Case Numbers: 3322506/2021 & 3322837/2021

EMPLOYMENT TRIBUNALS

Claimants		**Respondent**
(1) Mr D Norman (2) Mr J Gibbons	v	Snowbird Foods Limited

Heard at: Watford **On**: 6-8 and, in private, 24 February 2023

Before: Employment Judge Hyams **Members:** Mr I Middleton
Mr T Poil

Representation:

For the claimants: Mr Max Lansman, of counsel
For the respondent: Mr Colin McDevitt, of counsel

UNANIMOUS RESERVED JUDGMENT

1. The claimants were not treated detrimentally within the meaning of section 44 of the Employment Rights Act 1996. Their claims of such detrimental treatment accordingly fail and are dismissed.

2. The claimants were not dismissed unfairly. Their claims of unfair dismissal accordingly fail and are dismissed.

REASONS

Introduction; the claims made by the claimants in this case

1 The claimants were dismissed by the respondent with immediate effect on 22 July 2021. The persons who made the decisions to dismiss were not the same, as we describe below, but the circumstances which gave rise to the dismissals were the same. The claimants' roles differed, but they were both managers of

the production of the respondent's food processing factory. Technically, Mr Norman reported to Mr Gibbons, but they worked very closely together.

2 The claim forms in both cases were presented in time for all claims made by both claimants. The claim form in the case of Mr Norman, number 3322506/2021, was presented on 22 October 2021. The claim form for Mr Gibbons, number 3322837/2021, was presented on 12 November 2021.

3 Both claimants had more than 20 years' continuous employment at the time of their dismissals. They claimed unfair dismissal within the meaning of section 98 of the Employment Rights Act 1996 ("ERA 1996") and within the meaning of section 100(1)(e) of that Act. They also claimed that they had been treated detrimentally within the meaning of section 44(1A)(b) of that Act. On 22 March 2022, Employment Judge ("EJ") Warren consolidated the claims. The treatment which Mr Norman claimed was such unlawfully detrimental treatment was stated in paragraph 18(2) of the Grounds of Complaint at pages 22-23. That which Mr Gibbons claimed was such detrimental treatment was stated in paragraph 21 of the Grounds of Complaint at page 52. The complaints were to the same effect, although their wording differed slightly. Paragraph 21(2) was an incomplete version of paragraph 18(2). The latter was in these terms:

> 'C was subjected to the following detriments ("the detriments"):
>
> (a) Mr McGovern:
>
> (i) addressed C in an "aggressive, confrontational, offensive and bullying way" on 03.06.21 and 04.06.21 as further particularised at paragraphs and 7(1) and (3) above 11 above [sic]; and
>
> (ii) suspended C on 04.06.21, as a disciplinary sanction for a failure to follow a reasonable request and a refusal to do so, before any form of investigation had been conducted, as further particularised at paragraph 8(3) above.
>
> (b) An agent or employee of R's, whose identity is unknown to C, on a date between 15.06.21 and 29.06.21 unknown to C, solicited statements from R's employees unrelated to the matters initially under investigation referred to at paragraph 13(2) above."

The relevant law

Detrimental treatment

4 Section 44(1A)(b) of the ERA 1996 provides:

> "A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer done on the ground that ... in circumstances of danger which the worker reasonably believed

> to be serious and imminent, he or she took (or proposed to take) appropriate steps to protect himself or herself or other persons from the danger".

Automatic unfair dismissal

5 Section 100(1)(e) of the ERA 1996 provides:

> "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that ... in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger".

Unfair dismissal within the meaning of section 98 of the ERA 1996

6 The first question for a tribunal determining a claim of unfair dismissal within the meaning of section 98 of the ERA 1996 is what was the reason for the claimant's dismissal. That is a result of subsections (1) and (2) of that section which, so far as relevant, provide this:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it— ... (b) relates to the conduct of the employee".

7 In deciding what is the reason for an employee's dismissal, the following analysis applies. In *Abernethy v Mott Hay and Anderson* [1974] IRLR 213, [1974] ICR 323, at 330B-C, Cairns LJ said this:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

8 Paragraph DI[821] of *Harvey* helpfully states the manner in which those words have been approved and applied in subsequent case law:

> "These words, widely cited in case law ever since, were approved by the House of Lords in *W Devis & Sons Ltd v Atkins* [1977] AC 931, [1977] 3 All ER 40 and again in *West Midlands Co-operative Society v Tipton* [1986] AC 536, [1986] IRLR 112, HL where the rider (important in later cases) was added that the 'reason' must be considered in a broad, non-technical way in order to arrive at the 'real' reason. In *Beatt v Croydon Health Services NHS Trust* [2017] EWCA Civ 401, [2017] IRLR 748, Underhill LJ observed that Cairns LJ's precise wording in *Abernethy* was directed to the particular issue before the court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which causes them to take the decision – or, as it is sometimes put, what 'motivates' them to do what they do."

9 Where the employer has satisfied the tribunal that the reason is a potentially fair one, the question of the fairness of the dismissal falls to be determined under section 98(4) of the ERA 1996, which provides this:

> "Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

10 In a claim of unfair dismissal where the tribunal concludes that the reason for the dismissal was the claimant's conduct, the following issues arise.

10.1 Did the employer, before concluding that the employee had done that for which he or she was dismissed, carry out an investigation which it was within the range of reasonable responses of a reasonable employer to carry out? The best authority in that regard is the decision of the Court of Appeal in *J Sainsbury plc v Hitt* [2003] ICR 111.

10.2 Were there reasonable grounds for concluding that the claimant had committed the conduct for which he or she was dismissed? The following statement of the applicable principles in *British Home Stores v Burchell* [1978] IRLR 379 shows why that question needs to be answered, and how it has to be answered (although the third question stated in the following extract is the predecessor to the question which we have stated in the preceding sub-paragraph above; the correct test is as stated in that sub-paragraph).

> "What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

11 The final question which will then need to be answered is whether the dismissal of the claimant for the conduct for which he or she was in fact dismissed was outside the range of reasonable responses of a reasonable employer.

Our approach when considering the reliability of oral evidence

12 When considering the parties' oral evidence, we bore in mind the factors referred to in paragraphs 15-22 of the decision of Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm). What he said there was that it is best to work on the assumption that memories are often unreliable, and that the best approach to take at least in commercial cases is as described in paragraph 22 of his judgment, which was this:

> "In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

13 While that passage concerned commercial cases, there was, in our view, much to commend its application in all cases, even those concerning claimed

discrimination, which is what a claim of a breach of section 44 of the ERA 1996 in essence is.

The evidence which we heard

14 We heard oral evidence from the claimants on their own behalf and from Mr Richard Martin on their behalf. Mr Martin was from 2009 to 2016 the Operations Manager of the business which is now owned by the respondent and in which the claimants worked at the time of their dismissals.

15 The respondent is a private company, owned by Mr Albert McGovern and Mr Philip Paul jointly, with equal shareholdings. They both gave oral evidence to us on behalf of the respondent. We also heard from Ms Angela Black on behalf of the respondent. She works (and at the material time worked) for WorkNest HR.

16 We had before us a bundle of documents. It had 398 pages plus its index. Where we refer to a page below, we refer to a page of that bundle.

Our findings of fact

The respondent's business and the claimants' role in it

17 The ownership of the business of the respondent had by the time that the business was bought by the respondent changed hands several times. The business was established (it appeared to us; the precise manner in which it was established was not material) under the name of Chivers Farm Foods. The respondent's name was changed to Snowbird Foods Limited in 1999. The respondent's shares were acquired by Mr McGovern and Mr Paul jointly, on a 50/50 basis, in October 2012.

18 When giving oral evidence, Mr McGovern and Mr Paul each referred to the other as his partner. It was clear from that, and from their other oral evidence, that they operated the business of the respondent in substance, if not in form, in the manner of a partnership. Mr Paul was the primary manager of the respondent's operations. Mr McGovern's job title had previously been Financial Director, and after October 2012, he and Mr Paul described themselves as joint managing directors of the respondent.

19 Both claimants had, by the time of their dismissals, worked in the meat industry for the whole of their careers. Mr Gibbons started to work for Chivers Farm Foods in 1979. It had a factory in a location other than that at which the respondent's business was based, and Mr Gibbons was employed at that time as the business's Factory Manager. Accordingly, by the time of his dismissal, Mr Gibbons had worked for the respondent or a predecessor of the respondent as the owner of the business of the respondent, for 42 years. At the time of his dismissal, he remained the respondent's Factory Manager, but the business was rather larger than when he joined it.

20 Mr Norman's employment in the business which was, at the time of his dismissal (and the hearing before us), owned by the respondent started in 1987. By the time of his dismissal, he was the respondent's Production Manager, and he reported to Mr Gibbons.

The circumstances which gave rise to the claimants' suspensions on 4 June 2021

21 The claimants were both suspended on 4 June 2021. The circumstances which gave rise to those suspensions were the subject of a number of conflicts of evidence. We state below how we resolved the material conflicts of evidence. In order to avoid a long judgment being even longer, we do not refer below to every conflict of evidence. Where we state a finding of fact on a matter which was not of central importance but in regard to which there was a conflict of evidence, we do so having taken into account that conflict.

22 The respondent produces, among other things, Cumberland sausages. What might be called "ordinary" Cumberland sausages are produced using one of the respondent's production lines, which Mr Paul described (without contradiction by the claimants) in paragraph 2 of his witness statement as "state-of-the-art". In that paragraph, which we accepted, Mr Paul said this.

> "Snowbird Foods is a leading supplier of cooked meat products and ready meals to the food service industry. We operate a state-of-the-art production facility to the highest manufacturing standards. We cater for a wide range of industries including manufacturing, food service, wholesale, export, airline and travel."

23 The claimants were suspended by Mr McGovern on 4 June 2021 for refusing to manage the making of Cumberland sausage rings ("Cumberland rings"), the ingredients of which are the same as for ordinary Cumberland sausages, but the cooking of which is comparatively problematic. That is because the rings need to be formed by hand, and because cooking them is, as a result of their shape, not straightforward.

