rules.

14.2. A tribunal must not adjudicate on a claim that is not before it: *Chapman v. Simon* [1993] EWCA Civ 37.

14.3. In *Chandok v. Tirkey* UKEAT0190/14, Langstaff P observed:

> "
>
> 17. ….Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. ...
>
> 18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."

14.4. We also derived assistance from cases relating to applications to amend a claim. For our purposes it is sufficient to summarise the principles very briefly. The paramount consideration is the balance of disadvantage. What would be the disadvantage to the respondent caused by granting the amendment, and how does it compare to the disadvantage that would be caused to the claimant if the amendment were refused? In applying the balance of disadvantage, the statutory time limit may be a factor, but it is not determinative.

14.5. We saw no reason to apply a different test of fairness to the situations with which we were confronted. Even if a list of issues (or rival "facts related

to the question") do not have the same status as a claim or response, the effect of departing from them is the same: it has the potential to put the other party at a disadvantage, because they had previously had a different understanding of the case which they had to meet.

15. The respondent objected to our determining certain facts, for example, findings based on the claimants' analysis of performance data, on the ground that the respondents' witnesses had given an account of those facts which had not been specifically challenged in cross-examination. On that question we guided ourselves using these passages from *Commissioner of Police for the Metropolis v. Denby* UKEAT 0314/16.

> 61…I bear in mind the useful guidance from Lords Neuberger and Mance at paragraphs 54-55 [of *Chen v. Ng (British Virgin Islands)* [2017] UKPC 27], which seems to me the most authoritative recent pronouncement on the subject:
>
> > "54. … It appears to the Board that an appellate court's decision whether to uphold a trial judge's decision to reject a witness's evidence on grounds which were not put to the witness must depend on the facts of the particular case. Ultimately, it must turn on the question whether the trial, viewed overall, was fair bearing in mind that the relevant issue was decided on the basis that a witness was disbelieved on grounds which were not put to him.
> >
> > 55. At a relatively high level of generality, in such a case an appellate court should have in mind two conflicting principles: the need for finality and minimising costs in litigation, on the one hand, and the even more important requirement of a fair trial, on the other. Specific factors to be taken into account would include the importance of the relevant issue both absolutely and in the context of the case; the closeness of the grounds to the points which were put to the witness; the reasonableness of the grounds not having been put, including the amount of time available for cross-examination and the amount of material to be put to the witness; whether the ground had been raised or touched on in speeches to the court, witness statements or other relevant places; and, in some cases, the plausibility of the notion that the witness might have satisfactorily answered the grounds."

16. Where a party has omitted to cross-examine a witness about a contested matter, it becomes more difficult for the tribunal to determine the dispute, but it does not necessarily cease to be in issue. A relevant factor is whether or not the party was represented: *King v Royal Bank of Canada Europe Ltd* UKEAT/0333/10/DM per HHJ Richardson at paragraph 74.

Factor plan

17. When considering how particular facts related to the question of equal value, we had regard to the factor plan produced by the independent experts ("IEs"). The written reasons for the Batch 1 judgment set out the factor plan in full. We do not consider it necessary to repeat it here.

Evidence

18. We considered documents in a core bundle for each job role. The size of the core bundles varied significantly, from 158 pages for the SFA Process role to 2,390 pages for the comparator role. Each bundle contained, amongst other things, a witness statement from the job holder, one or more supporting witness statements and, in the case of the lead claimant roles, a statement from a manager for the respondent in relation to that role. In addition to the core bundles, there were 1,296 pages of supporting documents. A further 210 pages were added during the course of the hearing. We also had a separate bundle setting out the IEs' methodology, to which we occasionally referred.

19. It will not surprise anyone to learn that we did not read these bundles from cover to cover. Rather, we concentrated on the witness statements and those pages to which the parties had drawn our attention either in their written arguments or orally during the course of the hearing.

20. A number of witnesses gave oral evidence. We have found it more convenient to refer to these witnesses as we deal with each job role. That said, we based our factual findings for each role on the entirety of the evidence including, on occasion, the evidence of witnesses (such as Mr Adams) whose statements addressed different roles.

21. Both parties addressed the reliability of the oral evidence in their closing submissions. Whilst they each put forward arguments as to why we should not accept particular parts of certain witnesses' evidence, the parties proceeded on the footing that, in general, all witnesses were trying to tell the truth. We agreed with that general assessment.

22. Some of the comparators (Mr Devenney, Mr Beaumont and Mr Ballard) did not give oral evidence. They had, however, answered extensive questions from the claimants' solicitors in transcribed interviews. Given the formality of the setting, and the knowledge that their every word would be taken down, we are sure that all three comparators were aware of the importance of giving truthful and honest answers. We were therefore able to give their answers more weight than in a normal case where a witness has made a written statement without giving oral evidence.

Comparative findings

23. The claimants asked us to make findings which "cut across" the claimants and comparators. Principally these findings relate to targets and performance management. Our attention was drawn to paragraph 67 of the Batch 1 judgment, which, at a high level, identified similarities between stores and depots in terms of the importance of productivity an efficient working.

24. This time round, we have resisted the temptation to make comparative findings. We must keep in mind our function at Stage 2. At this stage our task is to determine the facts that relate to the question of value, but not to determine the equal value question itself. We recognise that it is theoretically open to us to find, as facts, that certain aspects of the claimants' and comparators' respective work are similar or different, by reference to factual matters such as when and how the work is done. But it is hard to draw the line between comparing the work itself

and comparing the value of that work. We have therefore found the facts separately.

SFA Process

25. In relation to the SFA Process role, we heard oral evidence from the following witnesses:

    25.1. Mrs Pauline Trickett – job holder and lead claimant, based at the Rawtenstall store;

    25.2. Mrs Sandra Holt, claimant and job holder, also based at Rawtenstall; and

    25.3. Mr William McCarthy, Night Trading Manager and subsequently Ambient Trading Manager at Rawtenstall.

Issue 1 – Negative on Hands

26. "Negative on Hand" was a technical term relating to a particular type of anomaly on the Perpetual Inventory (PI) system. If an item was passed through the checkout, and the same item was recorded on the PI system as being out of stock, the item would appear as a negative number. This would trigger an "exception" on the Process colleague's Telxon handset.

27. There is, now, very little dispute about what actually happened in relation to Negative on Hands. The parties have cooperated to agree a form of words for paragraphs 3.8.6.3 and 6.3.1(e) of the JD. As we understand it, all that remains is a disagreement over the wording of paragraph 3.6.2.

28. In our view, the best way to resolve the dispute is to substitute the following wording for the parties' proposed draft. The underlining merely highlights our inserted words:

> "All BAM exceptions, and some Negative on Hands (see below), need to be worked in the morning as PI must be updated in time to inform stock availability and ordering."

Issue 3 – Ordering of consumables

29. This issue has been resolved by agreement.

Issue 6 – Product knowledge

30. Certain facts appeared to be undisputed. A Process colleague was not specifically trained or tested on product knowledge. She would, however, acquire substantial knowledge of many items for sale in store. Common to all store workers, she would acquire knowledge of supermarket products from her personal experience outside work, for example when shopping or cooking. She would also pick up knowledge whilst working in store. As with all shop floor assistants, if a customer asked her for information about a product, she would be expected to "Wow" the customer, that is, to be as helpful as she could, so as to optimise the customer's experience. Being helpful would involve drawing on such knowledge as she had that was relevant to the customer's query.

31. The parties have rival forms of words which, they say, capture the ways in which Process colleagues acquired and deployed product knowledge. Before turning to the drafting disputes, we must resolve various points of principle.

"Paying attention"

32. The phrase, "by paying attention as…" runs through all the JDs under the product knowledge heading. Although the respondents' witnesses confirmed that these were their own words, they have clearly been chosen by the respondent's lawyers. We do not regard this fact as particularly suspicious. It is not uncommon for legal professionals to assist with the drafting of witness statements. Mr Short drew our attention to a recent Practice Direction in Business and Property Courts (PD 57AC) which requires a witness statement to include a declaration that the statement is in the witness's own words. We agree that, if a legal representative puts words into a witness's mouth when drafting a witness statement, they risk damaging the reliability of that witness's evidence on the point at hand and possibly in relation to other things they say as well. Much will depend on the nature of the words used and their significance to the issues in the case.

33. In this case, our view is that the words, "paying attention as…" are innocuous. It is hard to pick up knowledge on the job without paying attention. The repeated use of the phrase in the witness statements, though "mannered" (in Mr Short's words) does not tell us much about the reliability of any other part of the witnesses' evidence.

34. We see no harm in the inclusion of the phrase: it does not detract from the job-holder's acquisition of or use of product knowledge in her role. It is also true, for the same reason, that the phrase adds little to what is already there. We retain it, frankly, because to remove it would involve greater re-drafting.

"Type of products"

35. The next two points relate to the extent of the job-holder's knowledge and, in particular, this question: Was the job-holder's knowledge limited to the "type of products"? One dispute is procedural, the other as to what the facts actually were.

"Type of products" – procedural issue

36. At 3.26.4 of the JD, the claimants raised a dispute about the use of the phrase, "knowledge about the type of products". They used strike-through formatting to indicate that the appropriate wording should be "knowledge of the products".

37. The phrase, "type of product" can also be found at 4.11 of the JD. Here, by contrast to paragraph 3.26.4, the phrase has not been challenged by the claimants. Indeed, it was part of the original text of the job description as proposed by the claimants. Mr Short describes the absence of any highlighting or strike-through as an "omission", but argued that this should not prevent the tribunal from making findings that the job-holder knew more than just the type of product. For his part, Mr Cooper argues that the phrase, "type of products" is agreed and cannot now be re-opened.

38. We determined this procedural point in favour of the claimants. To our minds we did not need to look any further than the overriding objective and the balance of disadvantage.

39. The respondent has not, in our view, been put to a real disadvantage by the claimants seeking to contest the scope of knowledge. It was expressly in issue

in paragraph 3.26.4. The respondent could not just assume that was agreed just because it appeared in a different part of the JD.

40. We do not think that the omission from paragraph 4.11 has caused the respondent substantially to alter its cross-examination or submissions on this topic. That much is evident from the respondent's cross-examination and arguments in relation to the George job role. This was another job description where the phrase "type of products" appeared to be disputed in one place and agreed in another. As we later set out, Mr Cooper asked a George witness questions about the extent of her knowledge being essentially the colour, material and size of clothes. In his written submissions, he worked her answers – attractively, we might add - into an argument that Mrs O'Donovan was describing her knowledge of the "type of products" which could fairly be described as such.

41. The claimants, on the other hand, would be put to a considerable disadvantage if they were to be stuck with the phrase, "type of products". As Mr Short put it, the claimants would be done a disservice if the tribunal had to determine the scope of the job-holder's knowledge in an artificially limited way, simply because some parts of the JD had mistakenly been agreed.

"Type of products" - facts

42. We now turn to the merits of the dispute. Can the scope of Mrs Trickett's knowledge be fairly described as the "type of products"? This issue should also be resolved in the claimants' favour. From her involvement in assisting with product promotions, she had up-to-date information about which items were on special offer. She also knew, from her own experience, whether certain skin creams were perfumed and which wines she would recommend to a customer. If the respondent is worried that the claimant's formulation of 3.26.4 is too wide, that danger can be averted by asking the IEs to read it alongside this narrative explanation, so it can be put in its proper context.

43. We therefore omit the words, "type of" in paragraphs 3.26.4 an 4.11.1 of the JD.

Paragraph 4.11 - sources of knowledge

44. There is a further issue at paragraph 4.11. In the background, albeit without any dispute, is a slight overstatement of the way in which a Process colleague would acquire knowledge. She did not have a particular "department", in the sense of a range of products located in one place, and would not be as familiar with the items in a department as a colleague who worked in that department. As the respondent points out, she did not have any specific product knowledge training. She would, on the other hand, have an awareness of items that were on a promotion, or which were frequently the subject of a BAM exception. This knowledge might enable her to be able to suggest an alternative product if the item that the customer was asking about was unavailable. But it would not necessarily do so. She might have to resort to asking a colleague or inspect nearby products. As Mr Short points out, it is unlikely that she would read the product label of an unavailable item. But she might look at the label of the alternative product in order to check its similarity to the product that the customer had originally asked about.

45. Our decision here is to reword the paragraph as follows:

> "The JH is expected to and does acquire knowledge of the products in her department by paying attention as she performs her work, including promotions, BAM exceptions, and dealing with customers, or from her own personal knowledge. The JH uses this knowledge to respond to customer queries and give them confidence in her knowledge. The JH does not receive any specific product knowledge training and is not expected to acquire particular knowledge of all products which she deals with day to day [continue as originally drafted]".

Paragraph 4.11.2 – customer queries

46. There is a dispute at paragraph 4.11.2 described by Mr Cooper as "not one of fact but one of expression". The factual content of the competing versions does indeed overlap significantly. A fair reflection of the evidence, in our view, is the following finding:

> "The JH is able to inform the customer whether or not a product is available for sale and, if it is unavailable, is able to suggest options of alternative products. If the JH is able to provide this information from her own knowledge, she does so, but this is not required. If she cannot answer from her own knowledge, she looks at product labels or nearby products or asks a colleague."

<u>Issue 7 – Performance Management</u>

Paragraph 6.1.1

47. If the Process colleague failed to complete a task, she would inform her section leader or manager and explain why this was the case. The parties appear to be agreed that this was not only true, but relevant to the emotional demands of her work (JD paragraph 12.2.7).

48. The first bone of contention seems to be whether or not this fact should also appear in paragraph 6.1.1. which deals with organisation of work. We see no reason why it should not do so. Awareness of the completion or non-completion of a task, and being prepared to communicate the reason for non-completion, is part of how a job-holder organises their work.

49. The first sentence of disputed text (beginning "Where the JH…") is therefore included.

50. Everything that appears after that sentence should be deleted. It is covered in paragraph 12.2.7.

Paragraph 12.2.7

51. There is a dispute here about whether or not there should be any reference to formal or informal performance management procedures. Everyone agrees that these procedures exist. The respondent's objection is that their existence does not relate to the question of value. As the respondent argues, the mere existence of generic performance management procedures is qualitatively different from a process specifically attached to productivity targets. Referring to a generic performance management procedure in the context of unfinished tasks might give the misleading impression of a specific target-driven performance management regime.

52. We think that the proposed reference to performance management procedures is not completely irrelevant. The existence of a written informal and formal performance management procedure, even if it is generic, gives some indication to a role holder that they could expect consequences if they consistently failed to complete their tasks. Some reference should be made to them in the JD. It will be referred to in paragraph 12.2.7 unless the parties can agree on a better place.

53. The danger of misinterpretation can be averted if it is made clear that they were generic and rarely invoked.

54. In substitution for the claimants' proposed text at 12.2.7 we would therefore add this:

> "If the job holder failed to complete a task, she would inform her section leader or manager and explain why this was the case. This was to help ensure that the task was completed. It was not because the job holder was thinking of the personal consequences for her if the explanation was not accepted.
>
> Formal and informal performance management procedures were potentially available to a manager who considered that a colleague was consistently failing to perform a task, or not pulling her weight. It did not attach to any type of task or measure of performance. The procedure was rarely if ever exercised in respect of Process colleagues."

SFA Produce

55. We heard oral evidence from three witnesses about the SFA Produce role. The witnesses were:

    55.1. Mrs Julie Willby – job holder and lead claimant, based at the store in Kingswood, Hull;

    55.2. Mrs Sandra Wolfe – a claimant who worked in the same role at the same store; and

    55.3. Mr Sean Gray – a witness for the respondent, who held various management roles at Kingswood during the Relevant Period, including Produce Manager for about 18 months.

<u>Issue 1 – Product Knowledge</u>

Paragraph 4.13.1

56. At paragraph 4.13.1 there is an issue about the form of words to describe the sources of the Produce colleague's knowledge. Should the sources of knowledge be captured, as the respondent's written submissions suggest, by the phrase, "paying attention as she replenished or performed her other work, dealing with customers or using her own personal knowledge"? Or, as the claimants argue, should these words be deleted altogether? We do not think that either solution is optimal. The IEs should have an overview of the sources of product knowledge. The overview should include replenishing activities as a source of knowledge, as it formed a very significant part of the Produce colleague's role. The respondent's formulation, in our view, does, however, risk detracting from the fact that the Produce colleagues received substantial training and were tested on their knowledge. It is preferable, in our opinion, to incorporate the reference to training from the claimants' revised formula.

57. The claimant's written submissions raise the by now familiar objections to the use of the phrase, "type of products" in paragraph 4.13.1.

58. In relation to the Produce role, we find the respondent's procedural point to be determinative. In our view, the balance of disadvantage tips towards refusing the claimant to contest this previously-agreed phrase. Unlike the SFA Process role, the claimants proposed the phrase "type of products" consistently throughout the job description, and did not signal any intent to depart from it prior to the start of the hearing. This omission may well, in our view, have caused Mr Cooper to curtail his cross-examination of the Produce colleague witnesses. If the claimants are held to the phrase, "type of products", there will be some disadvantage to them, in that they may be deprived of the opportunity to argue (based on Mrs Willby's evidence) that she could tell customers how particular fruits and vegetables tasted. This is going beyond the type of product. But the disadvantage is relatively modest. It appears to be common ground that the SFA Produce used her product knowledge to be able to advise customers on matters such as how particular fruit and vegetables should be stored and, in particular, which items should or should not be refrigerated. This avoids the concern expressed by Mr Short that the phrase "type of product" implies knowledge that the most uninformed of customers would have.

59. The remaining disputes ("However" and "with") are about grammar and elegance, which we would expect the parties to resolve by agreement.

60. Our decision is, therefore, that the first part of paragraph 4.13.1 should read as follows:

> "The JH is expected to and does acquire knowledge of the type of products in her department from training, by paying attention as she replenishes and performs her other work, dealing with customers or using her own personal knowledge. The JH uses this knowledge to respond to customer queries and [continue as originally drafted].

Paragraph 4.13.4

61. Paragraph 4.13.4 raises a battle of words without any real underlying factual dispute. Customers would ask Mrs Willby whether particular fruit or vegetables were available. If it was unavailable, Mrs Willby would do her best to assist the customer to find an alternative. If she was able to inform the customer from her own knowledge, she would do so, but she was not expected always to know. When she did not know, she would make enquiries such as looking at product labels and nearby products, or asking a colleague.

62. We therefore re-write paragraph 4.13.4 as follows:

> "The JH is able to inform the customer whether or not a product is available for sale and, if it is unavailable, is able to suggest options of alternative products. If the JH is able to provide this information from her own knowledge, she does so, but this is not required. If she cannot answer from her own knowledge, she looks at product labels or nearby products or asks a colleague."

<u>Issue 3 – Staffing levels</u>

63. In 2009, Mrs Willby worked on the Friday "twilight" shift. When a colleague stopped working on that shift he was not replaced. This meant that, for a period of about 7 months, there was a reduction of one member of staff on that shift. After 7 months, Mrs Willby requested a change of shift which was granted. Although various efficiency changes meant that, over the course of the relevant 6-year period as a whole, fewer colleagues were required in the Produce Department, we accept Mrs Willby's evidence that, for these 7 months in 2009-2010, Mrs Willby's workload did increase. It was rare for her not to be able to complete her tasks.

64. The parties' proposed narratives at paragraph 12.2.9 should be replaced with this text:

> "As a result of staffing changes for a period of around 7 months in 2009-2010, there was a reduction of one member of staff working on the JH's Friday twilight shift. This resulted in the Job Holder having an increased workload, but it was rare for her to be unable to complete her tasks."

65. Mrs Willby also gave generalised evidence about a larger-scale reduction in staffing levels, up to the date of the hearing. As she rightly conceded, that evidence was not material to the demands of her work during the relevant period.

Issue 4 – Performance management

66. The claimants did not make any detailed submissions about performance management for the SFA Produce role.

67. The respondents have proposed a new form of words for paragraph 12.3.3. We consider it to be a fair reflection of the evidence and adopt the wording accordingly. We have added the reference to generic performance management procedures. Accordingly, the paragraph should now read:

> "If the Job Holder requires assistance to meet the above, she will either ask her colleagues directly for help or approach her Manager who could allocate additional resources if any were available. If no additional resources were available or the Manager did not consider it necessary to allocate more resources and, as a result, the JH did not complete the tasks within the stipulated timings, there would be no consequences for her. However, if the JH had not been properly pulling her weight, her Manager might have a word with her. The JH was never spoken to about not pulling her weight and this was typical as it was rare for Produce colleagues to be spoken to.
>
> Formal and informal performance management procedures were potentially available to a manager who considered that a colleague was consistently failing to perform a task, or not pulling her weight. It did not attach to any type of task or measure of performance. The procedure was rarely if ever exercised and there is no evidence of any Produce colleague being performance managed at the Kingswood store during the Relevant Period."

Issue 5 – Use of "dolly" for replenishment

68. Produce colleagues used a wheeled platform, called a "dolly", to transport stacked trays of produce along the aisles. Sometimes, the aisle was busy with customers and trolleys, so that the job-holder could not pull the dolly to the

shelves. It is the claimant's case that, when this happened, the Produce colleague would carry a full tray of up to 17kg of stock along the aisle. Initially, the respondent denied that this was at all part of her work. Both sides have since proposed new wording, and the factual dispute has narrowed. It is common ground that Mrs Willby would not carry a 17kg tray (for example of potatoes or carrots) – the heaviest load she would carry would be cauliflowers or cabbages which would weigh substantially less. It is also undisputed that Mrs Willby sometimes carried a single tray from the back room if a customer asked for a product that was not on the shelves. The only issue of substance appears to be the frequency of the activity.

69. We accept Mrs Willby's evidence that she would carry a tray about 3 or 4 times on a particularly busy shift such as a Sunday. The respondent submits that this evidence is exaggerated. It is, says Mr Cooper, inherently implausible that Mrs Willby would choose to carry a tray which had the same horizontal dimensions as the dolly itself, because the tray would be no easier than the dolly to pass through a busy aisle. We do not accept that argument. It ignores the fact that the dolly, pulled on wheels with a handle, would be less manoeuvrable than a single tray, which can be rotated or tilted by hand to pass through narrower gaps. This is true whether the dolly is defective or in full working order. Mrs Willby's evidence is not only capable of belief, but is also largely uncontradicted. Mr Gray, for the respondent, accepted that he would not intervene if he saw a single tray being carried.

70. We do, however, also accept the evidence of Mr Gray that he would intervene if he saw a Produce colleague unloading an entire dolly by hand from the end of the aisle. This leads us to believe that it would only be occasionally that the Produce colleague would carry an entire dolly's worth of trays substantial distances along the aisle.

71. In paragraph 15.13, in substitution for the disputed text, we insert:

> "Sometimes she may not be able to get her dolly to the area that she needs to replenish due to the presence of customers (or pallets before 9am). If so, she usually waits for the pallet to be moved, or for the customers to move, or politely asks customers to move, or goes down the adjacent aisle to access the location she needs from the other end of the aisle. On particularly busy shifts, about once a week, the aisle is so busy that it is difficult to ask customers to move, the job holder carries a tray along the aisle in order to replenish. The tray measures around 54cm by 36cm. The JH carries a tray approximately 3 or 4 times on such a shift. It is only occasionally that she carries all the trays from one dolly along the aisle. The JH will only carry trays of produce that she can safely carry, for example, lettuces, cauliflowers and cabbages. She will not carry heavier trays, such as potatoes and carrots.
>
> Occasionally, the JH also carries a single tray of produce from the back-up, when it is unavailable on the shop floor and has been requested by a customer."

SFA Clothing and Footwear (George)

72. The respondent's clothing department and footwear department operates under the well-known "George" brand.

73. The witnesses in relation to the George role were:

    73.1. Mrs Janet O'Donovan, job holder and lead claimant, based at the store in Aintree, Liverpool;

    73.2. Mrs Pauline Lyons, job holder and claimant, based at the same store; and

    73.3. Mrs Lorraine Johnson, General Merchandise Manager (Home and Leisure) at Aintree from 2004, holder of various management roles in other stores from about 2006 until 2016, and George and General Merchandising Trading Manager at the Aintree store from 2016.

Issue 1 – Staffing levels

74. During the relevant period, the number of colleagues in George decreased. Asda ceased to replace staff who had left. The reduction in staff numbers was accompanied by changes which improved efficiency. These included the introduction of self-scan checkouts, changes in how markdowns were done, and a new online ordering system for customers. The job holder in practice did complete her tasks for the day, but, despite the efficiency changes, felt under more pressure to complete her tasks because of the reduced staff numbers. She found it more difficult to monitor customer behaviour to prevent theft. Although prevention of theft was the primary responsibility of Security, the job holder in fact tried to maintain the level of vigilance she had done when staff numbers were higher.

75. In our view, this paragraph should be substituted for paragraph 1.3.5 of the JD.

76. We can keep our reasons relatively brief. In our view, Mrs O'Donovan and Mrs Lyons were more likely to know what it was actually like to work in Aintree George during the relevant period. Whilst the efficiency changes may have helped, it is not inconsistent with the notion that Mrs O'Donovan found it harder to balance completion of her tasks with maintaining vigilance to the level she was used to keeping. Mrs O'Donovan's motivation may well have been pride in her work, rather than any specific requirement of the respondent, who did not specify any particular standard of vigilance. It was, nonetheless, part of the demands of her work.

Issue 3 – Colleague Voice

77. We are not being asked to determine any "facts related to the question" under this heading. The dispute is about whether or not the "Colleague Voice" aspect of the role should be labelled as an "attribute", which will trigger a differential assessment of value (one with the attribute and another without). As we later explain in relation to the SFA Warehouse role, this is simply a matter of case management. In any event, our understanding is that the parties are now agreed that a differential assessment of value should be carried out, with and without the Colleague Voice element of the job-holder's work.

78. On that understanding, the word, "Attribute" should be inserted into paragraphs 1.3.5 and 14.7.4.

Issue 4 – Product knowledge and product specification

79. It is now common ground that George colleagues received no specific product knowledge training. The respondent's proposed sentence to that effect should be included in paragraph 4.14.1 of the JD.

80. Other parts of paragraph 4.14.1 remain in dispute. Again, the parties cannot agree on the form of words to describe the sources of the job-holder's knowledge. As with other roles that include a large amount of replenishment activity, it is not unfair to mention replenishment as a source of knowledge. But replenishment was not the only knowledge-enhancing activity. The respondent proposes to add, "or performs her work". We adopt that phrase, but expand it slightly to reflect the evidence more accurately, and to avoid singling out replenishment as the only specific activity.

81. The same paragraph also refers to the George colleague knowing about "type of products". Here, we think that the descriptor is apposite. Mrs O'Donovan confirmed that she knew about the different sizes, colours, materials of clothing. These are different types of clothing. So are different "styles" of clothing, which already appear in the agreed part of the paragraph.

82. It follows from these findings that the opening three sentences of paragraph 4.14.1 should now read:

> "The JH is expected to and does acquire knowledge of the type of products sold in her department (such as different sizes, colours, materials and styles) by paying attention as she replenishes, dresses mannequins, consults promotion pocket guides, deals with customers, and otherwise performs her work, and by using her own personal knowledge. The JH uses this knowledge to respond to customer queries and given them confidence in her knowledge. However, the JH does not receive any specific product knowledge training and is not expected to have particular knowledge about all products she deals with day to day."

83. For the same reasons as we have just given, we leave the phrase "types of products" intact in paragraph 4.14.2. There is no need to repeat the examples.

84. To achieve consistency with the evidence and with the other claimant roles, paragraph 4.14.12 should read:

> "If the product that a customer is looking for is not available the JH is able to inform the customer of alternative products. If the JH is able to provide this information from her own knowledge, she does so, but this is not required. If she cannot answer from her own knowledge, she looks at product labels or nearby products or asks a colleague."

<u>Issue 6 – Performance management</u>

85. In the light of the oral evidence, the respondent has proposed a new form of words for paragraph 6.3.3. We consider it to be supported by the evidence and find the facts accordingly. The paragraph should read:

> "A Section Leader or Manager works in the department and is available to assist with queries, provide feedback and/or allocate additional resources to tasks if any are available and if necessary, although this is rarely required."

86. Paragraph 6.3.4 should be amended consistently with the other claimant JDs. There is no need for this part of the JD to record facts about generic performance management. The respondent's proposed text is adopted in preference to that of the claimants.

87. The contested part of paragraph 12.1.18 should now read:

> "Provided the JH had been pulling her weight, there would be no consequences for her.
>
> Formal and informal performance management procedures were potentially available to a manager who considered that a colleague was consistently failing to perform a task, or not pulling her weight. It did not attach to any type of task or measure of performance. The procedure was very rarely if ever exercised in George at Aintree."

SFA Warehouse

Witnesses

88. The following witnesses gave oral evidence in relation to the SFA Warehouse role:

    88.1. Miss Adrienne Hutcheson – job holder and lead claimant, based at the Hamilton store;

    88.2. Mr James Grieve – Warehouse Manager at Hamilton from 2004 to 2014, called by the claimants as a supporting witness; and

    88.3. Mr Stephen McGowan – Ambient Trading Manager at Hamilton from 2011 to 2013, called by the respondent.

Issue 1 - Staffing levels

General

89. During the relevant period, there was a change in the number of staff working in the Warehouse on Miss Hutcheson's shift. Until about 2010, she worked alongside two or three warehouse colleagues, as well as the Warehouse Manager, making a total headcount of 4 or 5. From about 2010, Miss Hutcheson would typically have only one other warehouse colleague on shift together with the Warehouse Manager. Put another way, she was generally part of a team of three. Towards the end of the relevant period, there would be times during her shift when her colleague was away from the Warehouse. At those times, Miss Hutcheson would be working alongside only one other person. This general pattern coincided with a reduction in the Warehouse Manager's "hours budget". In broad terms we accept Mr Grieve's estimate of a reduction from 320 hours per week to 150 hours. This did not, however, mean that staffing levels on the claimant's shift reduced by the same proportion. Other shifts might have borne the brunt of the changes more severely.

90. The parties disagree about the implications of the reduction in staffing. Did it result in a corresponding increase in the demands of Miss Hutcheson's job? Some context is needed here. In particular:

90.1. The respondent describes itself as a low-cost retailer. It was continually looking to improve staff productivity as a way of keeping costs down. Reductions in staff numbers could be explained by a general trend that, over time, colleagues were expected to get more done during their working hours.

90.2. When the staff numbers reduced, the time-sensitive aspects of the job remained. For example, it was expected that, on average, it should take no more than an hour to unload ("tip") a delivery wagon. As we discuss in more detail below, the Warehouse team as a whole had an average tipping target. The smaller the team, the more each individual colleague's contribution mattered to the team's collective performance. Put more bluntly, an underperforming member of the team would have less chance to hide behind their colleagues.

90.3. On the other hand, over the Relevant Period there was undoubtedly a diminution in the overall amount of work that needed to be done in the Warehouse. There were a number of reasons for this. First, in mid 2012, the respondent opened another store nearby. The new store opening was followed by a reduction in turnover at the Hamilton store. Using approximate figures, in one year, the turnover dropped from £71 million to £66 million.

90.4. There was another reason why fewer people were needed in the warehouse. During the Relevant Period, the respondent introduced the practice of "top-stocking". This involved storing surplus stock on the shop floor, on the top shelves of the aisles. There it would stay, out of customers' reach, until there was sufficient shelf space for it to be displayed. This removed the need for the stock to be stored in the Warehouse and meant that Miss Hutcheson had less to do.

91. Our finding is that it is likely that, from 2010, the SFA Warehouse needed to work, to some extent, more productively and accountably than before. This development was "significant" (within the meaning of paragraph 1.3.2 of the job description), in the sense that it was more than trivial. But the increase in work was nothing like what would be needed to replace the work of an entire colleague on shift. We are aware that this finding involves not accepting, or at any rate, not fully accepting, what Miss Hutcheson told us in her oral evidence. According to Miss Hutcheson, despite the reduced turnover, there were just as many deliveries, just as many pallets per delivery, and just as many cases in each pallet. This evidence cannot in our view be correct. The drop in turnover cannot be explained by simply cutting prices. There must have been a reduced volume of stock passing through the Warehouse. That, combined with innovations such as top-stocking, must, in our view, have compensated significantly for the staff reduction. The Warehouse had the same spread of tasks, but, overall, those tasks must have taken substantially less time for the team as a whole than they did before 2010.

92. We now turn to the disputed parts of the SFA Warehouse JD.

Paragraph 1.3.2.1

93. We have re-written paragraph 1.3.2.1 as follows:

> "During the relevant period, there was a change in the number of staff working in the Warehouse on the Job Holder's shift. Until about 2010, she worked alongside two or three Warehouse colleagues, as well as the Warehouse Manager, making a total headcount of 4 or 5. From about 2010, the Job Holder would typically have only one other Warehouse colleague on shift together with the Warehouse Manager, making a total of three. Towards the end of the relevant period, at times when her colleague was away from the Warehouse, the Job Holder would be working alongside only the Warehouse Manager. This added to some extent to the need for the Job Holder to work productively. It did not involve the Warehouse team having to replace anything like the work of an entire colleague. This was because the reduction in staffing levels was compensated for to a significant extent by a downturn in volume of goods passing through the warehouse, and efficiency changes such as top-stocking."

Paragraph 3.2.5

94. In place of both parties' rival text for paragraph 3.2.5, we substitute:

> "From 2008-2010, this was typically a team of three or four (including her). From around 2010 onwards, it was typically a team of two (including her), plus the Warehouse Manager if they happened to be on shift as well."

Paragraph 6.1.1

95. It is agreed that paragraph 6.1.1 should make some reference to the reduction in numbers. We have used the respondent's new proposed text as a starting point and modified it slightly to reflect our narrative findings.

96. Our wording of paragraph 6.1.1 is:

> "During the Relevant Period, the JH generally worked with one other Warehouse colleague on the same shift, plus the Warehouse Manager if they happened to be on shift as well. There were more colleagues at the start of the Relevant Period. Sometimes there were parts of a shift when the JH would have been the only colleague alongside the Manager towards the end of the Relevant Period. These changes had some impact on the demands of the JH's work, but nothing like the need to do the additional work of the missing colleague."

Paragraph 12.2.2

97. The claimants seek to refer to the impact of staffing changes on the emotional demands of the Warehouse colleague's work. Their vehicle for doing so is paragraph 12.2.2. That paragraph is part of a list of "examples of the JH managing schedules of work, for example due to unforeseen interruptions and unplanned events" (see JD paragraph 12.2). In our view, it is stretching things too far to include the impact of gradual staffing changes as being one of those examples.

98. Paragraph 12.2.2 should therefore be deleted.

99. We do not in principle see anything wrong with the IEs taking into account the impact of staffing changes on the need for productivity when assessing emotional

demands. If the parties cannot agree on a way to insert it into Section 12 of the JD, the IEs should be referred to our narrative findings.

Paragraph 14.8.1

100. Section 14.8 is not about the impact of staffing changes, but about communication and relationships with such Warehouse colleagues as happened to be there. We agree that the respondent's new proposed text fairly sets out the facts relevant to that question. It reads:

> "The JH generally worked with one other colleague on the same shift, plus the Warehouse Manager if they happened to be on shift as well. They discussed between themselves the division of tasks and communicated regularly throughout the shift as to practical matters or allocation of tasks as the work progressed. Such conversations occurred multiple times in the course of a shift.

Issue 5 – Assisting Drivers and Entering Driveway Area

101. Part of the SFA Warehouse role involved helping a delivery driver to manoeuvre their trailer into the Warehouse. There is disagreement about how the job description should record that task. On closer examination, there appears to be no dispute at all about what Miss Hutcheson actually did. The parties' arguments relate only to how it should be described, because of the connotations that might be attached to words such as "waving" or "guiding".

102. In our view, the best course is to steer clear of the wording that either party initially proposed and to use neutral language that accurately sets out the facts related to the question of value.

Paragraphs 3.13.3, 11.10, 17.6.2 and 17.7.5

103. The second sentence onwards of paragraph 3.13.3 should read:

> "Frequently, the JH assisted delivery drivers from inside the Warehouse, standing at a safe distance away from the vehicle. She would use simple hand signals and spoken instructions to indicate to the driver how far to reverse and when to stop. Occasionally ,if the driver tried to enter the Warehouse at the wrong angle, she would ask the driver to drive forward out of the warehouse and attempt the manoeuvre again. At all times, it was the driver, and not the job-holder, who had ultimate responsibility for the safe driving of the vehicle."
>
> (The first sentence of paragraph 3.13.3 is as originally drafted.)

104. Paragraph 11.10 will consist of the same words, only with the heading, "Assisting Drivers".

105. The same words are to be used for the entirety of paragraph 17.6.2.

106. Paragraph 17.7.5 should begin with the same words, but will continue with, "She keeps this area…" as originally drafted.

Issue 6 – Seal numbers not matching numbers on manifest or delivery note

107. In order to understand Issue 6, the reader will need an overview of how the respondent's products got from a distribution centre to a store. Once a goods vehicle had been loaded at the distribution centre, the trailer was sealed with a

unique seal number. That number was printed on the delivery manifest. When the wagon reached the store, the SFA Warehouse (such as Miss Hutcheson) would check the seal number on the manifest against the seal number on the trailer. Written training materials informed the job holder of the requirement to carry out this check. If the seal numbers did not match, the Warehouse colleague was required to inform the Warehouse Manager, who would immediately make contact with the distribution centre. If no Warehouse Manager was available in-store, the SFA Warehouse would contact the distribution centre herself. This procedure was an important safeguard to protect goods in transit from being tampered with or stolen.

108. Everybody accepted that, theoretically at least, there could be occasions when a goods vehicle might arrive at the Hamilton store with a seal number that was different from the number stated on the manifest. The real dispute is whether or not these scenarios occurred in practice and, if so, with what frequency. Here are the different explanations for a seal mis-match, as posited by the claimants, together with our findings on those disputed issues.

108.1. Sometimes a wagon contained deliveries for more than one store. This was known as a "split delivery". In that event, if proper procedures were followed, the trailer would be initially sealed with a number corresponding to the manifest for the first store on the route. That route was pre-planned for the driver, who did not get to choose which store to visit first. Occasionally, however, for example if there was a road accident affecting the route, the driver would visit the stores in a different order, resulting in the trailer arriving at Hamilton with another store's seal number. Miss Hutcheson told us that this happened "once every couple of months". Mr Grieve's estimate was that it was "more than once or twice per year". We took into account that the reliability of Miss Hutcheson's estimates had been called into question by our rejection of Miss Hutcheson's estimate of an unchanged volume of goods passing through the Warehouse (see our findings on Staffing levels). Both Miss Hutcheson's and Mr Grieve's estimates were also somewhat vague. That is not surprising: estimates of this kind are hard to get precisely right. Nevertheless, they are broadly consistent with each other, and with Miss Hutcheson's unchallenged evidence that there would be out-of-sequence deliveries about once per month (see Issue 14). We prefer their estimates to Mr Adams' suggestion that this "hardly ever happened". The claimant and Mr Grieve were more likely than Mr Adams to know what actually happened at the Hamilton Store.

108.2. From time to time, a trailer would be sealed at the distribution centre and, at the last minute, someone would realise that an item had been missed. If it was just a few cases, they would usually have to wait until the next delivery. If an entire pallet had been left out, the seal would be broken and the missing item loaded onto the trailer. Crucially, though, the trailer would then be re-sealed and a new manifest re-printed with a matching seal number. For a forgotten pallet to result in a seal mis-match at the store end, there would have to be both a loading error and an independent failure to reprint the manifest. We agree with Mr Adams that a combination of failures such as this would be extremely rare.