24 It was the claimants' evidence that it was unsafe to make Cumberland rings on the day when they were suspended for refusing to participate in the making and cooking of what the parties agreed was a "trial run" of the production of 150kg of such rings. The cost of the ingredients for that trial run was said in oral evidence by Mr Paul to be about £300, but that was said at the end of the hearing, when he (at our invitation, in the circumstances to which we refer in paragraph 51 below) was recalled to give oral evidence, and was said in re-examination. No objection was taken to him giving that evidence about that cost, however, and it was not asserted by Mr Lansman that that evidence was contested by the claimants.

25 The quantity of material used in that trial run was within the normal range for trial runs at the respondent's factory. That range was (it was agreed) between 50kg and 200kg. It was Mr McGovern's unchallenged oral evidence that on that day, 4 June 2021, 14 tonnes of other products were produced successfully at the respondent's factory. Mr McGovern also said that the trial run of 150kg was a small batch to show to the customer what would have been produced if the Cumberland rings had been produced as part of the normal production process at the respondent's factory. That evidence was also not challenged.

26 There was a conflict of evidence about what had been said by the claimants about the making of Cumberland rings in the weeks before 4 June 2021. There were also conflicts of evidence about (1) what Mr Gibbons said to Mr Paul on that day about the trial run of such rings on that day, (2) the extent to which the respondent had before 2021 made Cumberland rings, and (3) the inherent risks to health and safety in the production of such rings in cooked form.

27 Mr Gibbons described those things in paragraphs 8-15 of his witness statement. We could not accept a number of those things. That was because, after considering other relevant evidence (including the statement of Ms Morton which we have set out in paragraph 46 below), we concluded that they were not accurate.

The safety of skewer removal

28 In particular, we rejected this assertion made in paragraph 10:

> "There is also a further issue with the skewers which hold 2 Cumberland sausage rings on them as there is no system for counting them in and out and it is always a difficult and risky job removing those skewers as we didn't have the appropriate protective gloves and clothing."

29 The respondent contended that there was a system for counting the skewers in and out, but because it was not the claimants' case as put to us that there was any material risk to health and safety as a result of there not being such a system, we did not need to come to a conclusion in that regard. It was, however, part of Mr Gibbons' case (but not that of Mr Norman) that there was a material risk to health and safety as a result of the need to remove skewers from Cumberland rings when they had just been cooked.

30 We rejected Mr Gibbons' assertion that "it [was] always a difficult and risky job removing those skewers as we didn't have the appropriate protective gloves and clothing". We did so after hearing oral evidence that anyone removing a skewer from a cooked Cumberland ring would do so wearing cotton gloves, and after seeing that Mr Gibbons himself had written in the email dated 22 June 2021 at pages 153-155 this:

> "Factory floor workers are not given special gloves to handle the hot skewers as stated in Mr P Paul's 2nd statement. They wear cotton gloves."

31 Mr Paul's oral evidence was that the respondent had in the past frequently produced Cumberland rings commercially, as opposed to in a trial run, whether in the kitchen of the respondent's New Product Development ("NPD") team or in a trial production run such as the one which the claimants refused to manage on 4 June 2021. In cross-examination, Mr Norman accepted that Cumberland rings had been produced in cooked form in the business of the respondent from 1999 onwards and that they had been produced three or four times per year. He also accepted that by 2021, the respondent had had three frying production lines for about six or seven years and that, even though 4 June 2021 was a hot day, the frying temperature would have been the same as on any other day. Mr Gibbons could not be sure that Cumberland rings had been produced from 1999 onwards but he accepted in cross-examination that they had been made by the respondent for "quite a long time".

32 Neither claimant gave any evidence of an incident when a worker had been burnt when removing a skewer from a cooked Cumberland ring. Mr Martin's evidence was in a number of ways tangential and of peripheral relevance at best, but we saw that in paragraph 8 of his witness statement he said that "[t]he factory was ... not equipped to produce Cumberland sausage rings as it would have presented problems from a food safety and health and safety prospective". However, he did not say precisely why the factory was not equipped to produce Cumberland sausage rings. We also saw that he said this in paragraph 4 of his witness statement:

> "I joined Snowbird Foods in late 2009 and worked there until September 2016. I reported directly to Mr Philip Paul who, I must say, was one of the best bosses I have worked for."

33 In answer to supplementary questions asked by Mr Lansman with our permission, Mr Martin said (as recorded by EJ Hyams, as tidied up for present purposes) in answer to the question what he meant by saying that the factory was not equipped to produce Cumberland rings:

> "I can speak only about the time I was working there. When producing Cumberland rings you have to have an area which is temperature controlled and if not then you have to control the material by using frozen meat. If you put too much frozen meat in then you will not cook the sausage. If there is not enough then the temperature in the production area is such that the material gets warm."

34 As EJ Hyams pointed out in submissions without contradiction, many gloves used for taking things out of modern ovens are made of cotton. In any event, it was inherently unlikely that there was any material risk to the safety of a worker

when removing a skewer from one or two Cumberland ring sausages, if only because they had previously been produced by the respondent on a number of occasions and there was no evidence before us of any resulting injury.

The parties' evidence about the things which were said by the claimants in the weeks before 4 June 2021 about the making of Cumberland rings and about what happened on 3 and 4 June 2021

35 Mr Gibbons' witness statement contained this passage.

> '12. The week of 24.05.22 [sic; i.e. 24 May 2021], Ms Shelby Morton approached me and asked about the Cumberland sausage rings. I told her that we could not produce them on a large scale because we did not have the appropriate equipment. Ms Morton told me we still had to make the sausages but I told her we could not do this. On 27.05.22 Mr Paul came to see me and spend some time in my office discussing a lot of things in general. During that conversation he told me that he'd been asked again for a quote on Cumberland sausage rings but "he'd put such a high margin on it so that no one would look at it."
>
> 13. On 03.06.21, Ms Morton asked me when the trial of the Cumberland ring sausages would take place and I told her they would not be made because it was not something the factory was equipped to do. Ms Morton asked what she should do now and I told her to inform Mr McGovern as Mr Paul was away. During the morning, the other members of staff informed me Mr McGovern needed to talk to me on the phone. I was apprehensive about this as I was concerned he would be confrontational and we were not able to have a conversation on the telephone.'

36 Mr Gibbons did not talk to Mr McGovern on the telephone either on 3 June 2021 or the following day. He described what occurred on 4 June 2021 in the following passage of his witness statement.

> '16. On 04.06.21, I arrived to see an email from Mr Paul which was sent on the evening of 03.06.21, asking me to make the sausages in order to keep everyone happy. He told me I would not need to be involved. However, because of my level of responsibility, I would have to plan how to cook them and the Cumberland sausage rings were not on the days job sheet. I was also concerned about the safety of the product and so I felt it was necessary for me to give my view.
>
> 17. At 6.30am, Mr McGovern stormed into my office, told me to "take a seat" and told me I had to do a trial of the Cumberland sausage rings. He stood very close to me, and pointed his finger in my face in

a very aggressive manner. He was very angry and told me I was jeopardising the company's business if I did not do the trial. I felt intimidated but refused to do the trial as I knew it would risk our compliance with food safety requirements as we did not have adequate staffing to be freed up for the job or equipment. I explained to him that the product could not rise above 8 degrees because of the risk of bacteria growth and that it was not possible to keep the product rising above 8 degrees in our factory when the job was completed in a room with the friers which was not temperature controlled and where the rings took a few hours to be made because of the complexity of the process. I also raised with him the issue of the need for protective gloves to remove the skewers which we did not have and a need for a system to prevent the skewers getting stuck. I also knew it would not be an issue for the business not to do this job. I am not aware of a risk assessment ever having been carried out in relation to the production of these rings and I do not think one has. I find this extremely concerning given the risk to employees from the metal skewers. I told Mr McGovern that he was an accountant and that I did not tell him how to do his job so he should not tell me how to do mine. Mr McGovern told me I was compromising the business.

18. About 30 minutes after this Mr Paul rang me, pleading with me to do the trial because he was on holiday and he would have to return if I did not. I agreed to sit down on Monday morning to discuss the trial with them and would consider manufacturing the rings following this meeting but was not in a position to produce the Cumberland rings immediately because of a shortage of staff and the risks that presented. Mr McGovern then returned about 30 minutes after that call and said very aggressively "we are now going to do them". I did not like being spoken to in that way but I remained calm. I told him we were not able to do the trial that day as it would not work because we did not have the resources. He then said "you leave me no choice" and handed me a letter which said that I was suspended until 17.06.21. I was completely shocked and so left in total disbelief. I couldn't believe what had happened.'

37 Mr Norman's witness statement described what happened on and in the period immediately before 4 June 2021 in the following way.

'11. In the week leading up to 03.06.21, both myself and John had had a conversation with Mr Paul where he told us that, despite his views that the factory was not in a position to produce Cumberland sausage rings, a kitchen sample of the Cumberland sausage rings had been signed off by a customer and that a small sample of the Cumberland ring sausages had been produced. I found this concerning as it was very unusual for a customer to sign off a

product based on such a small sample. This was because a small sample is always of a higher quality and it does not indicate the quality of a large scale sample. I was very concerned about being able to produce the rings to the expected standard.

...

14. On 03.06.21, I was working in the production office with Mr Papy Ramazini when Mr Albert McGovern entered the office. Mr Ramazini was told to leave the office. Mr McGovern's body language was very aggressive as he was standing and blocking the door. He told me to sit down and then pulled a chair very close to mine and sat with his face very close to me. I found this very intimidating. He aggressively asked me why we were not making the Cumberland ring sausages any more. We had received conflicting instructions in relation to the Cumberland sausage rings, with Mr Paul saying he did not wish to produce the rings as we did not have the appropriate equipment. We were also not told we would be making this product and were not consulted [138].