108.3. Before driving onto the road, wagons would be driven across a weighbridge to check that the loads did not exceed their maximum permitted

weight. If the weight limit was exceeded (which would not happen if the loaders had done their job correctly), the driver would return to the loading bay and the load would be adjusted. This would involve breaking the seal. Again, this remedial action would result in a new seal and a new matching manifest. It would be extremely rare for an initially-overloaded trailer to cause an eventual mismatch in seal numbers at Hamilton.

109. We now translate these findings into paragraph 3.15.1.1. The entire paragraph should read,

> "the seal numbers on the trailer door match the seal numbers on the manifest. Sometimes the seal numbers did not match. This occurred between two and six times per year, when a split load was delivered out of sequence. In extremely rare instances it might also occur because a vehicle had been opened and re-sealed at the depot to correct an error such as an item being left off or the weight being too heavy, coupled with a failure to re-issue the manifest with the new seal in accordance with the proper procedure. If the seal numbers did not match, the JH would inform her Manager, who would contact Customer Services at the depot immediately, or if the Manager was not available, the JH would contact Customer Services at the depot herself."

Issue 8 - Tills

110. Prior to working in the Warehouse, Miss Hutcheson held the role of Checkout Operator. She therefore had the necessary training to fill in on the checkout if extra numbers were needed. This was known as "Queue Busting".

111. Everyone agrees that, from 2010, Miss Hutcheson did Queue Busting work only once or twice per year. It is accepted on the claimants' behalf that Miss Hutcheson stopped Queue Busting in 2013. The factual dispute we have to decide is how often Miss Hutcheson worked on the checkout prior to 2010.

112. Generally speaking, it was not an efficient use of staff resources to pull someone from the Warehouse onto the tills. It would take Miss Hutcheson about 5 minutes to disengage from a Warehouse task, remove her Hi-Vis jacket and walk to the shop floor. She would then do about 15-30 minutes of Queue Busting before going back to the Warehouse. It made more sense to ask for Queue Busters from larger departments on the shop floor.

113. We also took into account that, up to 2010, the claimant worked in a larger team. Temporary absence on other tasks was less likely to be disruptive at that time.

114. Against that general background, we accept the consistent evidence of Mr Grieve and Miss Hutcheson herself. Their account was capable of belief and was not directly contradicted by anyone. They told us, and we accept, that the frequency of Queue Busting up to 2010 was about once per month.

Paragraph 3.42

115. The first part of paragraph 3.42, together with paragraphs 3.42.2 and 3.42.3, should read (as now proposed by the respondent):

> "The JH is trained to work on the checkouts and has assisted on the checkouts throughout during the Relevant Period. At the start of the Relevant Period, the

JH undertook Queue Busting occasionally (around once a month although this could be more frequent a few times a year, mostly during bank holidays, seasonable periods of if there were staff shortages on checkouts). From around 2010, it became rare for the JH to undertake Queue Busting: from around that time, the frequency reduced to about once every six months, and then reduced further to around once a year by the end of the Relevant Period.

3.42.2 Queue Busting is a process where checkout trained colleagues from other departments within the store can be called to temporarily assist on a checkout lane. This is done in times of high demand in order to assist the regular checkout operators when they are not able to deal with customers quickly enough to prevent unacceptably long queues forming.

3.42.3 During busy periods in store (for example seasonal events, promotions, bank holidays and peak weekend periods), the JH may be asked to help on checkouts as a Queue Buster. During these times, the JH's section leader would ask her to man a checkout lane for as long as necessary or until customer queues are manageable, usually for around 15-30 minutes. Calling on the JH as a Queue Buster was a last resort because of the potential disruption to the Warehouse Operation. When Queue Busting, the JH will conduct the tasks of a checkout operator."

116. Subject to the use of the word, "attribute" (see below), the remainder of paragraph 3.42, and paragraphs 4.7.5, 4.26, 7.11 and 7.12 should be as drafted by the claimants.

117. Paragraph 11.21 should also be as drafted by the claimants, but, at the respondent's suggestion, the last two sentences should read:

> "The JH asks to see ID occasionally when she is performing Queue Busting duties. The JH did not refer to the Front End Guide to Service during the Relevant Period".

118. We also agree with the respondent that paragraph 12.1.2 should now read:

> "On the occasional (or, later in the Relevant Period, rare) times when the JH assisted on checkouts, she sometimes (rarely) came across resistance, negative or unpleasant interactions from customers when having to refuse proxy sales, when asking to see ID for age-restricted products and when dealing with intoxicated customers;".

"Attribute"

119. During the hearing, a further issue arose about whether or not the Queue-Busting aspects of Miss Hutcheson's role should be described as an "attribute". The significance of "attributes", we were told, was that they were a convenient label for tasks done by a lead claimant in a particular role that were atypical amongst holders of that role generally. (In other words, Queue-Busting would be an "attribute" for Miss Hutcheson if SFA Warehouse colleagues did not generally do any work at all on the checkout.) Where an attribute was identified, the IEs would be asked to perform two assessments of value – one for the job with the attribute and another for the job without it. That would significantly widen the pool of claimants for whom the question of equal value could be determined by the findings in relation to the lead claimants. During final submissions, we discussed how this and similar labelling disputes ought to be resolved. It was agreed that the

dispute was, if anything, one of case management. It was not a determination of facts relating to the equal value question. We therefore declined to rule on it as part of this Stage 2 hearing. We simply express a provisional view that, if it is common ground that most SFA Warehouse colleagues did not in fact work on the tills, it would make sense for the IEs to perform the differential evaluation that the respondent proposes.

120. For now, the word, "Attribute" should appear under Issue 8 wherever it is proposed by the respondent, but followed by "[?]" to indicate that we have not actually made a decision about it.

Issue 9 - Product knowledge

121. The respondent has proposed a new form of words to record the facts relevant to product knowledge. In our view, this new formulation is a fair reflection of the evidence. We find the facts accordingly.

122. In coming to this decision, we kept in mind the dispute over the phrase, "type of products". In this case we found it unnecessary to resolve the thorny procedural issue. For present purposes we assume that it is procedurally open to the claimant to allege that Mrs Hutcheson's knowledge went beyond the type of products that she encountered. We find as a fact that it did not. The only example of product knowledge that she gave in her witness statement was "I knew the range of products that we stocked in different sections or if there was a new range that was introduced". The example put by Mr Short to Mr McGowan (with which he agreed) was, if there were no Heinz beans available, the Warehouse colleague would offer an alternative such as Branston beans. What Mrs Hutcheson and Mr McGowan were describing there was the job-holder's knowledge of different types of products.

Issue 10 – Training of other colleagues

Paragraph 5.6

123. Our first task under Issue 10 is to decide whether or not paragraph 5.6 of the JD should refer to Miss Hutcheson's training and experience as a Training Buddy.

124. The arguments are partly factual and partly about relevance.

125. We deal with the facts first. There is no dispute about the fact of her having received the training or having gained the experience. The fact in issue is whether or not, during the relevant period, she "continued to use the knowledge acquired as part of that training".

126. We determine that factual issue in the respondent's favour. Miss Hutcheson's witness statement contains no more than this bare assertion:

> "the skills and knowledge that I gained from being a Training Buddy certainly helped me in my day to day role when giving informal training to new colleagues."

She did not give any examples of any knowledge about training, or training skills, or explain how the knowledge or skills helped her when informally training new starters. Her assertion by itself was not sufficient to enable us to make a finding.

127. Once that factual issue was resolved, we could also determine the question of relevance. The remaining facts in paragraph 5.6 did not relate to the question of value. They would not help the tribunal to assess the demands of her work by reference to the factor of requirement for training. Her Training Buddy knowledge and skills were not used in the work that she did.

Paragraphs 6.7.1

128. Since the evidence was completed, the respondent has proposed a new form of words for paragraphs 6.7.1 and 6.7.2. We have adopted them with one minor change.

129. Most of the facts are uncontroversial, but there are a number of fault lines.

130. One appears to be an argument about presentation. The respondent wishes to draw a distinction between the Warehouse colleague's contribution to the "Store of Learning" on the one hand and her informal training of new starters on the other. They seek to have that distinction made clear by the use of separate paragraphs. We agree that it is better to keep them separate. The two aspects of her work were different in frequency and took place under different training regimes.

131. The next dispute, according to Mr Short's submissions, appeared to be about the frequency with which the Warehouse colleague carried out these activities. We did not, however, understand there to be any real disagreement once the Store of Learning was properly separated out from the informal training of new starters.

132. There is then a further dispute of fact, although it may just be a matter of labelling. The respondent objects to the phrase, "monitors the quality and standard of tasks". That is not how Miss Hutcheson described what she did either in her witness statement or her oral evidence. Mr Grieve, in his witness statement, said that Miss Hutcheson gave some feedback (which is recorded in the new text). For Miss Hutcheson to have given any meaningful feedback, she must have based it on some kind of observation. But such observation would not necessarily involve the elements of repetition or continuity or proactive attention that the word "monitoring" might imply.

133. Finally, we deal with the second issue raised in the claimants' written submissions. Again, it is an argument about descriptors rather than the basic facts which they describe. Was the Warehouse colleague providing "training" or "shadowing"? To our minds this is not a dispute of any real substance. Job shadowing is a familiar concept which the IEs will readily understand. The claimants themselves appeared to be happy with it. At paragraphs 6.7.1 and 10.1, the claimants themselves proposed that the JD should include the phrase, "the JH has been asked to provide informal job shadowing to … new starters". For its part, the respondent accepts that the Warehouse colleague "informally trains" new colleagues. If there is any dispute at all, it relates to the job holder's contribution to the Store of Learning, and whether the shadowing activities should also be described as "informal training". We do not think the label matters. In case the IEs think it is important, we find that, at some level, interactive job shadowing was a kind of training.

134. Paragraph 6.7.1 will accordingly read:

> "The JH has been asked to provide informal training to new Warehouse colleagues at most around once or twice a year during the Relevant Period.

This includes demonstrating the correct methods to perform tasks and answering questions about how to do certain tasks as a result of her experience in the role. Typically, the JH will give a Manager or section Leader brief feedback based on her observation of the new starter's performance."

135. Our wording for paragraph 6.7.2, reads:

"Separately, Hamilton is a 'Store of Learning' which means that there are often Trainee Managers and Section Leaders from other stores being trained across the various departments. The JH has been shadowed by trainees in order for them to get an overview of the Warehouse. Trainees could be present in the Warehouse up to 10-15 times a year, for a day or two at a time. When she is shadowed, the JH demonstrates the tasks that she performs, where possible gives the trainees an opportunity to try the tasks themselves, and may provide some brief correction or feedback. To that extent it is a kind of informal training."

Paragraphs 10.1 and 12.2.6

136. The respondent's new text for paragraphs 10.1 and 12.2.6 is consistent with the facts recorded at paragraphs 6.7.1 and 6.7.2 and we have adopted it.

Issue 11 – Performance management

Paragraph 6.2.3

137. It is common ground that some, but not all, of the Warehouse colleague's tasks were required to be completed within specific windows of time in order to contribute to the smooth running of the department (see paragraph 6.4.1). Some time-specific activities had to be done by a particular time of the day, such as booking in by 9am. Others, such as Challenge 20, involved ensuring that temperature-controlled stock was not outside a chilled area for more than 20 minutes.

138. Against that background, the parties are arguing whether or not paragraph 6.2.3 should use the words, "meet the relevant deadlines or targets" (as proposed by the claimants) or "complete the tasks on time" (as the respondent would prefer). We do not have difficulty with the word "deadlines". Readers of the JD will understand the word "deadline" simply to mean the time by which a task had to be completed. "Targets" in paragraph 6.2.3 would suggest measurement of personal performance against an individual target, which did not happen. The only acknowledged target of which we are aware was the Tipping target (see Issue 13), but that target was for the team as a whole.

139. Another dispute at paragraph 6.2.3 relates to the circumstances in which the Warehouse Manager would allocate additional resources at the request of a Warehouse colleague who might not otherwise complete a task by the deadline. Was it, as the respondent contends, subject to the proviso that extra help would be allocated only if the Warehouse Manager deemed it necessary? The proviso is supported by Mr McGowan's witness statement. There is, however, no evidence of a colleague actually being refused support on the ground that the manager considered it unnecessary. It was not put to Miss Hutcheson or Mr Grieve that this had ever happened. Paragraph 6.2.3 should note the absence of any occasion of refusal.

140. Paragraph 6.4.1 records the common ground that, if Miss Hutcheson would approach her manager if she did not complete a task on time. Two factual disputes exist around the penumbra of that agreed fact. How often did such a conversation happen? Did she tell her manager why the task was not done?

141. On the first question we agree with the respondent that these conversations happened rarely. That is the evidence of all three Warehouse witnesses.

142. We have altered the claimant's proposed wording to reflect our findings on the second question. Mr McGowan's evidence, which was accepted by Miss Hutcheson, was that, if she did not complete a task on time she would provide an explanation. What Mr McGowan went on to say in his witness statement was that there was no process of checking, and there was no need for employees to justify their performance on a daily basis. He was not challenged on this part of his statement and we accept it.

143. We have also re-worded the facts about informal and formal performance management. This is to achieve consistency with the other claimant job roles, but also to reflect Mr Grieve's evidence (which we accept) that he personally did have a conversation with a Warehouse colleague who had failed to perform a task with no justifiable reason.

144. To take account of these changes, paragraph 6.4.1 will now read:

> "Some (but not all) of the JH's tasks must be completed as soon as possible or within specific windows in order to contribute to the smooth running of the department. In the rare event that the JH fails to complete a task or misses a deadline, she informs her Section Leader or Manager. She explains why the task has not been completed on time, although she is not required to justify her performance. Provided the JH has been pulling her weight, there would be no consequences for her. However, if the JH had not been pulling her weight her Manager might have a word with her. The Warehouse Manager had an informal conversation with a colleague of the JH about failing to complete a task on time with no justifiable reason. The JH was never spoken to about not pulling her weight.
>
> Formal and informal performance management procedures were potentially available to a manager who considered that a colleague was consistently failing to perform a task, or not pulling her weight. Those procedures did not attach to any type of task or measure of performance. The procedure was rarely if ever exercised and there is no evidence of any Warehouse colleague being performance managed at the Hamilton store during the Relevant Period."

145. At paragraph 12.2.4 we have retained the word, "deadlines" for the reasons already given. We have deleted the claimant's proposed word, "organised". In our view it adds nothing to the activity summarised in the phrase, "plans her work to ensure that…"

146. We have reworded paragraphs 12.2.4, 12.3 and 12.3.1.2 consistently with our findings up to this point.

147. Paragraph 13.1 contains what is, as far as we can see, another dispute of pure drafting where everyone agrees what the facts are. The claimant took a number of

different sorts of decisions independently. Those decisions are listed in paragraphs 13.3 to 13.12. One such decision was whether or not a jammed pallet could be safely retrieved from high racking. Another decision was whether or not to accept damaged stock or refer it to a Section Leader or manager for possible rejection. In paragraph 13.1, the claimants propose to summarise the potential consequences of decisions such as these. Their proposed summary reads:

> "Many of those decisions had important implications for the efficient running of the warehouse as well as for her own health and safety and that of others."

148. Mr Cooper objects to the claimant's summary on the ground that it is "generic and uninformative", and that the JD already states what the consequences of each decision are. It is sufficient, the respondent says, merely to indicate that the consequences are explained "below".

149. We agree with the respondent that the most useful information when assessing the demands of decision-making is a brief explanation of what could happen if the decision was made a particular way. That is more helpful than a generalisation of those consequences. On the other hand, we think it would be helpful for the potential consequences of the job-holder's decisions to be signposted more clearly than the respondent would have us allow. When we read paragraph 13.3 to 13.12 to ourselves, it was reasonably easy for us to infer what the safety and efficiency consequences of each decision would be, but that was because we knew what paragraphs to look at and what to look for in those paragraphs. The potential consequences did not leap off the page to us and there is a danger that they might be missed by the IEs. We therefore think that the analysis would be helped by a measured summary, without loaded words such as "important". In place of both parties' disputed wording, we therefore write:

> "Some of these decisions had implications for the efficient running of the warehouse as well as for health and safety, as explained in paragraphs 13.3 to 13.12 below".

<u>Issue 13 – Tipping target</u>

150. The store had a target of tipping each single-deck delivery vehicle in one hour. (In the light of the parties' written submissions, it now appears to be accepted all round that this time-frame can accurately be described as a "target".) It was the responsibility of the Warehouse team as a whole to ensure that the target times were achieved. The depot kept data on the average weekly turnaround time of the deliveries made to each store. If a store was consistently under-target, the depot would raise the issue with the store. The Warehouse Manager prepared a weekly printout of the store's average tipping time. If it fell below the average target time, the Manager would inform the whole team.

151. None of those facts are controversial. Where the parties disagree is on the question of whether or not the target was personal to the job-holder, or merely applied to the team as a whole. There is also a related dispute about whether the job-holder was required to do any more than "aim to meet the target".

152. We find that the reality lay somewhere between those two positions.

153. Miss Hutcheson understood that the target was an average target which applied to the team. She accepted this in answer to one of Mr Cooper's questions.

Although, as Mr Short points out, the question was long and leading, it was also easy to understand, and illustrated with a clear example. From the remainder of Miss Hutcheson's evidence, we formed the view that, if she disagreed with what Mr Cooper was suggesting to her, she would have said so. Miss Hutcheson also said, more than once, "We had a target". Whilst this *could* be interpreted as meaning that each Warehouse colleague had their own personal target, that was not the natural meaning of what she said. It is also consistent with the fact that, if the average tipping target was not met, Mr Grieve's first action would be to inform the team as a whole.

154. On the other hand, it was clearly in understood by each Warehouse colleague that they had a personal responsibility to help the team achieve its collective target. This did not mean that Warehouse colleagues had to explain themselves each time they took longer than an hour to tip a vehicle. They did not, necessarily, need to provide any explanation if their average personal weekly tipping time was under an hour. Nevertheless, the personal responsibility was more than just an aspiration, as the respondents' phrase, "aim to…" would suggest. The job-holder's personal responsibility was apparent in two ways:

154.1. At annual appraisals, Mr Grieve would discuss performance against tipping targets. We do not know precisely what was said, or whether or not the discussion was assisted by the job-holder's personal record of tipping times. But this demonstrates to us that, at least, the job-holder's contribution towards the collective tipping target was considered as an aspect of her personal performance.

154.2. If a Warehouse colleague consistently failed to tip vehicles inside an hour, Mr Grieve would speak to them. This never happened with Miss Hutcheson. We agree with the respondent that this happened rarely as the team, as a whole, performed above average.

155. We think these facts can be expressed at paragraphs 6.3 and 12.3.11 in the following words:

> "The JH is expected to help the Warehouse to meet the target turnaround time for tipping a single delivery vehicle trailer (1 hour). The store is scored on these turnaround times and the manager prepares a weekly printout and informs the team if the turnaround target is not met. However, she is told that this is an average target for the store and understands that some trailers may take longer and some less time, and that the store will only be picked up by the depot if its overall average falls below an hour. The depot keeps track of the average weekly turnaround time of all deliveries made to the stores that it delivers to and would inform stores if they were consistently not meeting the tipping timeframe. The Warehouse Manager prepared a weekly printout of the store's average tipping time and informs the team if the average turnaround target is not met. Throughout the relevant period the store generally met the average turnaround time without difficulty.
>
> At the JH's appraisals, the Warehouse Manager discusses the JH's individual contribution to the team's average tipping target.

> This is considered an aspect of the job-holder's personal performance. If the JH consistently took longer than an hour to tip single-deck delivery vehicles, the Warehouse Manager would have an informal conversation with her. This happened rarely in the case of the JH's colleagues and did not happen to the JH herself."

Issue 14 – Out of sequence deliveries

156. There are two disputes about out-of-sequence deliveries. One is factual. The other, prior, issue is whether or not it is procedurally fair for the factual issue to be determined at all.

157. In order to resolve these issues, it is first necessary to explain how they arose.

158. The factual backcloth is undisputed. As we have already observed when discussing seal numbers, deliveries from the depot were not always made in the correct order. Sometimes a trailer would arrive at the Hamilton store when it was supposed to have called at another store first. The stock destined for Hamilton would be hidden behind the other store's stock, which may have to be unloaded in order to get access to the Hamilton stock, then reloaded before the vehicle set off for the next store.

159. The claimants' initial position was that, when this happened, the Warehouse colleague would have to make an assessment of whether or not to accept the delivery. According to the list of issues, such an assessment involved taking into account various factors such as the time and equipment needed to unload the other store's stock and reload it.

160. When cross-examined, Mrs Hutcheson acknowledged that she had no authority to turn away any delivery, whether correctly sequenced or not. Whilst this evidence does not have the status of a formal concession (Mrs Hutcheson being a lead claimant as opposed to a representative of the claimants), it has caused the claimants to take stock of their position. Mr Short's written submissions abandon the contention that the SFA Warehouse decided *whether or not* to accept an out-of-sequence delivery. Instead, the claimants now contend that she decided *how* to accept the delivery.

161. The respondent's submission is that this is a new factual allegation which "moves the goalposts" set out in the list of issues. Accordingly, says Mr Cooper, it would be procedurally unfair to allow the claimants to argue it.

162. We do not agree with the respondent's procedural objection. It appears to us to be implicit in the list of issues that the claimants' case was that a SFA Warehouse would need to make an assessment of the consequences of accepting an out-of-sequence delivery, in terms of how much extra time and what equipment would be needed. That would necessarily include deciding what to do if the delivery was accepted. The claimants' alternative argument was encompassed in the claimants' main case. At the risk of overstretching the respondent's metaphor, the goalposts have not moved; the narrower set of goalposts was always there.

163. On the merits of the dispute, we accept the evidence of Mrs Hutcheson that she did have to make an assessment of the impact of an out-of-sequence delivery on

the other scheduled deliveries. She also had to assess what equipment she would need to use.

164. We would therefore adopt the wording proposed by the claimants for paragraph 13.6, with the preamble, "The job holder could not refuse to accept a delivery." Paragraph 13.6.2 should be amended to read, "the JH is trusted to decide how to deal with an out of sequence delivery."

Issue 15 – conflicting priorities

165. Paragraph 13.10.2 contains the factual assertion that the Warehouse was "regularly under-resourced". We have already made narrative findings about the impact of staffing changes on the claimant's work. Here the claimants ask us to go further. "Under-resourced", to our minds, carries with it a statement of opinion that the Warehouse had fewer resources than it ought to have had. We do not think that such a judgement is a fact relating to the question of value. Of course, it may be a statement of pure fact to say that the Warehouse was under-resourced *in comparison* with its previous staffing levels. If that is the meaning of the phrase, it is better avoided. "With reduced resources" achieves the desired meaning more clearly.

166. We accept Mrs Hutcheson's evidence that there were occasions where she would have booking-in to do and a delivery vehicle would be waiting in the yard.

167. At the risk of hair-splitting, we agree with the respondent that Mrs Hutcheson could not "decide" how long each task would take. A task took as long as it took. What Mrs Hutcheson had to do was try to predict the duration of each task so she could prioritise them effectively. This mental process is satisfactorily captured by the respondent's verb, "assesses".

SFA Bakery In Store

Witnesses

168. We heard oral evidence from the following witnesses about the lead claimant's role in the Bakery:

168.1. Mrs Catherine Gardner, job holder and lead claimant, based at the Hamilton store;

168.2. Miss Siobhan Devlin, claimant and job holder at Hamilton; and

168.3. Miss Maryanne MacDonald, witness for the respondent and Bakery Manager at Hamilton from 2010 to 2017 (and at another store prior to 2010).

Issue 1 – Use of deck ovens

169. The factual dispute here was less complicated than for some other roles, but involved a relatively stark clash of evidence. There was a substantial overlap between Mrs Gardner's shift and that of her manager, Miss MacDonald. Whilst they were both on shift, Miss MacDonald was well placed to observe what Mrs Gardner was doing. Mrs Gardner claims that she and a number of colleagues did various disputed activities in plain sight about once per week; Miss MacDonald told us she did not see it happen. We tread as carefully as we can, bearing in mind that all three witnesses were friends and had a high regard for each other. We must, however, determine the facts one way or the other on the balance of probabilities.

170. Deck ovens were used for baking bread and bread rolls on trays. The oven was fitted with a damper, operated by a lever. It had a buzzer which would sound approximately 5 to 15 minutes before the bread would burn (depending on which type of product it was).

171. As well as the SFA Bakery In Store (otherwise known as a Bakery Colleague), the respondent employed Bakers who were trained to use the deck ovens. Generally there would be two Bakers on shift alongside Mrs Gardner. One of the Bakers would be in the area behind the ovens, mixing and preparing the dough, and the other would usually be at the front. If the Baker at the front went on a break, usually at about 9.15am, they would ask one of the Bakery Colleagues to "keep an eye" on the deck oven. If the buzzer sounded whilst the Baker was out, the Bakery Colleague could call over to the Baker at the back, but sometimes that Baker was busy. In that event, she would go to the oven herself, sometimes to pull down the damper and sometimes to remove the tray from the oven. Mrs Gardner removed hot trays from the oven about once per week.

172. Miss MacDonald had a desk inside the Bakery. She had a good view of the deck ovens from where she worked. At 9.15 she was on shift and usually at her workstation.

173. Bakery Colleagues were not trained to use their ovens. The written training materials for Bakery Colleagues included an instruction not to use equipment for which they had not been trained. That instruction was not always observed. For example, Bakery Colleagues openly flipped pancakes on a hotplate which they had not been trained to use. This was well known to the Bakery Manager.

174. In coming to these findings, we have taken account of Mr Cooper's submissions about the reliability of Mrs Gardner's evidence. He pointed out that Mrs Gardner was, at times, inconsistent about whether she was talking about the deck ovens or the rack ovens, which were different. Nevertheless we found the combined evidence of Mrs Gardner and Miss Devlin to be more reliable than that of Miss MacDonald. We did not doubt that she was trying to be truthful, but we thought her recollection was not fully accurate. In particular, we found that Miss MacDonald may well have been confused about when the practice of removing items from the ovens had started. Miss MacDonald acknowledged that, after the Relevant Period, she did observe Bakery Colleagues openly removing trays from ovens. That gave her no cause for concern. Her explanation was that, by then, some Bakery Colleagues had been trained as "Oven Busters". But that does not explain why she thought this activity to be unremarkable: Miss MacDonald did not know who was an Oven Buster and who was not. More likely in our view is that Bakery Colleagues had been removing trays from the deck oven well before the Oven Buster initiative had started.

175. Having found the facts, we must now decide whether these facts are related to the question of equal value. Was the activity of removing trays from the deck part of the Bakery Colleague's work? In our view, it was. The activity was done in full view of the Bakery Manager and was not challenged. In the language of *Beal,* the activity was tacitly approved.

176. Paragraphs 3.3.3, 4.2.2(g), 4.3.5, 4.3.7, 8.3.2 and 17.5.1 of the JD should therefore be written as proposed by the claimants.

Issue 4 – Product knowledge

177. There is very little dispute of fact about how the Warehouse Colleague acquires her knowledge. As with the other roles which involve a large amount of stock replenishment, we think it is worth highlighting this activity as a source of knowledge alongside dealing with customers and carrying out the other aspects of her work. We have also added the Warehouse Colleague's specific training as a means of acquiring knowledge. Paragraph 4.13.1 will be amended accordingly.

178. As with other roles, we have had to determine the dispute over the phrase, "type of product". Like the George and Process roles, this is a role where the claimants' stance was ambiguous: proposing the phrase "type of product" in some parts of the JD and disputing it in another.

179. We determined this dispute in the claimants' favour. It appeared plain to us, as a matter of fact, that Mrs Gardner's acquired knowledge went beyond "types of product". For example, she knew how bread should be stored or defrosted. She also had some knowledge of which products contained allergens, and where to find that information if she did not know. As Miss Devlin put it in her statement, that is different from knowing that there are three types of bread. For reasons we have already given, we did not find a significant disadvantage to the respondent. Holding the claimants to the phrase, "types of product" would cause a greater disadvantage by running the risk of artificially limiting the facts about scope of the Warehouse Colleague's knowledge.

180. We therefore prefer the claimants' wording for paragraph 14.1.2(e).

Issue 5 – Performance Management

Paragraph 12.4

181. The parties have agreed on a form of words for paragraph 12.4, so we do not need to determine any facts here.

Paragraph 12.5

182. Consistently with other store roles and with the evidence, we have re-written paragraph 12.5 as follows:

> "Where the JH misses a deadline or fails to complete a task, she informs her Section Leader or Manager. She usually explains why this is the case, but is not required to provide an explanation. Provided the JH has been pulling her weight, there would be no consequences for her.
>
> Formal and informal performance management procedures were potentially available to a manager who considered that a colleague was consistently failing to perform a task, or not pulling her weight. It did not attach to any type of task or measure of performance. The procedure was rarely if ever exercised."

Issue 7 – Timings for wrapping of baked products

183. The final issue relating to the Bakery colleague's work concerned the activity of wrapping freshly-baked bread products, such as rolls and French sticks. Were the items still hot when the job-holder wrapped them? Did the job-holder use gloves to handle hot trays?

184. As with most issues, the background facts are uncontroversial:

184.1. Bakers would bake bread rolls and French sticks on metal pans. When the rolls were fully baked, a Baker would remove the pan from the oven and place it on a rack. At some point afterwards, a Bakery colleague would wrap the rolls. She would use special perforated plastic, which enabled rolls to be wrapped whilst still warm without the packaging steaming up. Once the rolls were wrapped, the Bakery colleague would use an "L-sealer" to seal the packaging. She would then attach a printed sticky product label.

184.2. There were written Product Information Guides (PIGs) for baked goods such as bread rolls. According to the PIG, rolls should be left to cool for 10 minutes before being wrapped. After 10 minutes, the rolls would no longer be hot to the touch. The rolls did not have to be fully cooled. There was no specific 10-minute timing equipment for the cooling process. Nobody monitored the Baker colleagues with a timer to check whether the rolls had had their full 10-minute cooling time.

184.3. Rolls would cool down more quickly if they were removed from the pans and placed on cooling wires. This was a practice of which the Bakery Manager was aware. The cooling wires were next to the L-sealer.

184.4. It was possible to wrap rolls effectively in that plastic whilst the rolls were still hot to the touch, as opposed to being merely warm. But if the rolls were hot to the touch, the labels would turn black and the product would be less appealing. This meant that there was no point in wrapping hot rolls if the sole purpose was to get the rolls out on display more quickly, as they could not be displayed without a label.

184.5. The baking schedules were coordinated with other store activities so that the Bakery colleague would have enough time to allow rolls to cool for 10 minutes. Home-delivery Pickers, for example, would be scheduled to visit the Bakery at such a time when the rolls were planned to be cool enough to handle.

184.6. Sometimes a customer would look inside the Bakery and notice that there were freshly-baked French sticks that had not yet been put on the shelves. They would ask for one of the sticks to be wrapped. On such occasions, the Bakery Manager would politely inform the customer that they would need to wait until the bread had cooled down.

185. The evidence of Mrs Gardner and Miss Devlin was that, whatever the plans were, the reality was that sometimes Home-delivery Pickers would ask for fresh-baked rolls in a hurry. Pickers would say that the delivery van was "waiting to go out" and might leave without the bread. If deliveries went out without bread, Mrs Gardner said, the Bakery colleagues would get "pulled up". We accepted this evidence. It seemed to us to make sense that Home-delivery Pickers and Bakery colleagues alike would make it a priority to ensure that Home-delivery customers got their bread rolls. They are staple supermarket items, and failure to deliver them would lead to the customer having a bad Asda experience.

186. Miss MacDonald was not in a position to know what the Bakery colleagues were doing prior to her own arrival on shift. Home-delivery orders were processed before she arrived. She told us, and we believed, that at some point in her time at

an in-store Bakery, she had seen one or more Bakery colleagues use gloves to handle hot rolls and had "stopped them". She did not say that she had stopped Mrs Gardner or Miss Devlin. In her statement, Miss MacDonald acknowledged that Mrs Gardner might have used oven gloves to handle rolls, but said that this would be to take the rolls from the pans to place on cooling wires. If that was correct, it was highly likely that they were also using the gloves to carry the pans from the rack to the place near the L-sealer where the wires were located. The alternative would be to carry individual rolls across the Bakery.

187. We find that Mrs Gardner and Miss Devlin were not told by any Bakery Manager that they should not wrap hot rolls. The 10-minute cooling instruction in the PIG guide was treated as just as a guide. It was never timed or checked. This system of work created a high likelihood that Bakery colleagues would cut corners by allowing less than the full ten minutes.

188. We also find that, on those occasions where Home-delivery Pickers were waiting for fresh bakery products, Mrs Gardner would use oven gloves to carry the pan to the area by the L-sealer. She would wrap the rolls whilst they were still hot to the touch, but had cooled down enough to be bearable. She would then place the wrapped rolls on the racks to cool further. When the Pickers collected the rolls she would hand over the label separately so it did not go black.

189. In our view these activities were part of the Bakery colleague's work. It was her way of doing something a task that they were instructed to do. It was tacitly approved. There was no attempt to check whether or not the rolls were actually left to cool for 10 minutes, when the respondent knew or ought to have known that Bakery colleagues would at times face pressure to wrap rolls before the 10 minute cooling time had elapsed. The Bakery Manager was aware of the use of oven gloves to move the rolls. Nobody told Mrs Gardner to do it differently.

190. In our view these facts accord with the claimants' proposed draft for paragraph 15.9 of the JD, which we adopt in preference to that of the respondent.

Warehouse Colleague – Didcot ADC

Witnesses

191. The respondent called three witnesses to give evidence about the role of Warehouse Colleague. These were:

191.1. Mr Craig Dennis, job holder and lead comparator;

191.2. Mr Martin Dolan, job holder and lead comparator; and

191.3. Mr Gareth Adams, who held various management roles at Didcot ADC during the relevant period.

Issue 38 – Characterisation of union steward role

192. This was included in the original list of issues, but is no longer contested by the claimants. We have not included it in Annex B, as it did not involve any determination of fact on our part.

Issue 41 – Measurement of efficiency on Goods In

193. The phrase, "Goods In" encompasses two essential processes that occurred when goods were delivered to the depot. First, the trailer would need to be

"tipped" (unloaded) and then the pallets would need to be checked. It is common ground that there was no numerical target for tipping and checking: see paragraph 2.14 of the job description. It is also factually accurate to state that, since there was no numerical target, there was no electronic record of a Warehouse Colleague's progress against target. The claimants want this fact spelled out. The respondent objects on the ground that it implies that there was no monitoring of a Colleague's performance. What actually happened, the respondent reminds us, was that there was a supervisor specifically allocated to monitor the progress on Goods In. This was done by sight: it was obvious if there was a backlog of lorries waiting to be unloaded. If Warehouse Colleagues fell behind on tipping or checking, a supervisor would intervene and speak to them. The respondent has suggested that this form of monitoring be written into paragraph 2.14. In our view the solution to this dispute is to include the text proposed by both the claimants and the respondent. Both add to the overall picture and avoid the risk of a misleading impression.

Issue 108 – Use of camera

194. This dispute relates to the job description of Mr Beaumont, one of the lead comparators. It has some implications for the extent of physical effort, or lack of it, required when operating a High-reach Truck (HRT) to place a pallet on, or a retrieve a pallet from, the higher racking shelves. It is agreed that, in order to look up at the high shelves directly, the HRT driver would need to "crane" his neck upwards. It is also agreed that it was physically possible to avoid that neck movement. The HRT was fitted with a camera which produced an image of the shelves on a screen visible to the driver. Mr Beaumont could, in theory, have chosen to look the shelves that way. That practice would have been contrary to his training: Warehouse Colleagues were trained to watch the forks moving up without the use of the screen. Mr Dolan (another Warehouse Colleague) used the camera to watch the high shelves. None of this is disputed. Where the parties disagree is whether or not *Mr Beaumont* used the camera for that purpose.

195. There is no direct evidence on that question. Mr Beaumont was not called as a witness. The claimants submit that the respondent's failure to call him gives rise to an inference that Mr Beaumont was using the camera to watch the shelves. We disagree. Such an inference might be possible in an ordinary case where the employer has an effective monopoly over the evidence that can be given by its employees. But in this case, Mr Beaumont was questioned extensively by the claimants' representatives in advance of this hearing. They had the opportunity to find out from Mr Beaumont whether or not he used the camera. No questions were put to him on that topic. Our finding is that Mr Beaumont was trained to look at the high shelves directly by craning his neck and that is what he did.

196. Before leaving this issue, we would add that we would not want it thought that the tribunal *approves* of a system of work that requires regular neck movements of this kind. But that is not what the tribunal has to decide.

Issues 131 and 133 – How productivity targets were enforced

General

197. There are many disputes about the wording of the Warehouse Colleague's job description in relation to enforcement of productivity targets. Both parties seek narrative findings as well as a resolution of particular drafting points.

Narrative findings sought by the respondent

198. In his written submissions, Mr Cooper asks for the following narrative findings:

> "…the Tribunal is invited to make the following explicit narrative findings in its judgment:
>
> 30.1. Colleagues were notified of productivity targets during their inductions and the importance of those targets was repeatedly emphasised to them throughout their employment.
>
> 30.2. Colleagues' productivity was constantly monitored throughout each shift by supervisors reviewing live data.
>
> 30.3. The first level of action for a Colleague identified as falling behind was on-the-spot dialogue to encourage improvement. Informal conversations of that kind happened very often and were experienced and/or witnessed by colleagues daily.
>
> 30.4. Further reviews of each colleague's performance were carried out at the end of each shift and those who fell below target were very often spoken to.
>
> 30.5. Colleagues knew that supervisors reviewed their performance at the end of each shift and expected that they would be required to provide an explanation if they did not meet their target. Many of them monitored their own performance and kept records of anything which impacted on their productivity, and doing so was an important part of how they ensure [sic] that they met the demands of their job and were able to explain any shortfall.
>
> 30.6. Managers would not necessarily accept a colleague's explanation for any failure to meet a target and whether they did so would depend on the manager, the credibility of the explanation and the results of any further investigations, which could include reviewing CCTV footage. If a manager was satisfied that the Colleague had given an acceptable explanation, no further action would be taken. But if the explanation was not adequate, further action was likely, comprising initially an informal discussion or counselling and escalating to formal performance or disciplinary action for repeated breaches. Such action could be taken either for poor average performance over a week, or for poor performance on a particular shift.
>
> 30.7. One of the most common unacceptable explanations for Colleagues failing to meet targets was excessive downtime, which was therefore one of the most common reasons for both formal and informal action. However, action could be and was also taken where

> poor performance was identified without excessive downtime. (Whereas, conversely, downtime was only investigated where a Colleague failed to meet the target and so would not be identified absent such failure.)
>
> 30.8. Overall, both during the 12-week probationary period and subsequently, productivity targets were prominent in Colleagues' minds and their experience was of being under constant scrutiny: they knew that they were constantly being monitored and that every time they stopped for any reason that could lead to them missing a target and being called upon to explain themselves."

Narrative findings sought by the claimants

199. On behalf of the claimants, at 189-192 of his submissions, Mr Short asked us to record the following findings:

199.1. "The main area on which targets were focused was picking. In practice, Colleagues were not counselled or put into performance management for other activities."

199.2. "The key focus was on downtime, which needed to be explained when there were more than about 8 or 9 minutes of non-recordable activity, as opposed to output."

199.3. "For the purposes of performance management, performance against targets was measured as an average over a rolling weekly period."