15. I told Mr McGovern that I had been told by Mr Paul not to produce the rings. I also explained that there were issues with the safety of the product due to a need to cook the product within 1 hour where a temperature exceeds 8 degrees Celsius (as it does in the low-risk area), and the Cumberland sausages take longer to manufacture and therefore are a food safety risk [139]. I also said to him that "it was not in the day's production plan". As these production plans are prepared 24 hours in advance, it would not have been possible to make something upon an immediate request. However, Mr McGovern had tunnel vision during that meeting and was not willing to reason or listen to what I had to say.

...

19. I was very calm when I explained this and did not raise my voice. However, Mr McGovern did not appear to be listening and did not consider any solutions. He leaned forward and shouted "it's your fucking job, you fucking do it or you'll be getting a letter." I felt very uncomfortable and felt threatened by him [139]. At no point did Mr McGovern try to call me on my phone that day.

20. We had previously made the Cumberland sausage rings but this had taken place more than 3 years before this time and they were very time consuming and when produced, were incredibly problematic all the way through the process from start to finish as previously outlined in my statement. We had produced them for Bidvest who then delisted the product and when this happened, Mr Paul had

informed us we no longer had to produce them. In addition we would not have had time to produce the product. I was preparing for a BRC audit for the following Monday, Tuesday and Wednesday as well as completing the days production that had been planned the day before and which had been printed off by the Technical Team and distributed to the relevant staff to enable production preparation, e.g seasonings, meat, packaging labels, packing team ready. In order for them to be produced quickly, it would have required more staff to work on them so that we could ensure they were rolled and refrigerated before the temperature of the product rose and bacteria formed. However, there was not time for this as there were fewer staff in that day and all the jobs had already been allocated.

21. There was a camera in the production office. This camera was put there at the request of myself and Mr Gibbons as we were concerned that the night cleaners were using the office as somewhere to sleep as when we arrived in the morning, the chairs were often position in such a way that suggested someone had been using the chairs to put their feet up and the heater would be on which was not something we would usually use. We would sometimes cover the camera on the odd occasion during our lunch break to obtain some privacy as we were often interrupted during our break by work colleagues, from all areas of the business. We very rarely had any privacy or time to ourselves and the breaks we were entitled to often ended up as working breaks. By covering the camera and closing the office door we could at least have some degree of an uninterrupted break and this would hopefully be observed by other departments who have access to the CCTV.

22. The next day, on 04.06.21, Ms Morton came into the office and asked me when we were making the Cumberland rings. I told her that it was not on the days plans as I had explained to Mr McGovern, and told her that I had voiced my concerns to Mr McGovern. She then left the office. Following this Mr McGovern came in and asked me at what time we were "extruding the sausages." I did not understand this terminology and told him we were not extruding anything. He walked into the office where John was working and spoke to him. 15 minutes later he handed me a letter and told me to leave the premises. I was taken aback and confused by this and asked if he wanted the factory keys. He told me no, and to read the letter. I did not say anything further and went and got my car keys and went to my car.'

38 Mr McGovern's witness statement described the events of that day in this way.

'4. In May 2021 we received a request from an important client to produce a trial run of Cumberland ring sausage. This is a product

that we had made successfully many times previously, albeit this was the first request we had had to make it for some time.

5. We agreed to make the trial for the client and I understood from Philip [i.e. Mr Paul] that the requirement had been discussed with the Claimants and that we would commence production.

6. On 3 June 2021 I received a telephone call from Shelby Morton at 11:45 am to say that John Gibbons had refused to do the factory trial. I telephoned the office to speak with either of the claimants at 11 :51 only to be told that they were not available. I asked for one of them to phone me back as soon as possible.

7. I called John Gibbons on his mobile but he did not answer and did not return my call. At 12:22 pm I phoned the office again to speak with John Gibbons but again he would not take the call. At 12:39 pm I phoned the office again only to be told by Liz that John Gibbons had told her just to tell me that he got my message. I decided to attend the site to speak to the Claimants and I arrived at approximately 1:10 pm. John Gibbons had already left the site when I arrived.

8. When I arrived on site I went to the production office where Darren Norman was standing with his back to the rear wall with his arms crossed. I asked him what this antagonistic behaviour was about however I received no logical response. I then asked why he or John Gibbons had not phoned me back and Darren said I would have to ask John Gibbons that and that he had not received a message to phone me.

9. I asked Darren what the problem was with making the Cumberland rings and he said “I ain’t doing the rings”. I told him that the Cumberland rings were for an important client and they would need to be produced and they will be going down the line tomorrow. Darren responded “Well I ain’t doing them”. I asked him what the problem was and he said “the temperature” without going into any more detail. I said that the client was an important customer to which Darren said what else do they buy from us, I responded meatballs and more, Darren said what just a couple of pallets. This is what Darren thought of a customer who bought over £725K during the financial year just ended and during a pandemic as well. I said that we had produced them before, so what was the problem now. Darren responded that they were never cooked properly before. He also said “Sack me and I will go somewhere and say that I was being asked to produce food that wasn’t cooked”. He also said that he was sick of cheating for us and he was leaving. I said to Darren that I had

heard that, and when was he leaving. His response was when he sells his house and when he is good and ready to leave.

10. When I had asked Darren what issue he had about producing the product and he said 'the temperature', I can only assume that he may have previously tried to pass the product through the cooking process too quickly and hence risk it not being cooked. If he had done this then this would have been a serious breach of our company rules. I do not believe that Darren actually believed that we would not be able to make the product to the customer's specifications or to the required safety standards. He had simply decided that it was too much trouble to make the product and he was using that as an excuse not to do it.

11. The next day at 6:10 am I asked John Gibbons if he was going to do the Cumberland rings and his response was "No". I asked John if he was going to refuse to carry out a reasonable request to do the Cumberland rings. John told me that he was not going to make them and said "What are you going to do about it?". John also told me that he was on site the day before when I arrived but he avoided me and refused to phone either me or Phillip.

12. At 6:34 am Darren Norman came into the office. John said that Phillip had told him that they did not have to do the Cumberland rings.

13. Phillip told me that John had said that he would reluctantly make the Cumberland rings. I then went round to the production office to ask when the product run would begin as people had been on site since 6:00 am in order to make this happen. Darren told me he had no idea and when John came back from the toilet I asked him. John told me that he was not doing it and he said that I should get our chief engineer James Rumble to produce the Cumberland Rings. When I said that it was not the Chief Engineer's responsibility to produce the product John Gibbons stood over me in an aggressive manner and said that I should produce the product then.

14. I called Philip to discuss the situation and we made the decision to suspend the Claimants pending an investigation into their conduct. Our disciplinary procedure allows for suspension during investigations into alleged serious misconduct (page 117), which we considered this to be. At 7:50 am I suspended both John and Darren. Darren started rubbing his hands together saying "Good" and "That's what I have been waiting for" and "Do you want my keys as well?". I told him to read the suspension letter and it was not necessary to give me his keys. I made a note of our conversations

> on 3 and 4 June 2021 at the time, which are at pages 127 and 128 of the bundle.
>
> 15. On 4 June 2021 we successfully produced the Cumberland rings.'

39 The letters suspending the claimants were at pages 129 and 130 and were very brief. They simply suspended each claimant formally "for failure to follow out a reasonable request and refusal to do so from a senior member of the Snowbird Foods management" and invited the claimant to "attend a disciplinary meeting to be held at Snowbird Foods offices on Thursday 17th June at 13:00". Mr McGovern's note at page 127 was of what happened on 3 June 2021 and the note at page 128 was of what happened on 4 June 2021. In oral evidence, Mr McGovern said that he made the notes on the days in question, i.e. 3 and 4 June respectively. We accepted that he had done so and that they were truly contemporaneous notes. Whether they were complete was another matter. The note at page 127 was consistent with the oral evidence of Mr McGovern. We record here that the note included a record of Mr Norman saying to Mr McGovern on 3 June 2021, "I aint doing the rings", and that when Mr McGovern asked him "what was the problem with the rings", Mr Norman said "the temperature and they won't be cooked". In addition, Mr McGovern had recorded this:

> "I said we produced them before so what is the problem now. Darren responded that they were never cooked properly before. Darren also said to sack him and he will go somewhere and say he was being asked to produce food that wasn't cooked. Darren also said he was sick of cheating for us. He said he was leaving and I said yes I heard that so when was he leaving. His response was when he sells his house and when he is good and ready to leave."

40 The note at page 128 was of particular importance, and we therefore now set it out in full.

> 'Friday 04th June 06:10
>
> Are you going to do the Cumberland rings John – Response No
>
> Are you saying you are not going to carry a reasonable request to do the Cumberland rings John. John responded no and said "and what are you going to do about it".
>
> John also said that he was on site yesterday when I arrived but avoided me and refused to phone either myself or Philip Paul as he did not want to.
>
> 06:34 Darren came into the office singing

John said that Philip said that they did not have to do the Cumberland rings. John said that Philip said that he had loaded the price to the customer by over £4 contribution and that they [sic] customer wouldn't want to pay that so therefore they wouldn't have to make the product.

Following on from a conversation between Philip Paul and John Gibbons on the phone. Phil said that reluctantly John said he would do the Cumberland rings. I then went around to the production office to ask when the Cumberland rings will be run out as people had been onsite since 6am in order to make this happen. Darren said he had no idea and when John came back from the toilet I asked him. John responded that he was not doing it and he said that I should do it.

I then at 07:50 suspended both John and Darren. Darren starting rubbing his hands together saying good and that's what he has been waiting for and did I want his keys as well. I said read the letters and the keys were not necessary.

John and Darren's actions are tantamount to mutiny, holding the company to ransom, wasting company money by making a special courier cost necessary to get the product to the customer and jeopardising company turnover with an important customer."

41 Mr Paul was on holiday during the week which included 3 and 4 June 2021. He was in Norfolk, with his family. His witness statement contained the following passage (with the correction of the date in paragraph 8 which he made when giving oral evidence in chief):

"4. On Wednesday 26 May 2021 Shelby Morton acting head of NPD notified me that a factory trial was required for 100 kilogrammes of Cumberland rings for one of our important customers. She also told me that the Claimants had previously stated that they would not make Cumberland rings ever again.

5. This could be a time-consuming product to produce however we do have the facilities on site to produce it. At that point in time we were not producing that product because we had not received any orders for it, however it had been produced at the site previously between 1993 and July 2020 without incident.

6. I have made no secret of the fact that I would prefer not to manufacture Cumberland rings. They are a product that doesn't naturally suit our equipment or factory layout. However, when an important existing customer requests a product which can be produced, the request needs to be carefully considered. This customer had purchased over £700,000 in the previous financial year and the account was growing, the sales forecast was £1m+ for

2021-2022. On this occasion we decided as a business that we would make the rings rather than potentially allow a competitor access to our customer and threaten the whole account.

7. I informed the Claimants that an important customer had requested a factory trial for Cumberland ring sausages which the company had agreed to produce. John said to me that he and Darren would not roll the rings themselves as they had had their fill of doing that over the years. I said that I would not expect them as management to do so and that we had others to do the job and if we needed more staff; we would employ them.

8. On the afternoon of [3 June] 2021 I received a phone call from Albert. He informed me that Shelby had asked John when he could make the sausage lengths for the Cumberland rings. She said that John told her that he would not make them. Albert went on to tell me that he had called the factory and asked for a message to be given to John and Darren, requesting one or both to phone him back. He was told the message had been passed on but both John and Darren had refused to call him. He then tried their mobile phones which went unanswered.

9. I understand that Albert then travelled to the factory at around 1:00 pm and was unable to find John but when he spoke to Darren he refused to make the product.

10. Later that afternoon I phoned John on his mobile phone but he did not answer my call. At 7:23pm, I emailed John but I did not receive a reply. The following morning at around 7:00 am I called John on his mobile. He answered and I asked him why he was refusing to make the product when the week before he had agreed to make it. He said that it was too much and he just could not make them. I explained that we had already agreed on how they would be made. I reiterated that the customer had agreed the sample and specification and not making them was not an option.

11. I asked John again would he get the sausage lengths run so that NPD could roll them. He said because it was me asking he would do it but he wanted me to know how unhappy he was. He also said he was four staff down and therefore could not spare anyone to help NPD roll them. I accepted this and said I would let them know.

12. Following my conversation with John I called Albert who had been on site since 6:00 AM. I told him that John had said he would run the product and I also explained the staff shortage issue."

42 Mr Paul gave oral evidence to us that he had been called on the telephone at 06:10 on 4 June 2021 and that the call had woken him up. He told us that the operations of the respondent are continuous, so that he had to be ready to deal with crises on a "24/7" basis. He said also that he regarded himself as being on-call all the time, even when he was on holiday. Mr Paul said that he spoke to Mr Gibbons an hour after receiving the call that woke him up, and he was adamant that Mr Gibbons had at that time said that he would do the trial run on that day.

43 After the claimants were suspended, Mr Stephen Petrowsky, the respondent's Technical Manager, carried out an investigation into the circumstances which led up to the claimants' suspension. He interviewed both claimants, as well as Mr McGovern and Mr Paul. The interview of Mr Norman took place on 15 June 2021 and the record of it was at pages 138-140. The interview of Mr Gibbons also occurred on 15 June 2021 and the record of it was at pages 141-143. In the latter, there was this material passage about what happened on 4 June 2021:

> "30 Minutes later, Philip called my mobile and pleaded with me to do the trial as he was on holiday and would have to come back to sort it out if I did not.
>
> I did say that I would do it for you and he said we would sit down on Monday morning and discuss all of the problems together."

44 On 16 June 2021, Mr Petrowsky interviewed Mr McGovern. The record of the interview was at pages 263-268. The most material part of that record (all of which we took into account in making our factual findings) was this, straddling pages 266 and 267.

> 'I stand by my statement conclusion whereby I stated that John and Darren's actions were tantamount to mutiny, holding the company to ransom, wasting company money by making a special courier cost necessary to get the product to the customer and jeopardising company turnover with an important £million customer. It was necessary to suspend both individuals and remove them from the site in order to regain control of the situation and prevent the possibility of two aggressive individuals causing damage or sabotaging food products. It was necessary to remove both individuals to protect the company and the public at large who eat our products.
>
> It is not acceptable in any company where any individual thinks that they are bigger than the company itself. It was unacceptable that both John and Darren took the stance that they did and it is unacceptable that they have lied in the manner that they have. Darren states, "This is inflammatory and I am really at a loss about this and would like to know what he bases this highly inaccurate statement on". I suggest he reads

> the facts of my statement and remembers the facts of the two days in question and then maybe he will see where the basis comes from. Also the only inflammatory comments and actions are theirs.
>
> Darren states, "At no point in time did I raise my voice, show any aggression or threaten to damage or sabotage food products, and if Albert thought this why did Albert not accept my factory keys when they were offered? As I previously stated it was Albert that behaved in an aggressive and bullying manner. This has been observed on many occasions." Again, more lies. Darren was extremely aggressive and intimidating and because of what he could be capable of it was necessary to remove him from site. Apparently according to Darren I behaved in an aggressive and bullying manner which had been observed on many occasions. This is total fabrication. Darren and John were the aggressors and tried unsuccessfully to hold the company to ransom. If there are previous occasions of my aggressive and bullying manner, then surely those influences should be disclosed and not just hinted to.'

45 We record at this point that Mr Norman's witness statement contained this passage in paragraph 4:

> "Mr McGovern was hired by Mr John Drage as the accountant in 1992. I worked with him for just under 30 years. During this time we had a fine relationship. We did not have much cross over as he worked as the accountant and I worked on the factory floor. I was always professional and polite towards him."

46 Ms Shelby Morton, who was employed by the respondent as a Senior NPD Technologist, and Ms Lois McArdle, who was employed by the respondent as an NPD Technologist, were interviewed by Mr Petrowsky on 30 June 2021 as part of his investigation. At pages 254-256 and 245-246 respectively, there were records of what they said when they were so interviewed. The records were stated to have been made by Mr Petrowsky. They were in some respects inexplicably redacted. We were not told how the records were made. There were also copies of the document at pages 254-256 (i.e. the interview record of Ms Morton) at pages 303-305, with different redactions, so that the whole of the text of the document was present, taking both copies together. The record of Ms McArdle's interview was so far as material entirely consistent with that of Ms Morton. The material part of the interview record of Ms Morton was this (on pages 254-256 and 303-305).

> '19 May we were congregating in the boardroom for a meeting regarding another project, at which point Helen (HS), Lois (LM) and I (SM) were sitting together and there was mention of the Cumberland rings. DN said that "I will not do the rings, I would rather leave before manufacturing any rings. HS said when are you leaving, DN stated "I need to sell my house and then I will leave to live on a farm." DN was very insistent he wouldn't

be making the product. DN kept saying he will leave rather than make the rings. Things were getting uncomfortable and his manner was very unprofessional and rude. DN is very vocal and has been intimidating on many occasions. I could see HS was very uncomfortable therefore the conversation stopped.

I have worked for Snowbird for 2 years and I have regularly heard DN threaten he's leaving the business.

There were also multiple occasions where DN said that he wouldn't manufacture the Cumberland rings, he said he would leave the business before producing any rings.

20 May - Shortly after this meeting, we received product approval from the customer for progression to factory trials. I was scared and apprehensive to approach JG and DN to confirm the product was approved, I was worried as to their potential reaction to the news. To avoid any confrontation, I delayed this a couple of days as I was so worried.

We received the completed product sign off document form from the customer on 25 May, at which point I went to speak to Philip Paul (Jnt MD) to tell him the product was approved and to discuss the best course of action as I didn't want to cause a bad reaction or be shouted at by JG and DN. Phil said that he would speak to them so I gave him the trial sheet. After their conversation, Phil came back to say that he had spoken to them and that JG and DN would let us know when they would be able to fit this into production. So, I waited to hear regarding a date for the trial.

3rd June I was chased, this time by a senior member in the customers' team, stating they required the trial stock by 08 June. I went to speak to JG and DN to find out when they were planning to run the trial & see if it could be expedited at all. I was told that they wouldn't be running the trial. I said they wouldn't need to actually run the trial themselves and that the whole NPD team would be coming into the factory to help, it would be a team effort but they still said the trial would not go ahead. We are a team and should be working together, this resistance was a regular thing but I've never experienced anything like this before. They both were adamant not to do their job. I was shocked as this product has been produced in the factory for many years.

At this point I said to JG and DN what am I supposed to do? They said to call Albert (Jnt MD) then. I called Albert to explain the situation & he said he would speak with them to help and not to worry.

I wasn't happy about the situation as I wasn't able to do my job, I felt stuck in an awkward situation, the business made a decision to offer a product to our customer, this product was manufactured for many other customers

in the past. Oscar Mayer had approved the product but I was unable to do my job by running the trial. This made me feel very uncomfortable as JG and DN should be supporting me not causing friction.

An hour or so later, Albert called to update me that he was unable to get hold of JG or DN after leaving messages for them to call him back. Albert had no alternative other than to drive to Snowbird foods to speak to them as it was impossible to have a conversation on the phone, they kept ignoring his calls. Albert said that we would be running the trial the next day and for me to go and speak to JG and DN again. I was very apprehensive but whilst on our way over to the freezer to sort out stock, LM & I tried to go and speak to JG while he was out in the yard but he told me not to waste my breath and walked away from me – he seemed to be in a bad mood and it felt very tense so I left it as not to escalate the situation. As JG walked away, he walked over to DN who was moving around stock, DN said they will need a new production manager on Monday. This comment was said in a loud voice purposely [sic] so I heard it.