199.4. "None of the JHs faced disciplinary sanctions or other disciplinary measures despite regularly not meeting their target. Mr Dolan received counselling on one occasion (which did not amount to a disciplinary measure) but this was for excessive downtime, as opposed to being for his failure to meet targets."

Our findings

200. Having considered the evidence, we make the following narrative findings:

200.1. Warehouse Colleagues were notified of productivity targets during their inductions. The importance of those targets was emphasised to them during meetings which took place periodically during their probation. Performance against target was discussed during quarterly performance review meetings after their probation had ended and throughout their employment. The job-holder would know from those conversations that the targets mattered to the respondent.

200.2. Shift managers constantly reviewed live data to monitor the performance of particular activities on their shift. This continuous monitoring was focused on the collective productivity of the activity as a whole, rather than the performance of any particular individual Colleague engaged in it. By contrast, Supervisors would concentrate on the Colleagues' individual performance within an activity. They would also use the live data for this purpose. (We take this from Mr Adams' witness statement; his evidence on this point was not challenged.)

200.3. The first level of action for a Colleague identified as falling behind was on-the-spot dialogue to encourage improvement. If, part-way through a shift, it became clear that an individual Colleague was not completing their hourly shift targets, the Supervisor would not wait until the end of the shift before speaking to them. This is because the depot ran more efficiently when there was a constant throughput of goods. If Colleagues lagged behind for part of their shift and then caught up later, there was a risk of peaks and troughs, which could cause knock-on disruption to the next Activity in the chain.

200.4. Generally, informal conversations during a shift took place on the depot floor, where they could be, but were not necessarily, witnessed by colleagues. Often, they took the form of a brief call to action, such as, "Stop standing around" or, "Just get it picked", rather than asking the Colleague to give an explanation. Such conversations took place somewhere on the depot on most days.

(Here, we depart from Mr Cooper's use of the word, "daily". We looked at Annex D to Mr Adams' statement, and took a sample of dates across January and February 2014. It appeared that there were 6 days on which no recorded conversation had taken place. Mr Adams told us that, sometimes, if an explanation was acceptable to a Supervisor, no entry would be made on the spreadsheet. We accepted that this could happen, but it did not seem likely to us that this would account for all the days on which there was no conversation recorded. In particular, we noted many occasions where an acceptable explanation was in fact noted down. More likely in our view was that on at least some days, nobody was challenged by their Supervisor.)

200.5. Further reviews of each Colleague's performance were carried out at the end of each shift. Those who fell below target could be "spoken to", but not necessarily so. Mr Ballard's experience, for example, was that he was not approached by a Supervisor at all, despite a substantial number of days on which he did not achieve his Stock Pick target.

200.6. Reasons why a Colleague would not be spoken to at the end of a shift included:

200.6.1. Often, the Supervisor already knew that they had a good reason without having to be told. On some shifts for an Activity (such as the early shift on Goods Out) it was notoriously difficult to meet the target. Supervisors would generally not even ask Colleagues on those shifts to explain a failure to meet their target unless they were underperforming relative to the other Colleagues on the same Activity. Another obviously-good reason would be a visible queue in the battery bay for LLOPs, causing Colleagues to have to wait before they could resume picking.

200.6.2. Some Colleagues, such as Mr Ballard, Mr Dennis and Mr Devenney, chose to get their explanation in first. If they knew they were behind target, they would approach the Supervisor during their shift and explain their difficulty, rather than wait for the Supervisor to come and find them at the end of the shift. It was in their interests to do so. An example of such an incentive can be seen in Stock Picking. Colleagues sometimes fell behind their Stock Picking target because of a succession of small picks. If a Colleague pro-actively approached his Supervisor, and the

Supervisor agreed that he had had an unusual number of small picks, he would be given a better pick to help him catch up.

200.6.3. If a Colleague missed the target for a particular shift, the Supervisor would also check their performance over the rolling weekly period (see below). If their rolling weekly performance was at or above target, the Supervisor would not generally speak to the Colleague at the end of the shift. This accords with the experience of Mr Dennis and of Mr Devenney, who said,

> "As long as you hit your target for the whole week was at 100/% you was all right."

(There were exceptions: a Colleague whose weekly averages were good would nevertheless be spoken to about a missed target for a single shift if the circumstances indicated a lack of effort. Such circumstances would include a high margin of underperformance, such as 50%, or a separately-identified problem with downtime.)

200.6.4. Colleagues knew that Supervisors reviewed their performance at the end of each shift and expected that they might be required to provide an explanation if they did not meet their target. Because of this, many Colleagues monitored their own performance and kept records of anything which impacted on their productivity, and doing so was an important part of how they ensure that they met the demands of their job and were able to explain any shortfall. This practice of self-monitoring was not a requirement of the role. Nevertheless, it was part of the work of those colleagues who chose to do it.

200.7. Supervisors and Shift Managers would not necessarily accept a Colleague's explanation for any failure to meet a target and whether they did so would depend on the manager, the credibility of the explanation and the results of any further investigations, which could include reviewing CCTV footage. If a manager was satisfied that the Colleague had given a truthful explanation, and the explanation was outside the Colleague's control, no further action would be taken. Other more personal explanations might also result in a decision not to take further action. But if the explanation was not adequate, further action was likely, comprising initially an informal discussion or counselling and escalating to formal performance or disciplinary action for repeated breaches.

(We have expanded here on the respondent's proposed narrative. This is to distinguish, as we later do with the claimants' proposed text, between the *genuineness* of an explanation and whether or not a believed explanation was considered *acceptable.*)

200.8. Acceptable reasons could be factors that were outside the Colleague's control (such as repeated Small Picks, or having to wait for a replacement battery), in respect of which performance management would be pointless. They could be personal reasons, such as bereavement, which would tend to suggest that the Colleague would in due course start to perform better without the need for management action. Managers did **not** equate an acceptable explanation with "something other than excessive downtime" or

"something other than a lack of effort". It would not be enough for the Colleague to show that they were trying hard and not abusing their breaks.

200.9. As well as monitoring the Colleagues' performance against target, Supervisors also had access to data about Colleagues' downtime. The respondent defined "downtime" as any time when the colleague's Talkman recorded no activity for a period of 4 minutes or more. Downtime could be explained by a Colleague taking a break, whether authorised or unauthorised. It could also be explained by them doing unrecorded work, such as shrink-wrapping a pallet, or getting their vehicle battery changed. In fact, Supervisors recognised that some legitimate downtime could take more than 4 minutes, and would not question downtime unless it exceeded 8 minutes. (We sometime refer to the figure of 8 minutes for downtime as the "intervention level".)

200.10. Downtime was only investigated where a Colleague was failing to meet their hourly target or had failed to meet their shift target. In the absence of such a failure, downtime would not be identified. Until 2013, downtime reports were not automatically generated by the respondent's information systems. Supervisors wishing to investigate downtime would have to "run a report", which was time consuming to do. Significantly, in our view, even once individual downtime data was easily available, it was still only investigated if a Colleague failed to meet their hourly or daily target.

200.11. If a Colleague achieved his target before the end of his shift, he was permitted a second 20-minute break. He would, if so minded, be able to get away with a longer break than that, because his downtime would not be monitored unless he failed to meet his target. In practice, many Colleagues who reached their target with time to spare chose to carry on working to the end of their shift, often by volunteering for other tasks.

200.12. Colleagues knew that, if they failed to meet their shift target, and the Supervisor did not already know that the reason was acceptable, they may be asked for an explanation, even if they had not taken excessive downtime. Such instances were, in reality, unusual. Where a Colleague was unable to give an acceptable explanation for missing a target, that Colleague was usually found to have taken excessive downtime.

200.13. Managers also monitored a Colleague's average performance across a rolling weekly period. If a Colleague's weekly average was at, or just below target ("there or thereabouts"), no separate action would be taken. If, on the other hand, the Colleague was significantly below the average weekly target, the Supervisor would speak to them.

200.14. Sometimes a Colleague would significantly underperform on one shift, for example, by only achieving 50% of the target. In the absence of an adequate explanation, the daily performance figures alone would indicate a lack of effort ("taking the Mickey"). In this event, the Colleague would be spoken to about the poor-performing shift, but, as long as the weekly average was at or near 100%, no further action would be taken. As Mr Adams told us, this did not remove the possibility of performance management action against someone who met their weekly average targets where there was a constant pattern of serious underperformance for one day per week.

200.15. If a Colleague's performance against the weekly target did not improve after first being "spoken to", the reason would be investigated again, and, depending on the reason, further action would be taken. The next step was typically "counselling" (a formal recorded conversation). As a preliminary step, the Supervisor might ask the union steward to speak to the Colleague informally. (Mr Beaumont, for example, was often asked to speak to underperforming Colleagues.) If there was still no improvement after counselling, the respondent would take disciplinary action.

200.16. We agree with the claimants that the main area on which performance management was focused was Stock Picking. We accept that this was the overview of Mr Adams and the direct experience of Mr Dennis. It is also consistent with the records, which indicate that it was very rare for a Colleague to receive counselling for underperformance in any Activity other than Picking. We do not, however, agree that Picking was the *only* Activity on which Colleagues were counselled. There is at least one example ("Colleague 2") of counselling for underperformance which included Putaways.

200.17. Too much downtime was by far the most common reason for formal action. Mr Adams was asked about the frequency with which a Colleague was subjected to management action beyond being "spoken to", in circumstances where they had failed to meet targets, but did not have excessive downtime and had not abused their breaks. Mr Adams accepted that this happened in only "a handful of cases". These cases, whilst rare, were nonetheless real. Action beyond an informal conversation could be, and was, taken where poor performance was identified without excessive downtime. For example, a Colleague identified by Mr Adams as "Colleague 2" was issued with a counselling form on 12 August 2012 because he had underperformed when Picking and on Putaways. There was no mention of Colleague 2's downtime.

200.18. The existence of the targets was prominent in Colleagues' minds both during their probation and subsequently. The respondent would have us go further. It is the respondent's contention that Colleagues knew that they would have to give an explanation for stopping for *any reason***.** In our view, that proposition is overstating the demands of their work. It would be more accurate to say that Colleagues knew that:

200.18.1. if they failed to meet their target for their shift, they would have to explain any downtime that lasted more than 8 minutes, but would be unlikely to be specifically challenged over any shorter periods of downtime; and

200.18.2. if they substantially failed to meet their target for their shift, and had no significant periods of downtime, they might still have to give an explanation for the underperformance unless the reason was already known to their Supervisor.

200.19. The primary purpose of the enforcement regime was, as Mr Cooper reminds us, to optimise the flow of goods through the depot. The respondent did not impose sanctions against Colleagues for the sake of it. Informal intervention at an early stage (for example at the end of a shift) was often

enough to persuade the Colleague to improve their performance. This explains why relatively few Colleagues faced measures beyond counselling.

201. In reaching these narrative findings, we have looked carefully at the claimants' analysis of the individual comparators' performance data for 2014. We deal with those data in more detail below. As we later record, the data support our general finding that colleagues whose weekly average was on target would not face any performance management action other than being "spoken to" about the shift where they had underperformed. This proposition is in any event consistent with Mr Adams' evidence. The data also helped to demonstrate that high-averaging comparators regularly failed to meet the target for single shifts without being "spoken to". Crucially, though, the figures said nothing about the *reason* why they had not met their target on those occasions. This meant that we could not use the statistics to distinguish between shifts where a good reason for underperformance was already known to the Supervisor (needing no performance management action at all) and shifts where the failure to hit target called for an explanation from the individual Colleague.

Additional narrative findings – pay for performance

202. There is a distinct factual dispute under the heading of Issues 131 and 133. To what extent did performance against the targets affect a Warehouse Colleague's pay grade? In relation to this dispute, the claimants sought further narrative findings. These are set out in paragraph 163 of Mr Short's submissions:

"

a. Of the 422 employees who were in employment on 1/1/14 or joined between 1/1/14 and March 2017, 137 moved up a pay grade.

b. Of that 137, 61 subsequently moved down a pay grade.

c. The reasons for moving down a pay grade could include moving to a different (non-picking) role, absence, disciplinary findings or failing to meet performance targets.

d. An employee would not be moved down a pay grade for failing to hit performance targets at a single review.

e. An employee could be (but was not always) moved down a pay grade for failing to hit enhanced performance targets at a second or subsequent review.

f. It was not common for an employee to be moved down for failing to hit enhanced performance targets unless there were also issues with illness and absences.

g. An employee would not go down a grade for failing to achieve the enhanced rates required for activities using an HRT. This was because of health and safety concerns."

203. We find these particular statistics to be accurate and a useful part of the narrative. They demonstrate that the prospect of increased or reduced pay was real, but not immediate.

204. The decision to move a Warehouse Colleague down a pay grade was based on the manager's holistic assessment. As the Performance Review documents show, that assessment was in turn based on factors such as attendance,

discipline and attainment of performance targets. An employee would not be moved down a pay grade for failing to hit performance targets at a single review. It was not common for an employee to be moved down for failing to hit enhanced performance targets unless there were also issues with illness and absences. This does not, however, mean that the failure to hit the enhanced targets was not the initial reason for moving the Colleague down a grade.

Disputes over JD wording

205. We can now turn to the various disputes of wording under issues 131 and 133.

Paragraph 2.9.2.

206. In our view, the claimants' proposed text should be included. It is factually accurate. Mr Ballard stayed on the E3 pay grade despite repeatedly failing to meet the higher performance standard that would be expected for a Warehouse Colleague at that grade. The respondent argues, based on Mr Adams' evidence, that Mr Ballard's position was anomalous. Therefore, the respondent argues, it should not be referred to, because it is not representative of the common experience. We accepted Mr Adams' evidence that Mr Ballard's E3 grading was based on historic data going back to 2002 and that, since then, the targets had increased. Nevertheless, we do not think that Mr Ballard's grading was irrelevant to the common experience. It illustrates the fact that, for everybody, failure to meet the enhanced target would not *automatically* lead to a down-grading. This is a fact which the respondent has now recognised in Mr Cooper's suggested draft for paragraph 2.3.3 of the Background Document. It is now acknowledged by the respondent that "there was some manager discretion as to what grade to award based on a holistic review of overall performance…" We think it better to leave Mr Ballard's experience in at paragraph 2.9.2 so as to make it clear that that discretion was more than theoretical and was, in his case, actually exercised.

Paragraphs 2.11 and 2.12 – "closely" v. "regularly"

207. The parties disagree about what adverb to use to describe productivity monitoring during the probation period. The argument is centred about what the disputed wording might imply about the frequency and intensity of such monitoring. As explored more fully below, the respondent's proposed adverb, "closely", carries with it a particular meaning which implies continuous observation, correction and direction. In our view, this dispute can be avoided by expressly stating what happened. All Warehouse Colleagues, including those serving their probationary period, had their productivity monitored in the ways set out elsewhere in the JD and in our narrative findings. Additionally, Colleagues on Probation would have their performance against target formally reviewed at scheduled meetings, typically at the third, seventh and eleventh week.

Paragraph 2.11 – data on probation failures

208. An area of significant factual dispute was the proportion of new starters who left Asda because of their inability to meet the performance targets. As the evidence unfolded it was not difficult to see why each party thought that the other party's stance was wrong. The claimants' analysis was based on a starting point of 151 new recruits during the relevant period. This figure was unreliable, because it did not take account of the Warehouse Colleagues who left before

their details could be entered onto the PeopleSoft Human Resources system. The respondent's figure of a drop-out rate of one in three was based on Mr Adams' estimate and personal recollection of individual colleagues, both of which were demonstrated in cross-examination to be deeply flawed. In our view, the most accurate analysis can be found in the new text proposed by the respondent. Whilst based on a relatively small snapshot of time, it illustrates what we find to have been generally the case. A small, but real, minority of new starters would fail their probationary period (or extended probationary period) because of their inability to meet the targets. We would therefore include the respondent's new proposed wording for paragraph 2.11.

Paragraph 2.12 – "acutely"

209. We consider that the word "acutely" is a fair description of how performance targets would weigh on the minds of Colleagues during their probationary period.

Paragraph 2.18

210. As paragraph 2.18 of the JD records, Warehouse Colleagues' individual performance (such as the number of cases picked) was inputted by Supervisors onto spreadsheets known as Tracker Sheets. This was done at the end of a shift. Everyone agrees that Warehouse Colleagues were able to access the Tracker Sheet, although not everyone knew how to find it. Mr Adams accepted that Colleagues were not required to access the Tracker Sheet and most of them would not do so.

211. The respondent objects to the claimant's proposed text for paragraph 2.18 on the ground that it gives a misleading impression of the extent to which Colleagues knew that their performance was being monitored. We disagree. It adds to the picture. If a Warehouse Colleague has an opportunity to check their daily performance scores, and does not take that opportunity, even where they may only just have hit or missed their target, it says something about the extent to which the precise numbers are important to them. Any misleading impression can be cured by setting the information in its proper context. To that end, we mostly agree with the respondent's fall-back proposed formulation. We have made one amendment which we think results in greater accuracy. We have underlined the amendment purely to show the reader where it is.

212. For the claimants' proposed formulation should therefore be substituted:

> "Job Holders were aware that their Supervisors used and analysed data to monitor their performance. They could access the centralised tracker sheet kept by their supervisor and, during pay and performance reviews, the 'traffic light' system used on the tracker sheets was sometimes highlighted to Colleagues. However, <u>most</u> Colleagues did not access the tracker sheets and were unfamiliar with their format."

Paragraph 2.19

213. We agree with the respondent that paragraph 2.19 is better without the claimant's proposed addition. That paragraph is not about being "put into performance management". It is about how performance was monitored. The monitoring might include asking a slow Colleague for an explanation, but would not include the enforcement action (or lack of such action) taken once the facts were established.

Paragraph 2.23

214. The disagreement here is twofold. First, there is a factual dispute about the frequency with which colleagues were "spoken to" on the depot floor. It is dealt with in our narrative findings.

215. Second, the claimant argues that there should be no reference in paragraph 2.23 to the frequency with which *Supervisors* acted in a particular way, when what matters is the work of the job-holder. In our view, the frequency of the conversations is relevant to the job-holder's work, in that, the more often it happened, the more likely it was that an individual Colleague would either overhear such a conversation or be directly involved in it. Regularly witnessing a team-mate having to justify underperformance would make the job-holder himself more likely to be aware of the importance of keeping to target.

216. For the disputed phrase we would substitute "This occurred on most days, at times and in places where it could be witnessed by colleagues."

Paragraph 2.24 – "real time"

217. The respondent wants paragraph 2.24 to include the phrase, "in real time" as a shorthand for Supervisors frequently reviewing live data during the course of a shift. Whilst the claimants object to the use of that phrase, we do not know the claimants' basis for their objection. As long as everyone understands what the phrase means in this context, we see no reason to exclude it.

Paragraph 2.24 – acceptance of a Colleague's explanation

218. The claimants would like paragraph 2.24 to end, "Typically, the Colleague's account was accepted." In Mr Short's closing submissions, he has added the qualification, "although sometimes it would be checked first."

219. Even with Mr Short's rider, the claimants' proposed sentence needs unpacking. There are two concepts in play here. The first is whether or not the Colleague's explanation would be believed. The second is whether or not a true explanation would be considered acceptable (or "good"), such that no further action would need to be taken. The concepts are dealt with separately in the agreed text of paragraph 2.24.

220. On the question of the truth or otherwise of an explanation, it is worth adding two facts to paragraph 2.24:

220.1. First, there appears to be no evidence either way about how often a Colleague would be disbelieved or caught out in a lie. (As Mr Cooper points out, Mr Adams' evidence does not help here, as it went to the question of whether a believed explanation would be considered acceptable.) It is nevertheless likely in our view that such instances would be rare. This is because the ease of checking an explanation would inhibit a Colleague against lying.

220.2. Second, the evidence is that an explanation was not always checked. If a particular Supervisor knew and trusted a Colleague well, they would often take their explanation at face value.

Paragraph 2.25 – "as measured as an average over the week"

221. We do not consider this phrase necessary. Our narrative finding on this subject is, in our view, more accurate (see paragraph 200.8). The IEs will no doubt have that narrative in mind, but if the parties prefer, they can explicitly cross-refer to it.