Later on, once Albert had arrived – he had spoken to DN but said that JG had already left. He said the trial would be happening 04/06 & to leave the trial sheet on JG's desk which I did with a note to say that we would all be in first thing (6am) and to please run earlier on so that we have enough time.

04 June, we came in for 6am to run the trial earlier on, when I went to check with JG and DN about timings – I was yet again told that the trial would not be going through the factory and that it can go through the NPD Kitchen, this is not possible, firstly the kitchen is far too small, that is why a factory trial is needed as it's a large scale. JG and DN are fully aware of this they just didn't want to help me or the business. Secondly it would be against all technical protocol to make product in an NPD kitchen that was for a customer trial. JG and DN both said that there is no way the product would be run in the factory. I felt this was impossible, I was put in a really difficult position and felt very apprehensive and scared what would unfold next.

Albert arrived & I informed him of what I was told. He then went to speak to them, we were later informed that we with the help of the production teams in low risk and high risk that we could run the trial. I knew nothing as to the whereabouts of JG and DN at this point.

When we ran the trial without JG and DN present, we were under time pressure to get everything done due to the delay. In collaboration with the factory staff members, we were able to successfully run the trial with no issues at all. The factory staff were all very happy, helpful and willing to work as a team which was a breath of fresh air.

I made sure to follow the product at every stage and to keep in mind with regards to previous highlighted potential issues (as I would with any trial for potentially problematic products). The purpose of NPD trials is to test the scale up of products in the factory and resolve any potential issues that arise.

– I was told by JG and DN that the rings were always run on line 1 and that there wasn't enough time for the metal rods to be removed from the rings (as the line in high risk is quite short) and that they were so hot that they burnt your hands.

The product was run down line 2 (which is a much longer belt in high risk), there were around 2-3 of us on the line to check the temperature, check the product and remove the rods. Wearing the provided protective gloves – this provided more than sufficient protection from the temperature of the rods and the product. As is normal to handle cooked product straight out of the oven/fryer. I also asked the staff in high risk which line it is usually run down and they confirmed it is always line 2 (the longer line).

– I was also told by JG and DN that the product never reached the correct temperature when they came out of the fryer.

As we do with all trials, we sent a small batch through to test the cooked temperature, this first lot was below the temperature CCP so the product was discarded and more time was added to the fryer (standard practice). The next lot sent through hit the temperature CCP and the remaining product was sent through, throughout the remaining trial we didn't have any product which didn't reach the temperature CCP.

– I was told by JG and DN that the freezer is set to chill instead of freeze, if the product is frozen that it will be too brittle and break when they fall on top of each other into the weigh-head and that as they are only chilled they cannot be metal detected which is hazardous.

When running the trial, I went over to the weigh-head and the staff in high risk showed me the mechanism they put in place to stop breakages. When I visually inspected a couple of bags, I saw no breakages so was happy this mechanism was effective.

Another staff member was measuring the temperature of the product to show that it was frozen and on confirmation with low-risk packaging area, they confirmed the product was metal detected and there were no issues.

All the factory issues JG and DN raised about the product was incorrect, the product is labour intensive but every other potential issue to do with the manufacturing and cooking process was false allegations. The trial

> was a real success, the product was approved by the customer and the factory was happy and relaxed to produce this line. I've never seen the factory work so well together before. I am amazed at all the fuss / unprofessional behaviour and bad feeling JG and DN caused when clearly there was no issues.
>
> NPD is perceived as the department of aggravation by JG and DN. I would avoid JG and DN when they were in a bad mood and sometimes if there was a trial which I needed to request which I knew they wouldn't like, I would give them the trial sheet or leave it on their desk to discuss at a later date to avoid any possible conflict or aggravation. They are hard to work with, and when I would mention that I try and sway the customer to a product that would be easier for the factory, JG would say 'not hard enough' or 'do better'. This makes me feel very anxious and uncomfortable at times, this is why I gave the trial sheet to Philip as I was scared to approach both JG and DN."

47 The final two paragraphs of the record of what Ms Morton said to Mr Petrowsky are not material here, but they are relevant to the second set of allegations which were made against the claimants before they were dismissed. We concluded, as we say in paragraph 104 below, that that second set of allegations was part of the real principal reason for the claimants' dismissals, but we do not need to set out what Ms Morton said in the final two paragraphs of the record of her interview with Mr Petrowsky of 30 June 2021.

48 We describe below the procedure followed in deciding that the claimants should be dismissed. We mention it now because during it, Ms Black held a disciplinary hearing with Mr Gibbons via Teams on 23 June 2021. There were notes of what was said in that hearing at pages 159-173. Mr Gibbons accepted (through Mr Lansman) that those notes were accurate. On pages 163-164, there was this record ("AB" being Ms Black and "JG" being Mr Gibbons).

> "AB Did you have a conversation with Albert on the phone?
>
> JG No.
>
> AG So only Philip?
>
> JG On the Friday morning.
>
> AB So that was 4 June?
>
> JG Correct.
>
> AB Were there any other calls before that date?

JG No he was on holiday, I wasn't aware. Shelby told me Philip was on holiday and asked what she should do now, I said speak to Albert.

AB I see that in your statement. Can you talk me through the call you had with Philip?

JG He begged me to go on with the trial, he was on holiday in Cornwall with family and said we'll sit down on Monday and chat and rectify it. I said you keep saying that and it doesn't happen, he said I'll have to bring my family back to sort this out. I only really have a rapport with Philip, I don't have anything to do with Albert, the reason being, Phillip looks after the factory. He begged me and I agreed and said for him I would do it.

AB What transpired from you agreeing to do it and then not agreeing to do it?

JG The way Albert asked me and his whole aggressive behaviour. He's saying I'm aggressive, but I was calm."

49 Both claimants and Mr Martin accepted in cross-examination that the standard practice for the respondent's products was for them to be kept in a freezer (in a process which was called "positive release") until a check on the number of microbes in the product had been made, and for the product only to be released to the customer if and when the result of the check was satisfactory. It would, said Mr McDevitt when cross-examining Mr Gibbons, take about a week for the result of the testing of the product to be sent to the respondent. Mr Gibbons agreed.

50 Both parties put before us succinct skeleton arguments during the morning of 8 February 2023, after we had (we thought) heard all of the oral evidence that we were going to hear. Mr McDevitt made oral submissions supplementing his written submissions first. One of Mr McDevitt's written submissions was that there was no risk to health and safety from the cooking of the Cumberland rings on 4 June 2021 because of the existence of the system of positive release to which we refer in the preceding paragraph above. During Mr McDevitt's oral submissions, EJ Hyams pointed out that Mr McGovern had referred to the fact that a courier was needed to get the product to the customer at the start of the following week. Thus, pointed out EJ Hyams, the positive release process could not have been applied to the product of the trial run of 4 June 2021. Mr McDevitt then took instructions from Mr Paul and Mr Govern (who were both present in person throughout the hearing before us) and told us that he was instructed by them that the trial run of 4 June 2021 was for visual purposes. What he meant by that, he said, was that when there was a first trial, it was done in the NPD's kitchen and was done for taste purposes. The trial that was to be done on 4 June was to enable the customer to see what the product

looked like when it had been cooked and was on sale to the public in the form of a ready meal.

51 That was highly material if it was true. We said that if we were to take that into account and it was not accepted then it would have to be the subject of oral evidence. We adjourned the hearing for 15 minutes to permit the parties to take instructions. When they returned, Mr Lansman said that the claimants did not know that the trial run of 4 June 2021 was for the purpose of a purely visual test. Mr Paul then was recalled to give further oral evidence. He gave evidence in the following terms (as noted by EJ Hyams and tidied up for present purposes).

> "The reason for having a trial run on 4 June 2021 of 150kg of Cumberland rings was that the equipment it goes through on production is different from that which is in the test kitchen. The biggest test run that can be done in the kitchen is 3kg. So you only get enough product to make sure that the flavour is correct when you do a trial in the kitchen. The yield from the factory run could be different: industrial fryers or ovens could give a better or worse yield. If you want for example a product of 100g then the raw product will have to be more than that, and the weight of the product before cooking will be different when it is cooked on the production line from when it is cooked in the test kitchen.
>
> Some of the product that came through was (as we said yesterday) not at temperature; but some was at temperature and fit for purpose. That product [i.e. which came out at the right temperature and in a form which was fit for purpose] was frozen. Unlike the situation with a full production run, which goes to the consumer, that product [of the trial run of 4 June 2021] was held over the weekend in the factory in a freezer. On the Monday some was sent to the lab for microbial testing and some was sent to the lab for analytical testing; that is for a back of pack testing for the purpose of listing the items in the recipe. Two tests are requested for all factory trials, and this was no different. Three or four kilograms of the product of the trial run of 4 June 2021 were packaged and sent by courier to the customer. That was so that it could be seen and to see whether it fitted in the tray for the onion gravy and mash. We also had requests to add into the specification a colour chart; if the product was too dark then the customer would not want it, and if it was too light then they would not want it either. The customer wanted an optimum colour, so that the bulk of the production had to fit that colour.
>
> We do not know when they are going to do the trials [i.e. microbial and analytical]. They could be done the same day or the following week. The main analysis at that stage is the back of pack one to make sure that that fits the customer's customers' expectations, which will differ [i.e. from ultimate seller to ultimate seller]. Then, if that's okay, we gear up to making the product for them and we do a first production run. Most first

production runs are done without a customer present but on occasion the customer wants to be there. At that stage of the production, the product ends up with the consumer. This is all standard practice and has been so for 15 plus years."

52 When asked why it had not been said before then, either in a witness statement or a document, Mr Paul said that it was as far as they (i.e. Mr McGovern and he) were concerned, part of the factual background which was as well known by the claimants as it was by him (Mr Paul). He said that factory trials of the sort that occurred on 4 June 2021 were a weekly occurrence. He said too that he did not tell the claimants that the trial run was for the purposes which he described as recorded in the preceding paragraph above, as they would have known that very well without him telling them.

53 Both claimants were recalled. Among other things, Mr Gibbons said that he believed that the trial run of 4 June 2021 was "a production run for the client". Mr Norman said that he had "never heard" of a trial run just being for a visual test. He denied the proposition put to him by Mr McDevitt that he "knew full well that the product produced at end of the trial run [of 4 June 2021] would not be eaten".

54 In oral evidence, Mr Paul said that Cumberland rings would be made up in batches, so that the raw product would not all be put out to be worked on at room temperature. He also said (and was not challenged on this) that raw product increases in temperature by about one degree centigrade per hour, irrespective of the ambient temperature. In addition, he said that the Cumberland rings would be prepared (by being rolled by hand) in what the respondent called its Gourmet Room, which (unlike some other parts of the respondent's factory) is temperature-controlled.

Our conclusions about what, precisely, happened in May and up to and including 4 June 2021

55 We came to the following conclusions for the following reasons about what actually happened in the material period before the claimants were suspended, and why they were suspended by Mr McGovern.

56 We did not accept Mr Gibbons' evidence (in paragraph 18 set out in paragraph 36 above) to the effect that he did not say to Mr Paul in the morning of 4 June 2021 that he would participate in (by helping to manage) the process of making Cumberland rings on that day. We rejected that evidence of Mr Gibbons because we preferred the evidence of Mr Paul which we have set out in paragraph 42 above. We did so both because we found Mr Paul to be an honest witness, doing his best to tell us the truth, but also because the evidence of Mr Gibbons at trial that he had on 4 June 2021 said only that he would discuss the making of Cumberland rings on Monday 7 June 2021 was inconsistent with the records of what he said at the time, which we have set out

in paragraphs 43 and 48 above, about that matter. Most telling in that regard was the fact that Mr Gibbons' assurance that he would manage the production of the Cumberland rings plainly led to Mr Paul agreeing not to travel from Norfolk on 4 June 2021 to do that himself. Mr Paul, we concluded, would have returned from Norfolk on 4 June 2021 if Mr Gibbons had not in the morning of that day assured Mr Paul that he would manage the production of the Cumberland rings on that day.

57 We found the statement of Ms Morton of 30 June 2021 the vast majority of which we have set out in paragraph 46 above to be accurate in all material respects. Even though we did not hear oral evidence from Ms Morton, we saw that the statement was consistent with much of the oral evidence before us, including that of Mr McGovern and Mr Paul and some of that of Mr Gibbons and Mr Norman. If and to the extent that the evidence of Mr Gibbons to us was at variance with what Ms Morton said, we took into account (1) the fact Ms Morton's statement of 30 June 2021 was made very much closer to the time of the events to which it related than the date of the hearing before us, and (2) the unreliability of Mr Gibbons' evidence (a) in the respect to which we refer in the preceding paragraph above, and (b) set out in paragraph 28 above, which for the reasons in paragraphs 29-34 above we rejected.

58 As for what Mr McGovern did on 4 June 2021, given what we say in the final sentences of this paragraph, it was not necessary to make specific findings about precisely what happened then, although we concluded that the account of Mr McGovern in his note at page 128, which we have set out in paragraph 40 above, was accurate. What was important was the reasons for Mr McGovern's actions. Our conclusion in that regard was that all of the things which he did on 3 and 4 June 2021 and at all other material times were done on the ground, and only on the ground, that both claimants had refused to do something which he, Mr McGovern, believed they had no good reason for refusing to do. We concluded that at no time did Mr McGovern do anything to any extent because either claimant, or both of them, had asserted that the production of Cumberland rings was going to be unsafe.

59 As for the circumstances in which the claimants refused to manage or participate in the management of the proposed trial run, we came to the following factual conclusions.

59.1 The proposed trial run was not going to be dangerous because of the need to remove hot skewers. That was because (1) the protective gloves were, as we say in paragraphs 29-34 above, such as to make such removal safe, and (2) that conclusion was supported by what Ms Morton said about that matter in her statement which we have set out in paragraph 46 above.

59.2 What Ms Morton said in that statement about the first run of the product not being at the right temperature so that it was discarded and that the

next, second, run was found to be at the right temperature, was accurate. We took into account in coming to that the conclusion the following factors. (1) The claimants were not present when that occurred, so they could not give evidence about it. (2) There was no good reason to doubt that evidence of Ms Morton. (3) Mr Paul's oral evidence was to the same effect, as recorded at the start of the second indent of the extract set out in paragraph 51 above, and that was, we concluded, based on what Ms Morton had told him at the time, i.e. in June 2021.

59.3 We accepted the evidence of Mr Paul which we have described in paragraph 54 above about the slow rise in the temperature of raw product when it was taken out of cold storage and that the preparation of the Cumberland rings was going to be done in the respondent's Gourmet Room, which meant that the ambient temperature at the respondent's factory was irrelevant to the safety of the preparation of those rings.

59.4 We also accepted the evidence of Mr Paul which we have set out in paragraph 51 above to the effect that only three or four kilograms of the cooked Cumberland rings were going to go to the customer on Monday 7 June 2021. In addition, we accepted his evidence that it was going to them for the visual tests which he described in the penultimate indent in that paragraph, namely (1) to see whether it fitted in the tray for the onion gravy and mash, and (2) to see what the colour of the cooked product was likely to be. We also accepted his evidence that there was a need for a trial run of 150kg to enable the respondent to obtain a reliable set of figures for the ingredients. In accepting this evidence of Mr Paul and preferring it to that of the claimants, we took into account the lateness of the emergence of the evidence, and concluded that, like the evidence of Mr McGovern to which we refer in paragraph 78 below, it was not prepared in advance of the hearing before us because the person or persons responsible for the preparation of the witness statement evidence did not think through sufficiently thoroughly the evidence that would be required to be given by Mr Paul and Mr McGovern. That which was done by way of preparation of the evidence was well-done, but in this respect as well as that to which we refer in paragraph 78 below, there were material omissions. The evidence of Mr Paul in this respect and the evidence of Mr McGovern to which we which we refer below in paragraph 78 was, we concluded, reliable, and we accepted it despite the manner in which it was adduced.

59.5 We also concluded that the customer had before 4 June 2021 approved the taste of the Cumberland rings using the respondent's proposed ingredients and cooking them in the respondent's NPD kitchen. That was because (1) Ms Morton had referred to the approval by the customer of the product on 20 and 25 May 2021 in her statement which we have set out in paragraph 46 above and (2) we accepted that that approval had

happened because of the type of taste test to which Mr Paul referred as we record in the penultimate sentence of paragraph 50 above.

The disciplinary process followed, and what happened between the claimants' suspensions on 4 June 2021 and their dismissals on 22 July 2021

60 Mr McGovern and Mr Paul first caused Mr Petrowsky to carry out an investigation into the claimants' conduct on 4 June 2021, and at first planned to have Ms Black make the decisions on what should happen to the claimants as a result of that conduct. Mr Petrowsky wrote to the claimants individually on 8 June 2021 (in the letters at pages 131-134) inviting them to an "Investigation Hearing" on Thursday 10 June 2021 to "discuss" the following "issues" that had been "raised in relation to" their conduct:

> "• On Thursday 3rd June 2021 and again on Friday 4th June 2021, when instructed to prepare Cumberland sausages for a key client, you refused to do so despite a Director explaining to you that this was an exception and was required to satisfy this client's needs;
>
> • As a manager, your refusal to carry out this task meant that It was not carried out by the line workers under your supervision; and
>
> • You stated in justifying your refusal to manufacture Cumberland sausages that Philip Paul had told you on a previous occasion that you and/or the team would not be required to do so, however this is untrue and/or misleading."

61 The letter continued:

> "Following this meeting, a decision will be made as to whether the points discussed should proceed to a formal disciplinary hearing. I enclose the company's disciplinary procedure from the Employee Handbook.
>
> The documents I will be referring to at the meeting are listed below for your information, namely:
>
> Statement of Albert McGovern
> Statement of Philip Paul
> Statement of Shelby Morton
>
> They will be sent to you prior to the Investigation Hearing."

62 The claimants declined to attend the meeting of 10 June 2021 because (as Mrs Norman wrote in her email of 10 June 2021 to Mr Petrowsky at page 135) they had not been sent a copy of the respondent's "disciplinary handbook" or of "the three statements" to which he had referred in the passage set out in the preceding paragraph above. The claimants then attended meetings with Mr

Petrowsky on 15 June 2021. Records of what they said to him at those meetings were in the form of statements, of which there were copies at pages 138-143, which were signed by both Mr Petrowsky and each claimant.

63 Ms Black on 18 June 2021 sent the claimants under cover of the two letters (in identical terms) at pages 144-147 copies of the documents at pages 138-143 and 263-278. The documents at pages 263-278 were records of what Mr McGovern and Mr Paul had said to Mr Petrowsky on 9 and 16 June 2021, and records of what Ms Morton and Mr Ian Barrett, the respondent's Deputy Engineering Manager, had said to Mr Petrowsky on 9 and 16 June 2021 respectively. Ms Morton's interview record was at page 276 and was of only three paragraphs.

64 Ms Black's letters invited the claimants to a disciplinary hearing on 23 June 2021. That was consistent with the requirements of the respondent's' Disciplinary Policy and Procedure of which there was a copy at pages 117-120. That provided on page 118 under the heading "Disciplinary Hearing Invites":

> "You will be given sufficient notice of any hearing to allow you to prepare for it. While this will vary from case to case, the Company will generally try to give at least two days' notice of any hearing and in complicated cases a longer period of notice may be given."

65 On the same day, 18 June 2021, Mr Norman raised a grievance in writing, in the form of a letter addressed to Mr Petrowsky of which there was a copy at page 148. It enclosed the statement at page 149. In part, it complained about Mr McGovern's behaviour on 3 and 4 June 2021. As can be seen from what we say in paragraph 2 above, no complaint was made to the tribunal about the manner in which Mr Paul determined Mr Norman's grievance. As a result, we refer to the grievance here only because its history is part of the material factual background to the manner in which Mr Norman was dismissed.