Paragraph 2.25 – the steps in the performance management process

222. We would retain the respondent's proposed text outlining the various steps in the performance management process. They were real and not just theoretical. We would delete the phrase "and probable", because the narrative findings give a more accurate picture. Since this paragraph relates to "further action" beyond initially being "spoken to", we would make it clear that the further action would only be taken if the Colleague had not satisfactorily explained their underperformance during their initial conversation.

Paragraph 2.25 – explanations other than downtime

223. In our view, the claimants' proposed text is adequately covered by our narrative findings.

Paragraph 2.26 – "For context…"

224. Paragraph 2.26 sets out some agreed statistics about the number of recorded Supervisor conversations that actually took place over approximately a 6-month period. Until final submissions, the claimants' position appeared to be that they wished to contextualise those statistics by setting them against the total number of mathematically-possible opportunities for such conversations to have taken place. On reading Mr Short's written submissions, it now seems as if the claimants no longer seek to provide that contextual information. Rather, they want paragraph 2.26 to include more detail of what the conversations were about. (To put it this way, they seem to be replacing *context* with *content*.)

225. Before determining the alleged facts on their merits, we considered whether or not it would be procedurally fair to allow the argument to shift in this way. We decided that it would not cause any unfairness. Whilst the claimants appear to be making a distinctly different point to that which was originally made under the heading of paragraph 2.26, it was one of the "narrative" findings for which the claimant contended which effectively cut across multiple paragraphs of the JD. We also noted that the respondent had an opportunity to deal with that point during Mr Cooper's final oral submissions. He did not raise any procedural objection to the claimant's arguments under paragraph 2.26, despite having made the same objection in relation to a different paragraph.

226. Having cleared the procedural decks, we determined the facts as follows:

> "These conversations included conversations asking why a target had not been met or asking about periods of downtime in excess of about 8 minutes, most of which elicited a sound explanation so that no further action was taken."

227. If any further detail is needed, the IEs can draw it from the narrative findings.

Paragraph 2.26 – Colleagues given counselling

228. Coming into this hearing, it appeared that there was also a dispute about whether paragraph 2.26 should state the number of Colleagues who had been

identified as requiring further action. It is now agreed that this figure should be included. The claimants now seek to have that figure supplemented with a sentence relating to the 20 Colleagues who were given counselling. The claimants want the JD to explain what the relevant matter of concern was for which they were counselled. We see no reason why it should not do so. Generally, the reason for counselling was excessive downtime or abuse of breaks.

Paragraph 2.26 – Capability dismissals

229. There was initially a dispute about whether or not any Colleagues were dismissed under the Capability Process during the 6-month reference period set out in paragraph 2.26. The respondent now proposes a form of words to indicate that one Colleague was dismissed under that procedure during that time. In our view, it is only fair for the paragraph also to make clear that the dismissal was for ill health capability. The respondent's proposed text also refers to later dismissals under the same process. We do not know what aspect of capability was the reason for those dismissals.

Issue 138 – Reporting of productivity targets (hourly v. per shift/week basis)

Paragraph 6.4

230. Paragraph 6.4 relates to Letdowns. In summary, Letdowns involve using a High Reach Truck (HRT) to remove a pallet from the high racking and to place it in the picking bay at ground level. The claimants have proposed a sentence in paragraph 6.4 to the effect that Mr Dennis was not himself aware of the time required to remove each pallet. We do not think that there is evidence to support this proposition. It appears to be based on something that Mr Dennis said in relation to Putaways, which is a similar, but distinct, task.

231. A more accurate reflection of the status of the hourly target comes from Mr Dennis' witness statement at paragraph 48. The following is our paraphrase, which should be inserted into paragraph 6.4:

> "Performance against the hourly target was not enforced, provided that the Shift target was met, but the job holder was aware of the need to work efficiently throughout the shift because the pallets he was removing from storage were being used to replenish the stock that colleagues were collecting on Picking."

Paragraph 7.5 – first dispute

232. There are two contested blocks of text in paragraph 7.5, both proposed by the claimants.

233. In our view, the first block of text should be retained. If it were not there, it would imply that there was a separate time target for each replenishment assignment. That was not the reality. Colleagues were not timed over a single replenishment. Provided a Colleague met the Shift target of 67 assignments per shift, he would not have to justify taking too long on any one particular assignment.

Paragraph 7.5 – second dispute

234. We cannot find any evidence to support the claimants' assertion that the lead comparators did not know how long each assignment should take. The second disputed sentence should therefore be deleted.

Paragraph 19.10

235. As with paragraph 7.5, we agree with the claimants that there should be some qualifying words to make clear that there was no specific time target for each Putaway pallet. The drafting can be refined to read:

> "…allowing him approximately 3 minutes for each assignment on average."

Paragraph 8.4

236. We would delete the claimants' proposed sentence, "The JH worked to the overall target for the week." Our narrative findings set out the position more accurately. There can be a cross-reference to those findings if necessary.

Issue 140 – Enforcement of productivity targets when using HRTs

237. Performance against productivity targets was, to put it neutrally, taken into account when determining a Warehouse Colleague's pay grade. Issue 140 concerns the impact of targets for Activities which involved using the HRTs. A point of principle runs through the drafting disputes. It is about the tension between two competing priorities. One was to maximise Colleagues' productivity when using HRTs. The other was health and safety. If Colleagues felt that they needed rush a manoeuvre in order to fulfil their target, the consequences could be disastrous. The disputed wording concerns how managers struck the balance between the two priorities.

238. In our view, the respondent's new formulation is the preferred starting point. It fairly reflects Mr Adams' evidence that HRT-related targets were not discounted altogether. We do not, however, think that it takes proper account of something else that Mr Adams told us. *Colleagues,* he said*, would never be moved down a grade for narrowly failing to meet the 105% or 110% target for HRT-based Activities.*

239. We therefore add this italicised sentence to the respondent's formulation at paragraph 2.7. There is no need for it to be repeated separately for each Activity using an HRT. We accordingly adopt the respondent's new form of words for paragraphs 2.3.2, 2.3.3, 2.5, 5.5, 6.5 and 7.6 of the Background Document.

240. In paragraph 25.4 there is a dispute about reference to an individual comparator's personal experience of not moving down a pay grade. We deal with these points at length elsewhere in the judgment. We do not see what it has to do with Issue 140 and do not determine it at this point.

Issue 141 – Monitoring pace of work against targets was not a "stipulation"

Recording that the activity was not a stipulation

241. Here we are not being asked to determine facts - everyone agrees what they were – but to resolve disputes about whether a particular fact should appear in the JDs or not.

242. During their shifts, the comparator Warehouse Colleagues made various checks, and kept written notes, to help them keep track of their progress against their targets, and to help them explain any instances of underperformance. They were not required to take these steps, nobody checked to see if they had done them, and there was no risk of any sanction for omitting to do so. The claimants contend that the voluntary nature of the practice should be spelled out in the JDs.

243. The respondent does not suggest that the claimants' proposed text is factually inaccurate. Nevertheless, Mr Cooper says, repeated references to the lack of stipulation are inappropriate, in that:

243.1. It contributes towards a misleading impression that the targets were less important than they were (described colourfully as "death by a thousand cuts"); and

243.2. It is irrelevant to the question of whether or not these checks and records were part of their work.

244. We determined this issue in favour of the claimants. We did not think that there was a serious risk of the IEs being misled into downplaying the importance of the targets. On the contrary, the importance of the targets is, if anything, emphasised by fact that that these Colleagues chose to do something that they did not have to do as a means of keeping to target and having their explanation for under-hitting it at the ready.

245. As to the respondent's other objection, it is of course correct that a non-compulsory activity remains part of an employee's work if it is part of the way in which work is carried out, "and/or" has been tacitly approved by managers: see *Beal* at paragraph 32(3). But, as paragraph 32(2) of *Beal* also makes clear, it may be worth pointing out to the experts that the employee cannot be required to do the activity in question. We respectfully agree. Whether an activity is required or not can be relevant to the equal value question. A compulsory activity is usually more demanding than a voluntary one, because, as well as doing the activity itself, the employee will know that they may have to demonstrate that the activity has been completed. It adds to the emotional demand of the work. In this case, the Warehouse Colleagues did not hand in their notes. There were no spot checks and, whilst some Colleagues kept their notes in their lockers for a few days, it was for their own benefit and not so that they could produce the notes for inspection.

246. We therefore include all the claimants' proposed insertions into the JD paragraphs for Issue 141.

"Regularly"/"Frequently"

247. There is another small point on which we are required to adjudicate under this heading. Should the JDs use a word to indicate how often the job-holders self-monitored? What should that word be? The claimants objected to the word, "regularly" as proposed by the respondent. Now the respondent suggests that "regularly" should be replaced by "frequently". We agree. As Mr Cooper reminds us, the respondent's new formulation is consistent with the IEs' schematic, according to which, "frequently" means "during a shift or daily". That was the position here. Paragraphs 12.31, 21.5 and 25.7 should be amended accordingly.

Conditional right to a second break

248. It is common ground that all Warehouse Colleagues were automatically entitled to one break, no matter how well or badly they were performing. Mr Adams told us that, in addition, a Colleague who was meeting his target would be permitted a second break of 20 minutes. That break would count as downtime, but would not need to be explained. He was not challenged on this evidence and we accept it. The respondent proposes that paragraph 20.8 of the JD should reflect this fact. We agree.

"Closely monitored"

249. At paragraph 20.8 there also appears one of a number of clashes over the use of the phrase, "closely monitored" in connection with a Warehouse Colleague's downtime. Although it does not fall within Issue 141, it is convenient to deal with it here.

250. The adverb, "closely", in the minds of the IEs, is characterised by "ongoing observation, correction and direction", and should therefore only be used where this is truly happening. The claimants argue that this overstates what was going on in the distribution centres. The respondent's case is that the descriptor is not only a true reflection of the reality, but also necessary to achieve consistency with the tribunal's Batch 1 judgment. (Under issue EH17 of Batch 1, the tribunal determined that the role of Personal Shopper was "one of the most closely monitored roles in the store".)

251. To our minds, the correct answer lies in between the two parties' positions. Supervisors did indeed pay ongoing attention to downtime during the course of a shift, and challenged excess downtime on the spot (justifying the use of the phrase, "closely monitored"), but *only* if the Colleague was not meeting their target: see paragraphs 200.8 and 200.10. We therefore qualify the respondents' wording for paragraph 20.8 with these words:

> "would be closely monitored if he was not achieving his target"

252. Paragraph 20.8 also refers to the impact of Mr Dolan's union activities on his record-keeping. We deal with this point below under the issues that relate personally to him.

<u>Issues 139 and 142 – Mr Dennis' personal experience of performance against targets and failure to meet those targets</u>

General

253. Each comparator has a separate job description which supplements the Background Document. Into each job description the claimants seek to insert data which, they say, describe the job-holder's personal performance against targets, and the consequences (or lack of them) that actually followed from any underperformance. This exercise is broken down into the different Activities (such as Stock Pick, Putaways etc), each of which had their own target. All performance data are measured over the period January to December 2014.

254. The respondent resists the inclusion of these data. The grounds of objection are.

254.1. They are unreliable, as explained by Mr Adams at paragraphs 124-131 of his statement;

254.2. The data for the lead comparators do not reflect the general experience; and

254.3. They are irrelevant to the sections of the job description where the claimants want them to appear.

255. We deal with each objection in turn.

Objection 1 - unreliability

256. Mr Adams, in paragraphs 124-131, puts forward three reasons why, in his view, the claimants' data analysis is unreliable.

Distortion

257. The first reason is that the claimants have counted the number of shifts on which the comparators met their targets on a particular Activity and expressed that number as a percentage of the total number of shifts on which they performed that Activity. He illustrates the perceived flaw by giving an example of a hypothetical Colleague who worked 20 shifts on Stock Pick, achieving 99% of target on 10 shifts and 105% on the other 10 shifts. In that example, on the claimants' analysis, he would have achieved his target only 50% of the time, even though his average performance was 102%. (This is the kind of distortion one sees, for example, in a "first past the post" electoral system. The total number of seats won says nothing about the number of votes cast nationwide.)

258. If this were the only criticism, we would not see any reason for concern. The claimants are happy for the average performance figures to sit alongside the percentage of on-target shifts. The IEs are not going to be fooled into thinking that the comparators were generally underperforming. What the statistics would show - if otherwise reliable - is that there was a substantial number of *shifts* on which they underperformed. If no action was taken against them, and no record even of being informally "spoken to", it would support the claimants' case that Warehouse Colleagues were not subject to any performance management for failing to meet a shift target unless their average weekly performance was also below target.

Inaccuracy

259. Mr Adams' next criticism of the figures is that they are likely to be inaccurate for certain Activities. Pick-by-Line (PBYL) had varying targets depending on the type of stock that the Colleague was given to pick. In paragraph 130, Mr Adams dissected the claimants' analysis of Mr Devenney's performance on PBYL. He gave the example of a shift identified by the claimants as one in which Mr Devenney had not met his target. A note on the labour sheet for that shift showed that Mr Devenney was actually moving heavier stock with a reduced target, which Mr Devenney had surpassed.

260. Mr Dennis' evidence also supports Mr Adams' view that some of the data were inaccurate. The example he gave was non-flow Let-downs. Those operations could not be scanned, so the labour sheets would record fewer let-downs than he had actually done.

261. Mr Adams was not challenged on this deconstruction of the claimants' figures, despite Mr Cooper expressly throwing down the gauntlet to Mr Short during the hearing. That does not mean that we must necessarily accept what Mr Adams

says on this point: see *Denby,* cited above. We do not, for example, think it likely that, had he been challenged, Mr Adams could have sustained a position that *all* the claimants' figures were inaccurate. He could not, for example, have gone as far as to say that all the shift shortfalls identified by the claimants could be explained by the comparator having a reduced target for that day. We think that, despite the kinds of inaccuracy that Mr Adams has identified, the figures contribute towards a picture of a substantial proportion of daily shift targets not being met for one reason or another. What we cannot do, however, is make reliable findings about what the actual percentage of underperforming shifts was. It is therefore wrong to include those percentages in the JDs.

Missing information

262. Mr Adams' final point is that, even if the claimants have correctly identified shifts on which the comparators missed their targets, the claimants' analysis does not take account of the *reason* for underperformance. If it was a reason that was obvious to the Supervisor (such as a battery bay queue, or insufficient picked stock for Goods Out), there would have been no need for the Supervisor to ask the Colleague to explain himself, and no action would be taken against that Colleague, even informally. We do not know how many of the comparators' underachieved shifts are explained by such a reason.

263. Again, Mr Adams' analysis resonates with the comparators' own experience. Mr Dennis' evidence was that one could not tell from the PBYL pick rates alone whether any individual Colleague had performed well or badly. This was because colleagues on PBYL worked as a team, doing differing tasks, some of which were more time-consuming than others.

264. In our view, this objection is not a reason for discounting the claimants' figures altogether. They still reliably point to a significant proportion of shifts where the target was missed. That evidence contradicts the estimates given by the comparator witnesses of their own high compliance rates, and leads us to believe that the comparators, such as Mr Dennis, have overestimated the extent to which they hit the target on each shift.

265. Where Mr Adams' point has more force is in relation to the conclusions that can be drawn from those figures about performance management. Just because a proportion of shifts have been under-target without apparent consequences for the individual, that does not mean that the targets were not enforced. As Mr Adams says, it comes down to the reason why the target was not met. The lack of enforcement action for any particular shift may well be because the Supervisor knew that it was for a legitimate reason without having to speak to the Colleague concerned.

Objection 2 – reflection of the general experience

266. This brings us to the second objection. The individual comparators' data are unhelpful in allowing the IEs to evaluate the demands of their work. If the individual figures do no more than reflect the common experience, it is sufficient for the JDs to incorporate our narrative findings about what that common experience was. To the extent that a comparator's experience is different from the common experience, their own situation is meaningless unless there is something to suggest that the demands of the individual comparators' work was

different from that of Warehouse Colleagues in general. We cannot find anything to suggest that their demands were different. (Mr Dolan's union steward responsibilities are an exception, but that does not justify the inclusion of specific performance figures for him, since it is agreed that his union responsibilities should not be taken into account when assessing value.)

267. Of course, the way in which individual comparators achieved their shifts, and the consequences of their individual underperformance, are relevant to our findings about what the common experience actually was. But we have already taken account of the individual comparators' data in making those findings, so far as we were able to do so.

Objection 3 – irrelevance to particular sections of the JDs

268. Had we not agreed with the first two objections, our preferred approach would have been for the JD to include the performance figures in one section, without repeating it for each of the Activities.

269. We now turn to the particular drafting disputes.

Mr Dennis - Paragraph 5.4

270. We see nothing wrong with the JD setting out examples of legitimate delays that might cause Mr Dennis to fail to hit his target for Putaways. We would not include the percentage figures for the reasons given above.

Mr Dennis – Paragraph 5.29

271. There is no need to repeat the examples of delays which already appear at paragraph 5.4 in relation to Putaways. Our narrative findings explain why we do not agree with the claimants' formula of "not due to a lack of effort". For the claimant's proposed text, we substitute, "He would approach the supervisor if he thought he would struggle to hit his target for a shift and would give an explanation."

Mr Dennis – paragraph 6.4, 7.5 and 8.4 - figures

272. For the reasons we have given, we delete the claimant's proposed additions to these paragraphs.

Mr Dennis – paragraph 6.37

273. In substitution for the claimant's proposed text at paragraph 6.37, we add:

"When the job holder thought he was unlikely to make the target for the shift, he would inform his supervisor in advance so that the reason for not making the target was known. If the explanation was acceptable no further action would be taken."

Mr Dennis – paragraph 7.5 – "potentially"

274. The next dispute is displayed as part of Issue 139 and 142. Whilst it does not actually engage the point of principle that this issue is about, we determine it here for convenience. What the parties are arguing about here is the impact of delays in flow racking replenishment. Everyone agrees that it could have a knock-on effect on the ability of Colleagues to carry out Flow Picking. The claimants want to insert the word, "potentially", presumably to make clear that this effect was not an inevitable consequence. We agree. We did not understand Mr Dennis' witness statement to be saying that delays in Flow Picking would always follow

from delays in Flow replenishment. Nor would it make sense for him to do so. There were many different product lines in the flow racking. The extent of any knock-on delay would depend on which particular product lines were being picked and which were late in being replenished.

Mr Dennis – paragraph 8.28

275. Paragraph 8.28 describes the interruption to Stock Picking Activities caused by cases on a pallet being out of reach. There would be a delay of between 1 and 6 minutes whilst the Picker arranged for an HRT driver to turn the pallet around. It is given as one of a number of examples of factors that made it more difficult for a Picker to meet his target. Not only would it have an impact on the hourly and daily target, but the delay would also be recorded as downtime, as the Warehouse Colleague would not be logging data into the Talkman until the pallet had been moved.

276. The respondent wishes the JD to emphasise that it was "*therefore"* important for the job holder flag down the HRT driver "as efficiently as possible". We delete the word, "therefore". It suggests that the need for efficiency stemmed, at least in part, from the fact that the delay would be recorded as downtime. But a 6-minute spell of recorded downtime would be of no consequence, as we found that managers would not act on downtime unless it exceeded 8 minutes. It would, however, still be in the Colleague's interest to act quickly, because of the overall impact on target.

277. Delays of this kind would be an example of a legitimate reason for not completing the target. As we have already stated in our narrative findings, if the Supervisor was satisfied that the target had been missed because of a delay that was outside the Colleague's control, no further action would be taken. The claimants wish for paragraph 8.28 to include a reminder of that general proposition. In our view, there is no need for it.