66 On 22 June 2021, Mr Petrowsky sent Mr Norman the letter at pages 150-151, which included this passage:

> "As you are aware, we have asked an independent HR Consultant Angela Black to hear the disciplinary and Angela has kindly forwarded your fit note and further grievance update on to me. I am sorry to hear that you are unwell and wish you a speedy recovery.
>
> I am writing to firstly acknowledge your fit note and to confirm that your suspension is therefore temporarily lifted, and you are now placed on sick leave. I shall maintain contact with you during your absence to understand how you are progressing and what, if anything, we can do to assist your recovery. Please also contact me the day before your fit note expires in order to update me as to whether you are fit to return to work or will be further absent.

> I can confirm that you qualify for Statutory Sick Pay. Under the statutory rules, no payment will be made for the first three days of absence, known as 'waiting days'. Thereafter, the statutory payment of £96.35 per week will be made."

67 No copy of that "fit note" was in the bundle before us.

68 On 22 June 2021 Mr Gibbons sent Ms Black the email at pages 153-155, which started thus:

> "Dear Angela Black
>
> I am at a loss of where to start in relation to what appears to be continuous lies and slating of my character. ... I am distraught at how my name has been blackened after 34 loyal years of working for the same company under numerous owners where I have been awarded yearly, sometimes 6 monthly, bonuses and thanked for my exemplary hard work".

69 Mr Gibbons then attended the disciplinary hearing of 23 June 2021 held via Teams to which we refer in paragraph 48 above, where we set out a material part of the notes of that meeting.

70 Also on 23 June 2021, Mr Paul invited Mr Norman to a grievance hearing on 25 June 2021. He did so in the letter at pages 174-175. Mr Paul stated in that letter that the parts of the grievance that related to what Mr McGovern did on 3 and 4 June 2021 would be "investigated as part of the disciplinary process by Angela Black, HR Consultant", and not by him, Mr Paul.

71 Mr Norman said in an email of 24 June 2021 of which there was a copy at page 176 that he would not be able to attend the proposed meeting of the next day "following my G.P. signing me off due to health reasons." Early on 25 June 2021, Mr Paul sent Mr Norman the email at pages 178-179 in which he said this:

> "Your GP has signed you off as unfit to for [sic] working however this does not prohibit you from attending any hearings and in fact it can be detrimental to your health to leave grievances unresolved and, as you are aware, there are also disciplinary matters to be addressed.
>
> I would therefore suggest that if you are able we go ahead with today as planned, however I am happy to take written submissions if you feel unable to attend Zoom or a telephone call or we can rearrange the hearing for next week should you need some time this week to recuperate."

72 Just under an hour later, Mr Norman replied in the email on page 178, asking for the meeting to be "reschedule[d] ... due to the nature of my mental health at the moment". Mr Paul then sent Mr Norman the letter dated 25 June 2021 at page 180, inviting him to a meeting on 28 June 2021.

73 On the same day, 25 June 2021, Mr Paul sent Mr Gibbons the letter at page 181, acknowledging receipt of a "fit note" for Mr Gibbons, and stating that his suspension was "therefore temporarily lifted" and that he was "now placed on sick leave".

74 Mr Norman then added to his grievance in the letter at pages 184-185, which was sent on Sunday 27 June 2021 to Mr Paul. The grievance hearing then occurred on the next day via Zoom. Mr Norman recorded it. On 1 July 2021, Mr Paul sent Mr Norman the letter at pages 191-194, rejecting his grievances and giving detailed reasons for doing so. Mr Norman appealed that rejection, but it is not necessary to say any more here about the grievance.

Allegations of further misconduct on the part of the claimants

75 The first half of Ms Black's witness statement described how she was going to have a disciplinary hearing with both claimants but that she did not have one with Mr Norman because he had been "signed off unwell by his doctor" so that she held a hearing in person only with Mr Gibbons. The rest of her witness statement was in these terms.

> "9. I had not yet written up a decision when I was advised by the Respondent that during the Claimants' suspension several employees had come forward making serious allegations of bullying and harassment by the Claimants. It was decided that the allegations were of such a serious nature that they should be added to the disciplinary allegations already stated.
>
> 10. As far as the initial allegations against Mr Gibbons were concerned, that is those relating to his refusal to make the Cumberland ring sausages, I would have issued a first and final written warning. My reasons for that, despite a finding that he was guilty of the allegations, included his very long service and his previously clean disciplinary record.
>
> 11. I therefore held off on issuing the disciplinary outcome while the further potential allegations were being investigated. I wrote to Mr Gibbons on 7 July 2021 advising him of the same and confirmed to him that as I was going off on annual leave and therefore, it would likely be the end of the following week before he would hear anything from me. (page 203) I advised Mr Gibbons that once the investigations had been completed he would be provided with the

new investigation material and he would be invited to attend a reconvened disciplinary hearing.

12. On 19 July 2021 my colleague Tracy Craik sent Mr Gibbons an invitation to a reconvened disciplinary hearing to take place on 22 July 2021 via Microsoft Teams. (page 232). Attached to the invitation were copies of the statements that had been taken from his colleagues. (pages 234 – 259)

13. On 19 July 2021 Mr Gibbons emailed to let me know that he would be unable to attend the hearing on 22 July 2021 because he was currently signed off sick. (page 329)

14. I wrote to Mr Gibbons on 22 July 2021 advising him that he might wish to provide a written submission for my consideration at the hearing if he was unable to attend. (page 330)

15. Mr Gibbons indicated that he would send a written submission instead of attending the hearing and I asked him to send it to me by Monday 23 July 2021 (page 326), which was subsequently extended to 26 July 2021 at his request. (page 327)

16. Mr Gibbons provided his written submission (pages 331 – 333). I took that into account together with all of the other evidence when coming to my decision.

17. On 27 July 2021 I wrote to Mr Gibbons with the outcome of the disciplinary hearing. (pages 340 – 349).

18. I upheld six of the eight allegations against Mr Gibbons, the most serious of which were the ones numbered 4, 5 and 6 on page 341. Those were the allegations in relation to Mr Gibbons' behaviour towards his colleagues. My decision was that Mr Gibbons was guilty of Gross Misconduct and that he should be dismissed without notice. My reasoning in relation to my decisions is in the outcome letter.

19. I did take account of Mr Gibbons' long service with the company and his clean disciplinary record up to that point, however I considered that, given his completely unacceptable behaviour towards his colleagues, summary dismissal was the only appropriate outcome.

20. Mr Gibbons was given the right to appeal against my decision, however I understand that no appeal was ever received."

76 Mr Paul's witness statement did not state in terms that he had decided to carry out the disciplinary investigation into Mr Norman's conduct, but he told us that it was decided that he would do so because he was also dealing with Mr

Norman's grievance, and the latter (as we say above) included complaints about Mr McGovern's conduct on 3 and 4 June 2021. The final section of Mr Paul's witness statement was in these terms.

> "31. Darren was initially invited to attend a disciplinary hearing on 23 June 2021 (pages 146 - 147), however he was unable to attend due to illness.
>
> 32. In the meantime, some colleagues of the Claimants had come forward to make some very alarming allegations against them, which included physical violence, threats of physical violence, aggressive language and threatening behaviour. That resulted in Stephen Petrowsky taking statements from several of our staff.
>
> 33. I wrote to Darren on 19 July 2021 inviting him to a rescheduled disciplinary hearing on 22 July 2021 by MS Teams. In the letter I set out those additional allegations and attached the statements that Stephen Petrowsky had taken from colleagues. (invitation pages 260 - 262) (statements pages 263 - 307)
>
> 34. In my letter I advised Darren that since the hearing had already been rescheduled it would only be rearranged again in exceptional circumstances. I said that if he could not attend due to illness then he could submit written representations for me to consider. I also said that he could have his wife attend the meeting with him as his companion if he wished.
>
> 35. Darren was unable to attend the hearing due to illness but he emailed me written representations for me to consider at the hearing. (pages 313 - 314)
>
> 36. I went ahead with the disciplinary hearing in Darren's absence and I considered all of the information that I had available to me before making my decision. The notes of the disciplinary hearing are at pages 323 - 325 of the bundle.
>
> 37. I wrote to Darren on 23 July 2021 advising him that my decision was that he was dismissed for gross misconduct and I set out detailed reasons for my decision in that letter. (pages 334 - 339)
>
> 38. We received no appeal from Darren against his dismissal.
>
> 39. Angela Black conducted John Gibbons' disciplinary hearing and her witness statement will give details of that."

77 The statements at pages 234-259 contained detailed allegations of what was on any view gross misconduct by the claimants towards some of those whom

they managed. We do not refer in detail to the allegations made in those statements here because we did not come to a factual finding on any of them. That was because we did not hear any evidence on those allegations because we concluded (with the parties' agreement) that it was neither necessary nor in the interests of justice to do so. That was not only because of a lack of time but also because if the claims of unfair dismissal did not succeed then there would be no need to make findings of fact on the allegations.

78 However, the manner in which those allegations came to be made and the manner in which, and the extent to which, they were investigated were highly material issues. The initial absence of any direct evidence before us about those things was stark, and we were going to raise it with the parties when the respondent's witnesses gave evidence, i.e. during the course of their evidence. However, Mr McGovern was the first witness for the respondent and he gave such direct evidence in the following circumstances. He gave evidence at the start of the second day of the hearing, and Mr McDevitt adduced additional evidence from him by way of supplementary questions asked by way of examination in chief. EJ Hyams' notes of the manner in which that evidence was adduced (tidied up for present purposes) were as follows.