Mr Dennis – paragraph 8.33

278. Sometimes Mr Dennis would be assigned a succession of "small picks", where only a small number of cases was loaded onto a pallet. Small picks made it harder for him to reach his target. According to Mr Dennis' statement, if he pointed out a run of small picks to his Supervisor, he would "usually" be reassigned a better pick. Whilst Mr Dennis was asked about this process in cross-examination, it was not put to him that he would always get a better pick on request.

279. The respondent's new proposed text for paragraph 8.33 properly reflects Mr Dennis' evidence in this regard and should be included.

Mr Dennis – paragraph 8.36

280. We are concerned here with another legitimate cause of delay. The IEs will, no doubt, bear in mind that delays like these are examples of reasons which, if they were accepted by the Supervisor as being the genuine reason for missing a target, would result in no further action being taken against Mr Dennis. The fact does not need to be spelled out.

281. The respondent's proposed text is also in our view unnecessarily repetitive. By the time the reader gets to paragraph 8.36 of Mr Dennis' job description, they

will not have failed to grasp that delays such as these will inevitably slow down the pace of work and make it more difficult to hit the target.

Mr Dennis – paragraph 9.2

282. This is another drafting dispute that does not require us to determine any facts. The context is how much cumulative weight Mr Dennis would lift, on average, in a whole shift if he met his target. The cumulative weight is agreed at 4,632 kg. The claimants object to the use of the phrase, "required pace", presumably because it may imply an absolute requirement to hit the target, when the reality was that Supervisors tolerated failure to hit the target where satisfied of the explanation, as more fully explained in our narrative findings. We do not think that the reader will lose sight of this nuance. (See, also, our findings on the phrase, "required to meet".) This is preferable to the claimant's formulation of "pace to pick 265 cases an hour". This is just an unnecessary repetition of the figure at paragraph 9.3.

Mr Dennis – paragraphs 9.3, 10.3 and 12.4

283. We have already explained why, in our view, the claimants' proposed text for these paragraphs should be deleted.

Mr Dennis – paragraph 13.4

284. In paragraph 13.4, the claimants wish to refer to Mr Dennis' experience of rarely reaching his target on the early shift in Goods Out. It is already built into our narrative finding. We do not think it needs to be repeated. It may be relevant for the IEs to know that the Colleagues were given longer to load a double-deck trailer than they were given for a single-deck trailer. That part of the claimants' proposed text will be retained. In the peculiar circumstances of the Goods Out Activity, we think that "had a Productivity Target" is a better reflection of our narrative finding than "had to meet his Productivity Target".

Mr Dennis – paragraph 19.6

285. We have incorporated both parties' suggested wording for paragraph 19.6. The relevant part of the paragraph now reads:

> "…If the Job Holder was behind his hourly Target he knew to pick up his pace of work. One of the ways in which this could be achieved was to request a bigger pick from the Letdown desk."

Mr Dennis – paragraph 19.17

286. We have already found that it was difficult for Colleagues working on the early shift in Goods Out to meet their target and that this difficulty was recognised by managers. Paragraph 19.17, as drafted by the claimants, would go further. It implies that efficient planning on the early shift would make no difference to whether or not the target would be reached. That cannot be right: Mr Dennis did not say that the early shift *never* met their target, or that there was no need for efficient planning on that shift. We therefore delete the claimants' form of words and replace it with, "It was recognised by managers that this was more challenging on the early shift than on the late shift."

Mr Dennis – concentration table

287. The parties have devised a table to set out the demands of Mr Dennis' work on concentration, accuracy and memory. Row 2 of that table concentrates on the demands of listening to and following the instructions on the job holder's Talkman. Under the heading, "Impact of Failure to Exercise" is a list of the potential consequences of not concentrating and listening properly to the Talkman. In a further column headed, "Duration and Frequency", the table sets out the agreed position that inactivity on the Talkman for greater than 4 minutes would count as "downtime". Unhelpfully, in our view, that column goes on to state that Mr Dennis could be "spoken to" in the event of downtime being recorded. In an attempt to counter this narrative, the claimants propose to add further text to the "Impact" column. They want that column to include a summary of what would happen in the event of a target not being met, or downtime being adequately explained. It should not be there. This table is not about targets. It is not even about the consequences of taking downtime. What matters, for the purposes of this table, is the demand of concentration placed on Mr Dennis by the potential impact of not his not properly listening to the Talkman. It is no answer to say, as Mr Short does, that it is the respondent's fault for raising the issue in the "Duration and Frequency" column. Two wrongs do not make a right.

Mr Dennis – accuracy table

288. For the same reason we delete the claimants' proposed text from the accuracy table.

Mr Dennis – paragraph 25.1

289. We agree with the respondent that Mr Dennis was not just "given" productivity targets; he was "required to meet" them. "Given" underplays the consequences of not meeting the targets without good reason. There is little danger of the respondent's phrase being misinterpreted: our narrative findings make clear that the requirement to meet the targets was not an absolute one.

Mr Dennis – paragraphs 25.2 and 25.3.2

290. We do not include Mr Dennis' performance data for the reasons we have given.

Mr Dennis – paragraph 25.3 – "consistent"

291. Paragraph 25.3 raises a dispute about the pace at which Mr Dennis was required to work. Was the pace required to be "consistent"? We find that it was. The term is appropriate, provided that it is properly understood that it does not take the respondent's case any further than our narrative findings. If Mr Dennis worked at an "inconsistent" pace, he might be "spoken to" by his Supervisor during his shift, but would not be spoken to at the end of his shift if he had met his daily shift target, and would not face any further action if his weekly target had been achieved.

Mr Dennis – paragraph 25.9

292. As we explain above, we have amended paragraph 25.9 to qualify the phrase, "closely monitored".

293. It is agreed that this paragraph should also include a reference to the earned 20-minute second break.

Mr Dennis – paragraph 25.12

294. The next controversial passage is paragraph 25.12. It is about Mr Dennis' practice of keeping a note of interruptions to his work and, in particular, why he did it. One of the reasons, says the respondent, is that Mr Dennis knew that he was being "constantly monitored". The claimants' position was that these words should be deleted.

295. We think it important that there should be some reference to monitoring during the course of a shift, so that it is clear that, if the explanation for a delay was not obvious, the onus would be on Mr Dennis to explain why he was not achieving his hourly target. It also avoids giving the misleading impression that Mr Dennis had absolute freedom to choose his pace of work provided he met his target for the shift. On the other hand, the respondent's formulation might imply that downtime was being constantly monitored, when that was not the case.

296. Our preferred wording is, "he was aware that he was being monitored against his hourly target and that he would have to explain…".

Mr Dennis – paragraph 25.13

297. In our discussion of the individual performance data, we have already expressed our finding that Mr Dennis has overestimated the proportion of shifts on which he met his target. We think that the respondent's phrase, "generally met his target consistently for most Activities" is tainted by that overestimate. More accurately, the JD should state:

> "The Job Holder usually met or exceeded his Target for most Activities and, if he did not, his non-achievement of the target was generally accepted as being for a good reason."

Mr Dennis – paragraph 25.13.1

298. We find the claimants' proposed phrase, "meaning no further action was taken" to be accurate and innocuous. Paragraph 25.13.1 presupposes a state of affairs on the early shift in Goods Out. It then constructs a hypothetical scenario in which that state of affairs has been confirmed by Supervisors to exist and is, in the Supervisors' minds, the reason why Mr Dennis has failed to hit his target for that Activity. It is inconceivable in those circumstances that any further action would have been taken against Mr Dennis.

Mr Dennis – paragraph 25.13.2

299. We have deleted the claimants' proposed text for this paragraph. In our narrative findings we have stressed that managers did not equate an acceptable reason with one that was "not due to a lack of effort".

Mr Dennis – paragraph 25.14

300. As we have already explained, we consider the phrase "monitored in real time" to be an accurate description which ought to be included.

Mr Dennis – paragraph 25.16

301. Paragraph 25.16 states that Mr Dennis was aware of the potential for disciplinary consequences for him persistently failing to meet his targets. It cross-refers to the Background Document, which sets out the detail of those

consequences. The respondent also wishes for paragraph 25.16 to include a summary of the procedure. There is no need. It just adds more words.

Mr Dennis – paragraph 25.17 – first sentence

302. We have rewritten the first sentence of paragraph 25.17, to take account of our findings up to this point. The first sentence now reads:

> "Because he either met his Targets, or was able to satisfy his Supervisor that he had a good reason for not meeting the Targets on those occasions when he failed to do so, the Job Holder did not personally face any of these consequences."

Mr Dennis – paragraph 25.17 – remainder

303. We have amended the remainder of paragraph 25.17 consistently with our findings in relation to paragraph 2.26 of the Background Document.

Mr Dennis – paragraph 25.18

304. We have amended paragraph 25.18 to match our findings at our paragraph 238 above.

Mr Dennis – paragraph 25.19

305. It is common ground that Mr Dennis was aware of colleagues who had been moved down a pay grade because they had not performed at the expected level. The respondent would have us go further. At paragraph 25.19, the respondent wants us to record that (to Mr Dennis' knowledge) the reason for dropping a grade was the colleagues' failure to meet the higher performance targets. We do not think that much turns on the dispute, but it would be more accurate to say,

> "He was aware that a number of his Colleagues were moved down the pay scale because of their manager's assessment that they had failed to perform at the expected level for the pay grade (for which their failure to achieve the higher level targets was the starting point)."

<u>Issues 139 and 143 – Mr Dolan's personal experience of performance against targets and failure to meet those targets</u>

Preliminary

306. During his oral evidence, Mr Dolan told us that he preferred to be known as "Martin". That was how everyone rightly addressed him during the hearing.

307. In our written judgment we have reverted to the more traditional convention of his title plus family name. This is only for consistency with the key documents in the case and to make life easier for the IEs, and not out of any lack of respect for Martin's wishes, which we understood to be chiefly about how he is addressed in conversation. If we have misunderstood the importance of this issue, we will readily amend his name and issue a certificate of correction for that purpose.

Mr Dolan – paragraph 5.4

308. We have slightly re-written the second sentence of paragraph 5.4 by inserting the words "on average". In doing so have tried to achieve a fair balance between word economy and accuracy. It emphasises the fact that nobody timed Mr Dolan over a single Putaway. We agree with the respondent that the word, "constantly" accurately describes the need to balance speed and safety.

309. The claimants seek to insert a sentence referring to a pay review meeting in March 2014. At that meeting, Mr Dolan was told that he was not meeting his full targets and was warned that he could be put through a capability process if his performance did not improve. He was not actually subjected to any capability procedures. What the claimants do not mention is that Mr Dolan was a union steward, who had a reduced target. He thought the warning was unfair, because – as Mr Dolan saw it – the Supervisor had not understood that he was operating to a reduced target. Mr Dolan's uncontradicted evidence is that, after a few months, his Supervisors realised that he had to be managed against the expectations for stewards, not colleagues. That explains why, ultimately, he was not put through any capability process.

310. The respondents resist the inclusion of the claimants' proposed sentence. One ground of objection is that it gives a misleading impression of how underperformance was managed. In our view, that difficulty can easily be overcome by giving a more balanced account of the facts.

311. It may be – we were not sure – that the respondent also objects to the meeting being referred to on the ground that it is unrepresentative of the common experience. If that is the respondent's argument, we are unpersuaded by it. On the contrary, we find this meeting to be a good example of how perceived failures to meet targets were managed in practice. If a Supervisor perceived that a Colleague was persistently failing to meet their target, albeit based on a misapprehension of what that target was, they would warn the Colleague that they may face formal capability procedures. Formal capability action itself was rarer. One explanation for this is that, before beginning formal procedures, managers would need to investigate the facts. Such an investigation would, in this case, have quickly revealed that the Supervisor had been holding Mr Dolan to the wrong target.

312. We therefore substitute this wording for the claimants' draft:

> "After completing his probation, the Job Holder was spoken to on one occasion (during a pay review dated 17 March 2014) regarding perceived failure to meet targets. He was warned that he could be put through a capability process. Supervisors realised that he had to be managed against reduced targets and formal capability procedures were never actually started."

Mr Dolan – paragraph 7.27

313. At paragraph 7.27, the claimants wish to refer to the fact that Mr Dolan kept a note of his downtime excuses during his probation, but not afterwards. In order to explain why he did not do so afterwards, there would, as the claimants acknowledge, need to be a reference to the impact of Mr Dolan's union steward activities on his need to account for downtime. This introduces further complexity, because it is agreed that Mr Dolan's additional work as a union steward should not be taken into account when assessing value. Presumably, therefore, any compensatory relaxation in the demands of his work should also be ignored.

314. We are mindful of the phrase, "Fools rush in where angels fear to tread". The parties have agreed that some of the compensations of being a union steward (such as the 50% target) should be written into the JD. The last thing we want

to do is unravel areas of agreement. Bearing in mind that the respondent appeared content to make no reference at all to Mr Dolan's notetaking in paragraph 7.27, we think it would help to avoid perilous issues such as these if we delete the claimants' proposed reference altogether.

Mr Dolan – paragraph 7.31

315. For reasons we have already given, we prefer the respondent's wording of paragraph 7.31 to that of the claimants. This paragraph contains another example of a reason which, if found by a Supervisor to be genuinely the explanation for a failure to meet the target, would result in no further action being taken. We are sure that the IEs will be alive to that fact.

Mr Dolan – paragraph 22.5.2

316. There are three contested passages in paragraph 22.5.2.

317. The first dispute relates to a series of descriptive words which the respondent wishes to include in its summary of informal steps taken to improve Mr Dolan's performance. These descriptors in our view accurately reflect Mr Dolan's evidence and are appropriate for inclusion.

318. The second dispute is about the reasons for counselling on 28 January 2014. The claimant's summary of those reasons is more balanced than the respondent's characterisation.

319. Finally, the respondent's written submissions propose a new form of words setting out Mr Dolan's attempts to dispute the counselling. These are accurate and relevant. They are part of the claimant's communications with management on the issue of his performance, which is what paragraph 22.5 is all about.

Mr Dolan – paragraph 20.10

320. Paragraph 20.9 lists a number of interruptions to Mr Dolan's work. They were undoubtedly considered legitimate reasons for downtime. The question is, should paragraph 20.10 mention the legitimacy of these reasons, when the section is supposed to be about the emotional demands of having to deal with interruptions? In more legal language, is this fact of these reasons being considered legitimate related to the question of value by reference to the factor of emotional demands? In our view this fact is of some relevance to that question. On the one hand, Mr Dolan knew that these interruptions would make it more difficult to hit his target and put the onus on him to have to explain himself unless the legitimate delay was already known to the Supervisor. On the other hand, he knew that these interruptions were considered legitimate reasons for delay, so that if the Supervisor believed that this was the reason, no further action would be taken. We therefore adopt the claimants' wording of paragraph 20.10 to spell out the legitimacy of these delays, in case it was not clear already.

321. For consistency with our other findings, we would substitute, "in real time" for "constantly".

Mr Dolan – paragraphs 20.11 and 20.12

322. These paragraphs appear to us to be repetitions of paragraphs 22.5.2 and 5.4 and we decide the issues accordingly.

Mr Dolan – paragraph 20.13

323. We have adopted the respondent's proposed text for paragraph 20.13 as it accords with the evidence.

Mr Dolan – paragraph 20.14

324. There are a number of separate minor drafting disputes here. Most of them have already been determined. We do, however, need to decide one or two points.

325. The paragraph opens with a recitation of what happened if Mr Dolan did not achieve his 50% target. It is common ground that Mr Dolan generally did not have much trouble meeting that target. When he did fail to achieve the target, it was because of interruptions caused by his union steward activities. On those "odd occasions", he was "spoken to", but no further action was taken. Those facts are best described by the phrase, "(which was only on the odd occasion) he was spoken to about it."

326. The next dispute is about the degree of likelihood of further, more formal action, in the event Mr Dolan still did not meet his target. This appears to be an exercise in pure speculation, as everyone agrees that Mr Dolan consistently either met his target or had a good reason for not meeting it. To say that Mr Dolan "would" have received counselling ignores what possible reasons there might have been for the imagined underperformance. To the extent that this level of speculation is appropriate at all, it is best captured by the claimants' word "might".

Mr Dolan – paragraph 20.15

327. We have deleted the claimants' proposed addition to paragraph 20.15. Other parts of Mr Dolan's JD incorporate our earlier findings that he did not actually face formal action.

<u>Issues 139 and 144 – Mr Beaumont's personal experience of performance against targets and failure to meet those targets</u>

Mr Beaumont's experience generally

328. Unlike some of the other comparators, the claimants are not attempting to include Mr Beaumont's performance data based on the labour sheets. They do, however, wish to make reference to his performance based on his estimates of shifts where he had reached his target.

329. For most Activities, Mr Beaumont himself estimated that he only rarely failed to meet his target. Where he was able to put a figure on his achievement rate for a particular activity, that figure exceeded 90%. He was least confident about his performance on Flow Picking, and did not give a precise estimate. This was because, as we know, performance on Flow Picking can depend on a number of factors, such as delays in replenishment.

330. On 12 January 2014, Mr Beaumont was spoken to for taking excessive downtime. Mr Beaumont was spoken to in performance reviews about the need to improve, but otherwise did not face any formal action.

331. We do not understand these facts to be contentious. Where the parties disagree is about whether or not any of this information should be stated in various paragraphs of the JD.

332. The legal battleground here appears to be:

332.1. whether or not these facts are related to the question of value at all; and

332.2. if so, how are the facts related to the question? Are they related in the same way as the particular section of the JD would suggest that they are related? Another way of putting the same questions is: Are the proposed facts relevant to the aspects of value being addressed in these parts of the JD?

333. In general, our answer is that the facts of Mr Beaumont's achievement against targets, and experience of performance management, are only of limited relevance. They are consistent with our narrative findings about Warehouse Colleagues generally, and do not add significantly to those findings. Generally, they do not need to be included when describing the Activities to which the performance targets relate. Where they are specifically relevant to a work demand (such as emotional demands), we make this clear.

Mr Beaumont – paragraph 5.4

334. Paragraph 5.4 is part of a detailed description of what Mr Beaumont did when engaged in Putaways. It sets out the expected work rate, rather than the consequences (or lack of them) for working slower than the required pace. There should therefore be no reference to Mr Beaumont's performance in this paragraph.

335. We have re-written the respondent's proposed description of the time per assignment, by adding "on average". As with Mr Dennis, we agree with the phrase, "constantly balancing…"

Mr Beaumont – paragraph 5.28

336. We delete the claimants' proposed wording about Mr Beaumont not meeting his target.

337. There is a further dispute about the frequency with which Mr Beaumont relayed information to his Supervisor. Was it "most of the time", as the claimants suggest? We find that it was. That is what Mr Beaumont said to the claimants' solicitors when interviewed about it.

Mr Beaumont – paragraph 5.29

338. The claimants would like paragraph 5.29 to record that Mr Beaumont "has never been required to produce a note". This could mean that he has never been required to allow a Supervisor to inspect his note, or that he has never been required to make the note in the first place. Either way, it is relevant, for the reasons we have given in relation to "stipulation of the role". It ought to be included.

339. The other part of the claimants' proposed text states that Mr Beaumont's Supervisor would take his word for it if he was asked to explain his position. This assertion will not be included. We have not heard from Mr Beaumont. He may well have believed that his word was taken at face value, but he would not know what if any checks the Supervisor had made before accepting his account. As we have already made clear in our narrative findings, Supervisors sometimes

checked a Colleague's explanation by reviewing CCTV or looking at the labour sheets. (Of course, a Colleague who lied to a Supervisor and got away with it would know that their false story had not been checked, but there is no reason to think that Mr Beaumont ever did that.)

Mr Beaumont – paragraph 6.4

340. Paragraph 6.4 (Letdowns) is very similar to 5.4 (Putaways). The disputes are the same and we decide them in the same way.

Mr Beaumont – paragraph 8.4

341. We delete the claimants' proposed text from paragraph 8.4 for the reasons already given.

Mr Beaumont – paragraph 8.29

342. As explained in our paragraphs 276 and 277, we adopt the respondent's proposed text, subject to the deletion of the word, "therefore", and do not include the claimants' proposed wording.

Mr Beaumont – paragraph 8.33

343. Mr Beaumont was not spoken to about excessive downtime on Picking. Without further context, this statement tells us nothing about the demands of Mr Beaumont's job. It may be that Mr Beaumont's downtime did not exceed the intervention level of 8 minutes, or that the explanation was obvious to the Supervisor. We do not understand the claimants to be suggesting that Mr Beaumont actually did take downtime exceeding 8 minutes without challenge. It appears to be acknowledged by the claimants that unexplained downtime was a cause (almost always *the* cause) of formal action being taken. We therefore delete the claimants' proposed text for paragraph 8.33.

Mr Beaumont – paragraph 8.37

344. This is another dispute that we have already resolved in the respondents' favour, for which we have given our reasons.

Mr Beaumont – paragraphs 7.5, 9.3, 10.3, 11.2 and 13.4

345. The claimants' proposed text is to be deleted here, too, as a consequence of our general finding at paragraph 333.

Mr Beaumont – paragraph 14.4

346. We have already stated our opinion that the JD should include a reference to the 1.5 hour target for loading a double-decker trailer.

Mr Beaumont – paragraph 14.5

347. Here is another summary of the relationship between performance targets and pay grades. In the Background Document, we have already approved the respondent's new addition to that summary. By way of reminder, it states, "There was some manager discretion as to what grade to award, based on a holistic review of overall performance…" In our view, it should be inserted into Mr Beaumont's JD, too.

Mr Beaumont – paragraph 25.2

348. See our paragraph 289. We adopt "required to meet" in preference to "given".

Mr Beaumont – paragraph 25.3

349. In keeping with our findings in respect of Mr Dennis, we adopt the respondent's use of the word, "consistent" for Mr Beaumont.

Mr Beaumont – paragraph 25.3.2

350. In our view, this is an appropriate place to include a brief summary of Mr Beaumont's general performance management history. His performance against targets, and action in respect of it, formed part of the emotional demands of his work. It should reflect our general findings, which we repeat for convenience:

> "For most Activities, the Job Holder himself estimated that he only rarely failed to meet his target. Where he was able to put a figure on his achievement rate for a particular activity, that figure exceeded 90%. He was least confident about his performance on Flow Picking, and did not give a precise estimate. This was because, as we know, performance on Flow Picking can depend on a number of factors, such as delays in replenishment.
>
> On 12 January 2014, the Job Holder was spoken to for taking excessive downtime. The Job Holder was spoken to in performance reviews about the need to improve, but otherwise did not face any formal action.
>
> The Job Holder's experience was consistent with the general way in which Warehouse Colleagues' performance was managed in accordance with the tribunal's narrative findings."

Mr Beaumont – paragraph 25.9

351. Paragraph 25.9 starts with a dispute about the word, "closely", as to which our determination is already set out in paragraphs 249 to 251.

352. This paragraph also deals with the second 20-minute break. In common with the other comparators, we have adopted the respondent's new draft.

353. In addition, the claimants seek to include in paragraph 25.9 Mr Beaumont's recollection that he was only spoken to about downtime if he did not meet his targets. This is factually accurate and supported by Mr Adams' evidence. But it does not need to be repeated in Mr Beaumont's JD as it is already part of our narrative findings for Warehouse Colleagues in general.

Mr Beaumont – paragraph 25.11 – legitimate reasons and real-time monitoring

354. The first sentence of paragraph 25.11 should be as drafted by the claimants. We have substituted "monitored in real time" for "constantly monitored". Our paragraphs 320 and 321 explains why we made these findings.

Mr Beaumont – paragraph 25.11 – better picks and full pallet pulls

355. The remaining dispute in paragraph 25.11 is about the opportunities that Mr Beaumont had to catch up on his targets. It should be remembered that paragraph 25.11 and paragraph 25.10, are both about the emotional demands of having to deal with interruptions.

356. It is an agreed fact (see paragraph 8.34 of the JD) that, whilst working on Stock Picking, Mr Beaumont would have better picks reassigned to him if he was allocated too many small picks. This accords with the oral evidence of Mr Dennis

and Mr Dolan. But it does not necessarily follow that Mr Beaumont would be given good picks if his reason for falling behind was something other than a succession of small picks. Paragraph 25.10 is about interruptions and not small picks.

357. The claimants also suggest that Mr Beaumont could catch up on his target by doing full pallet pulls. The respondent's position is that this assertion is unsupported by evidence. Having read the transcript of Mr Beaumont's interview, we agree with the respondent. Mr Beaumont mentioned pallet pulls, but did not suggest that they were a means of catching up after an interruption. He was making a different point altogether.

358. The claimants' proposed text should therefore be deleted.

Mr Beaumont – paragraph 25.13

359. We have dealt with the "real time" point already. The respondent's formulation prevails.

Mr Beaumont – paragraph 25.14

360. Paragraph 25.14 is about the effect on pay grades of failure to hit targets at the second performance review. If left in the form proposed by the respondent, it would suggest that a loss of grade was an automatic consequence. As we have indicated, that is not correct. The claimants' proposed version includes Mr Beaumont's personal performance on PBYL, which should not in our view be there. For the two rival formulations we substitute:

> "…he would move down a pay grade, subject to the manager having discretion to keep him at his existing pay grade."

Mr Beaumont – paragraph 25.15 – "might" v. "would"

361. This is another dispute about the best word to quantify the speculative likelihood of something happening in circumstances that did not actually exist. Mr Beaumont was at E2 grade and hit most targets more than 90% of the time. His examples of his actual reasons for not hitting his targets were of a kind that would result in no further action. Paragraph 25.15 requires us to imagine that he was at E1 and failing to hit his targets over a period of two or more weeks, without any information about what the reason was for this imagined failure. As we have previously found, "might" is the lesser of the two evils here.

Mr Beaumont – paragraph 25.15 – union steward conversations

362. We have already recorded our narrative finding that Supervisors often asked Mr Beaumont, in his capacity as a union steward, to speak to underperforming colleagues. There is a dispute about whether this fact should appear in Mr Beaumont's JD. Our view is that it should not. Inclusion of this fact creates the risk of the reader getting the wrong idea of how this fact relates to the question of value. The activity of initiating these conversations should not be treated as part of Mr Beaumont's work, as has been agreed that his work as a union steward should be left out of account when deciding the question of value. The respondent does not disagree. Nevertheless, the respondent contends that the fact that Mr Beaumont was having these conversations is relevant to the value of *all* the Warehouse Colleagues' work, because they risked being on the receiving end of such a conversation if they underperformed. That much is true,

but it is better to record the demands of Warehouse Colleagues in general in the Background Document. If the parties cannot agree on a suitable part of the Background Document to record this fact, the IEs should be referred to our narrative findings about the role of the union steward in speaking to an under-performing Colleague.

Paragraph 25.16

363. As to the disputes in paragraph 25.16,

363.1. We have deleted the claimants' first two blocks of text, for reasons which we have already explained; and

363.2. We have dealt with the remainder in the same way as for the other comparators.

<u>Issues 139 and 145: Mr Devenney's personal experience of performance against targets and failure to meet those targets</u>

Mr Devenney – paragraphs 5.4, 6.3, 7.3, 9.4, 21.2 and 21.3.3

364. As with other comparators we have declined to add proposed references to Mr Devenney's 2014 performance data to these paragraphs.

Mr Devenney – paragraph 5.31

365. As we have done in the corresponding paragraph for Mr Dennis, we have deleted the claimants' disputed text for paragraph 5.31.

Mr Devenney – paragraph 9.4

366. Although we have not included Mr Devenney's performance data, we kept the example of targets being more difficult to meet if there was only a small number of cases per pallet. This is an example of the common experience of a reason for underperformance being already known to the Supervisor, with a result that the job holder did not need to be asked about it.

Mr Devenney – paragraph 9.2

367. In Mr Dennis' JD we preferred the respondents' phrase, "required pace" to the claimants' restatement of the hourly picking target.

Mr Devenney – paragraph 15.6

368. This is another paragraph corresponding to one in which we have made findings for Mr Dennis. Our substituted text is:

> "…If the Job Holder was behind his hourly Target he knew to pick up his pace of work. One of the ways in which this could be achieved was to speak to his Supervisor and request a bigger pick."

Mr Devenney – paragraph 15.8

369. We could not find evidence to support the claimants' factual allegation that Mr Devenney actually did take longer breaks if he met his target ahead of schedule. If the purpose of paragraph 15.8 is a reminder of what he was permitted to do, or what he could get away with doing, it is covered in our narrative findings and does not need to be repeated.

Mr Devenney – paragraph 21.2

370. For reasons already given, "required to meet" is preferable in our view to "given".

Mr Devenney – paragraph 21.3

371. We agree with the word "consistent" as explained in relation to Mr Dennis.

Mr Devenney – paragraph 21.6

372. Part of paragraph 21.6 concerns the use of the word "briefly" to describe the conversations that he overheard Supervisors having with other Colleagues. We think the word is appropriate for inclusion. It reflects what Mr Devenney said in his interview. Being on the receiving end of a sharp reminder to "stop standing around and get on with it" is a different kind of emotional demand than being required to justify one's failure to miss a target. We do not see the need for the JD to spell out that Mr Devenney himself was not spoken to. This is not because this fact is irrelevant, but because it is already clear. The paragraph clearly concerns conversations Mr Devenney overheard involving others.

373. The claimants assert, and the respondent appears to dispute, that Mr Devenney's explanations for missing targets were typically accepted.

374. When interviewed by the claimants' solicitors on this topic, Mr Devenney was asked,

> "Q And on stock pick, you mentioned before that sometimes you might be waiting ten to 15 minutes for someone to let something own. If you didn't hit your target on a particular day and you explained that you'd had to wait a few times for that to happen, would that generally be accepted?
>
> A Yeah. Normally, if you get a bit of downtime you normally report it that day. You'd say to the desk, "I've had to wait," and they would check."

375. In our view, this evidence supports the following finding, which should be substitute for the claimants' proposed text:

> "Typically, this discussion would result in the manager accepting the Job Holder's explanation for why the target was not met, although it would be checked first."

Mr Devenney – paragraph 21.7

376. Mr Devenney was not provided with copies of his downtime reports. We do not understand how this fact, if correct, would relate to the emotional demands of his work. It should not therefore appear in paragraph 21.7.

377. There is a dispute about whether this paragraph should state that Mr Devenney's downtime explanations were typically accepted. Again, the following form of words is in our view more accurate:

> "His explanations for downtime were typically accepted by his Supervisors, although they would be checked first."

378. The paragraph is amended to include the familiar form of words for the 20-minute second break.

Mr Devenney – paragraph 21.8.5

379. Mr Devenney confirmed that he could be asked to move to another Activity part-way through a shift, but that this was "very rare". This example, which appears paragraph 21.8.5, should be qualified with the words, "very rarely".

Mr Devenney – paragraph 21.9

380. As with Mr Dolan, we think that there is some value in spelling out that the interruptions listed in paragraph 21.8 were considered legitimate reasons for not meeting a target.

381. We have changed "constantly" to "in real time".

Mr Devenney – paragraph 21.10

382. We have here another clash between the respondent's summary of a comparator's performance levels, based on the comparator's own estimates, and the claimants' analysis of that comparator's performance data for 2014. Our narrative findings are that comparators tended to overestimate the number of shifts on which they met their target.

383. We think a more accurate summary is:

> "The Job Holder usually met or exceeded his daily target for most Activities. His average performance measured over multiple shifts was over 100%. On those shifts where he did not meet his target, his explanation was generally accepted."

384. This should be substituted for the first sentence of paragraph 21.10.

Mr Devenney – paragraph 21.11

385. We approve the use of "real time" as with the other comparators.

Mr Devenney – paragraph 21.13

386. We do not include, as the claimants wish us to include, the proposed comments about Mr Devenney not facing disciplinary consequences. The lack of action is unsurprising bearing in mind Mr Devenney's high average performance.

Mr Devenney – paragraph 21.14

387. Our changes to paragraph 21.14 mirror the equivalent changes we have made for the other comparators: omission of the "for context" calculation, followed by a re-wording of the facts about capability dismissals.

<u>Issues 139 and 146 – Mr Ballard's personal experience of performance against targets and failure to meet those targets</u>

Mr Ballard – paragraph 6.4

388. As with the other comparators, we have not included Mr Ballard's performance figures.

Mr Ballard – paragraph 6.5

389. At paragraph 206 for our reasons, we have indicated that Mr Ballard's experience should form part of the Background Document. We do not, however, find that this fact is relevant to paragraph 6.5 of Mr Ballard's JD. This is because the performance reviews give a single grading across all activities for

performance against targets. The manager's discretion is in any case based on a holistic assessment of performance. If Mr Ballard's pay grading were included at paragraph 6.5, it would suggest that it was related to the particular demands of Stock Picking.

390. We therefore omit the claimant's proposed text from paragraph 6.5.

Mr Ballard – paragraph 6.29

391. We decided the issues under this paragraph in the same way as we did for Mr Dennis. That is to say, we deleted the respondent's word, "therefore" and did not include the claimants' proposed wording.

Mr Ballard – paragraph 6.33

392. As our narrative findings should make clear, Mr Ballard did not wait for a Supervisor to come and find him if he was behind target. He got his explanation in first. The claimants' draft of paragraph 6.33 leaves that important context out. We have reworded it as follows:

> "The Job Holder's Supervisor did not come to speak to him about how efficiently he was working. If the Job Holder was behind target, he would approach the Supervisor to alert him to the problem."

Mr Ballard – paragraph 6.34

393. As we see it, what the claimants are seeking to achieve in paragraph 6.34 is to emphasise that unavoidable small picks were seen as an acceptable reason for not meeting the target. This is more accurate than the generalised statement, "there was no sanction for not meeting his target". We therefore do not include the claimants' proposed text, but add, instead,

> "If this was the reason why the Job Holder did not meet the target, the reason would be considered acceptable."

Mr Ballard – paragraph 6.37

394. Consistently with the other comparators, we have adopted the respondent's proposed wording for paragraph 6.37 in preference to that of the claimants.

Mr Ballard – paragraph 7.2

395. We also prefer the respondent's version of paragraph 7.2. We do not repeat our reasons for that decision.

Mr Ballard – paragraph 7.3

396. The claimant's summary of Mr Ballard's individual performance data should be left out of paragraph 7.3.

Mr Ballard – paragraph 7.4

397. We do not include Mr Ballard's pay treatment in paragraph 7.4 as the claimants would like us to do. This is partly because performance for pay purposes was assessed over all the Activities (see our reasons in relation to Mr Ballard's Stock Picking). It is also because the claimant's proposed text would imply that the performance grade was a reflection of the regularity of shifts on which the target was reached. In fact, it was based on average performance over a longer period. Bumper shifts could balance out poor ones.

Mr Ballard – paragraphs 8.3, 8.4, 9.2, 9.3, 11.4, 11.5, concentration table and accuracy table

398. The claimants' proposed text is deleted from these paragraphs for the reasons we have already given.

Mr Ballard – paragraph 29.15

399. This paragraph is about physical effort in PBYL. (For simplicity's sake, we use the word "lifting" to encompass other physical movements such as stretching and lowering.) In our view, an assessment of effort should be based on how much lifting the job holder actually did. If interruptions to the PBYL activity – for whatever reason - meant that Mr Ballard did not lift as many cases as his target required, his job was less physically demanding than it would have been had he met his target. We know that Mr Ballard did not achieve his target for PBYL, either consistently or on average. He did not, therefore, lift an average of 8,180 kg of cases per shift, as the respondent would have us find. The claimant's version has the advantage of correcting that factual inaccuracy.

400. If the parties agree, they may prefer to calculate Mr Ballard's real average figure, which would be 93% of 8,180 kg. That would, we think, be of more use to the IEs. The default position, however, is that the claimants' text will be inserted into paragraph 29.15.

Mr Ballard – paragraph 25.2

401. We adopt the respondent's phrase, "required to meet", in preference to "given".

402. The claimants' performance data should be removed.

Mr Ballard – paragraph 25.3

403. We prefer the respondent's wording of this paragraph to that of the claimants, for reasons we have given.

Mr Ballard – paragraph 25.3.3

404. We do not include the claimants' proposed text in paragraph 25.3.3. Our reasons should be apparent from similar paragraphs in the other JDs.

Mr Ballard – paragraph 25.4

405. Consistently with our finding at paragraph 206, we agree with the claimants that Mr Ballard's E3 pay grade experience should be mentioned under the heading of the emotional demands of his work. Where we disagree with the claimants is in the wording of the phrase, "despite the Job Holder consistently falling well below the E3 target for some activities". As we understand it, underperformance on one particular activity would not be a reason for reducing a Colleague's pay grade if the average performance across all Activities was at the required threshold.

406. We prefer, "Despite the Job Holder's average performance over the period not meeting the E3 Targets, no further action was taken against the Job Holder".

Mr Ballard – paragraph 25.7

407. At paragraph 25.7, the claimants assert that, typically, a discussion between a manager and Mr Ballard about the reason for not meeting a target would result

in the manager accepting Mr Ballard's explanation. We looked for evidence to support that assertion. So far as we can tell, it consisted of Mr Ballard answering, "Hmm" when that proposition was put to him. In our view it is better if paragraph 25.7 does not mention it.

408. The IEs will, in any case, know that, where a Colleague gave an explanation, and it was both believed (after checking) and acceptable, no further action would be taken.

409. It is, in our view, both relevant and accurate to include the fact that conversations on PBYL did not happen in the middle of a shift, because the Supervisors did not have the data until the end of the shift. This part of the claimants' proposed text should be included.

Mr Ballard – paragraph 25.8

410. We have qualified the word, "closely" as in our paragraph 251.

411. The claimants' reference to downtime exceeding 4 minutes is unnecessary; our narrative findings refer to the intervention level of 8 minutes. We have already excluded reference in other comparators' JDs to not being given a copy of the downtime reports.

412. We adopt the respondent's new proposed text about the additional break.

Mr Ballard – paragraph 20.10

413. For now-familiar reasons we have included the claimants' proposed text in the first sentence of paragraph 20.10 and changed "constantly" to "in real time".

Mr Ballard – paragraph 25.11

414. We have reworded the respondents' summary of Mr Ballard's performance at the start of paragraph 25.11. It is more accurate to say, "The Job Holder usually met his shift target for most Activities, and his average performance on most activities was at or near 100%."

Mr Ballard – paragraph 25.11.3

415. We have omitted the phrase, "and were not due to a lack of effort" from this paragraph, and do not repeat our reasons for doing so.

Mr Ballard – paragraph 25.13

416. There are three disputed blocks of text here.

417. In the first, we prefer the respondent's form of words (beginning, "Supervisors took into account…") to that of the claimants.

418. In the second disputed block, we substitute these words for the claimants' and respondent's formulation:

> "…following the period in which they had underperformed before their Supervisor decided to move their pay grades".

419. This way of putting it, we hope, makes clear (a) that a fresh decision was needed after the 13-week improvement period and (b) that in the absence of improvement the decision would normally be to move the pay grade.

420. The final block of text should be re-written:

> "Despite the Job Holder's average performance over the period not meeting the E3 Targets, no further action was taken against the Job Holder".

Mr Ballard - paragraph 25.14

421. We prefer the claimants' "may have been" and "could" to the respondents' "was" and "would". This is for the same reasons that we have given in our paragraph 361.

422. The "for context" calculation proposed by the claimants is removed.

423. We deal with the capability dismissals summary in the same way as the other comparators.

Mr Ballard - paragraph 25.15

424. The claimants' proposed text for paragraph 25.15 is deleted.

Next steps

425. It is our understanding that the parties have arranged a round-table meeting for 19 October 2021, in order to discuss the Batch 3 job descriptions and narrow the issues. We hope that this judgment assists them in that enterprise.

Employment Judge Horne

13 October 2021

SENT TO THE PARTIES ON

14 October 2021

FOR THE TRIBUNAL OFFICE