> "Q: Can you explain how the witness statements that relate to the bullying etc came into being?
> A: It happened after the suspension of the claimants on 4 June 2021. I was working in the office late one evening. The Night Hygiene Manager, Baharani Nzeyimana, said could he come and talk to me; and I said yes of course. And he told me about racism and bullying going on over a number of years. [EJ Hyams' notes were plainly slightly incomplete here, as can be seen from the next entry below.] I said that I would speak to my business partner that night. I spoke to Mr Paul that night and he then the next day spoke to Ellis Whittam [the respondent's solicitors]. At that time the statements were passed to Ellis Whittam; they said that we should ask the staff to say anything, whether good or bad, about the claimants, if they wanted to do so. Twelve or thirteen statements were then provided by various members of the company. That is how the statements came about.
>
> Q: You said that Baharani mentioned six or seven others and that you went to your advisers and they said that anyone wanting to say anything, whether good or bad, should be invited to come forward; how was that done?
> A: Stephen Petrowsky said that if anyone wished to say anything now was the time to do so. He said do not worry about the consequences; and that is how the things came out.
>
> Q: How did he impart that to the workforce?
> A: I do not know.

Q: Were any of the witnesses paid to do it?
A: Absolutely not; they were just paid to do their jobs. They were paid a salary and that was it, nothing more."

79 Mr Paul gave evidence next. After his cross-examination had ended, EJ Hyams asked him whether he had thought about speaking to the persons who had alleged that the claimants had committed the misconduct to which we refer in paragraph 77 above, to see whether the allegations appeared to withstand scrutiny. He then said that he had in fact spoken to three of the employees who had made the allegations, and he referred to Baharani, Papy, and Noel. Having done so, he said, he "unfortunately ... believed what they all said". He also said that the more they all said the more each corroborated what the other had said, and the more it (i.e. what they said) all fitted together.

80 We gave Mr Lansman an opportunity to carry out further cross-examination on that, and he asked Mr Paul whether he had asked the staff about some allegations which had been made in 2012 of a similar sort, which were then investigated and not found to be well-founded. Mr Paul said that he had not done that. It was then put to Mr Paul that consistency can be a sign that the members of staff had met up and co-operated and come up with an untrue story, and he was asked whether he had considered that. Mr Paul said that he had done so. However, he said, he had on balance, and sadly, believed the allegations. We accepted his evidence in that regard: we concluded that he was disappointed to have concluded that the allegations were true, but that he had indeed genuinely believed them to be true.

81 Mr Paul was asked what was his main reason for deciding that Mr Norman should be dismissed, and whether or not it was that Mr Norman had done the things for which he was suspended on 4 June 2021. He said that he had taken advice from Ellis Whittam and the respondent's HR advisers on whether or not Mr Norman should be dismissed and that he had done so because he had wanted to make the right decision. EJ Hyams pressed him to say what his own conclusion was, and pointed out that if he relied solely on the advice given to him in making his decision then it was not his decision, but that of the advisers, that Mr Norman should be dismissed. He then said that it was his decision, and that the letter at pages 334-339, which was dated 23 July 2021, was an accurate statement of the reasons for that decision. We accepted that it was such an accurate statement.

82 We saw that in that letter, on page 337, there was the following passage.

> 'Papy stated that he has witnessed your bullying and intimidating behaviour "over a long period of time" and that he has not reported this out of fear of reprisal from you. He stated that he has witnessed verbal threats and actual physical threats and that others in the factory feel the same way and are scared to speak up.

> Lois [McArdle] confirmed that Shelby [Morton] and herself were "extremely nervous" about giving you the trial request as they believed you would react badly, which is why I was the one to ask. Lois stated that she was made to feel nervous as to how you would react and that she felt the need to avoid conflict. Shelby stated that she was scared and apprehensive to approach you to confirm that the product was approved as she was worried about your reaction to the news and so delayed telling you for a couple of days. In addition, Shelby stated that she avoids you when you seem to be in a bad mood or when there is a trial running which she knows would annoy you and cause conflict, making you difficult to work with and causing her anxiety and discomfort.'

83 We saw that below that passage, there was a recitation by Mr Paul of Mr Norman's written responses to the evidence in the statements which contained allegations of misconduct towards his (Mr Norman's) colleagues.

84 When pressed to say what he would have done if Mr Norman had only been accused of refusing to make Cumberland rings, i.e. whether he would have decided that Mr Norman should be dismissed for his actions on and in the days before, 4 June 2021, Mr Paul said that he would have taken advice. Eventually, he gave evidence which was to the effect that the real reason why he decided that Mr Norman should be dismissed was that he had concluded that the allegations of misconduct towards colleagues were well-founded and that the appropriate sanction for that misconduct was Mr Norman's dismissal.

85 After Ms Black had given evidence, Mr Lansman said that Mr Gibbons was no longer claiming that the reason, or if not the sole reason then the principal reason, for his dismissal was that he had refused to participate in the process of making Cumberland rings on 4 June 2021. Thus, Mr Lansman pressed a claim only of unfair dismissal within the meaning of section 98 of the ERA 1996 in respect of Mr Gibbons.

86 Mr Lansman pressed both Ms Black and Mr Paul on their failure to postpone their hearings to decide whether or not the claimants should be dismissed to a date after 22 July 2021. Mr Paul said that he did consider postponement and discussed the possibility with Ellis Whittam. They suggested, he said, that if he did postpone the hearing of 22 July 2021 then that would help to perpetuate the anxiety and uncertainty of the situation for Mr Norman, and that it would not help anyone's mental state to do that in this kind of situation. As a result, he thought that it was the fairest thing to carry on, he said. We accepted that evidence.

87 We saw that Mr Norman on 20 July 2021 sent the email at page 315 in response to one of earlier that day from Mr Petrowsky, inviting Mr Norman to "attend the disciplinary hearing" referred to in the letter sent by recorded

delivery the previous day. The email from Mr Norman in reply included this passage:

> "Thank you for your email and the attached documentation.
>
> As you are aware, I am currently signed of[f] sick with depressive disorder and anxiety which has been bought [sic] on by what is going on with work. I have consulted with ACAS and in accordance with their guidelines I am able to request that this hearing is postponed until I am in a fit state and confident, I will get a fair hearing.
>
> I have attached the direct link to ACAS's website for your guidance in this."

88 At pages 309-310 there was an email from Mr Paul to Mr Norman in reply, in which Mr Paul wrote that he was "sorry to hear" that Mr Norman "remain[ed] unwell". Mr Paul's email continued:

> "You will note that we have already waited until your initial fit note ran out to invite you to this re-arranged hearing. In any case, the matters to be discussed are of a very serious nature which cannot be held off any further, I therefore do intend for this hearing to go ahead on Thursday as planned.
>
> As you know, currently the plan is to hold the hearing by zoom, I would be happy to meet face to face, by telephone or by written submissions if you prefer and if you need support, your wife, Mrs C Norman can attend.
>
> Please let me know your preference by COB today and I shall make arrangements.
>
> I must note that should you fail to attend it will be held and a decision made in your absence."

89 Mr Norman replied on the same day (at page 309):

> "Hi Philip,
>
> My fit note did note [sic] run out. Please check your dates. In addition to this, I informed you on Friday 16 July 2021 that I would be submitting a second fit note on Monday the 19th as continuance. I reiterate, I am currently very unwell and urge you to respect this."

90 Mr Norman then sent the letter at pages 313-315 (the text of which was in small, single line-spaced font, but was on the first two of those pages only). It contained a detailed response to the allegations of misconduct other than on

and in relation to the refusal to participate in the making of Cumberland rings on 4 June 2021. It started in this way:

> "Dear Philip,
>
> Following my request for the disciplinary hearing relating to the incidences of June the 3rd and 4th to be postponed due to my ill health and your persistence in going forward with it in my absence, I feel under extreme pressure to try and address some of the points you have raised in light of your refusal to postpone until I am in better health. I have repeatedly informed you that I am unwell due to the stress and situation caused by Albert McGovern's behaviour and have produced two consecutive Doctors fit notes to support my ill health. My ill health has been significantly worsened by the shocking statements that have now been sent to me. It is extremely disappointing that after my extensively long and loyal service as your production manager you have not taken this into consideration and been supportive of me and despite me agreeing for you to contact my doctor for clarification of my current state of health, you have chosen to ignore this and basically forced me into a position where I have to try and defend myself whilst unwell. Shame on you Philip, I thought you were a better person than that.
> The information request relating to my personal file clearly shows that over almost 34 years (since the start of my employment in 1993) I have an empty file – an unblemished and clean record, no history of sickness, poor attendance, poor punctuality, grievances, disciplinary actions, verbal warnings, written warnings or any other statements that support acts of physical violence, threats of physical violence, aggressive language and or aggressive behaviour, discrimination, intimidation and harassment, ever. From an initial suspension relating to the 'unreasonable request' this has now suddenly escalated into what can only be described as an attempt to discredit me with the most vile and abhorrent statements. It is horrifying and incredibly upsetting and stressful to read these statements that have suddenly just been produced following Albert's unprofessional treatment of me, on the 3rd and 4th of June. I intend to clear my good name and believe this is no more than a witch hunt because I have stood up for myself against Albert. I would request that the following points be investigated for the statements that have been made, and be considered when you carry out your disciplinary:".

91 The detailed response to the statements then followed.

92 When it was put by Mr Lansman to Ms Black that it would have been fair to hold another meeting with Mr Gibbons so that she could go through the new allegations with him in person, she said that she had given him an opportunity to attend the resumed hearing on 22 July 2021, and he had said that he was not going to attend. We saw that he had done so in the email at page 329 sent at 14:56 on 19 July 2021, in which Mr Gibbons said this:

> "Hello
>
> I only received your email at 12.22pm today and read it an hour or so later therefore it was impossible to reply to you before 12 noon.
>
> I will not be taking the meeting on thurs as i am currently signed off sick and reading the lies and inaccurate statements has made it worse for me. I also believe I need to get legal advice"

93 Ms Tracey Craik, Ms Black's assistant, had responded on the same day in the email at pages 328-329, where she wrote that she was responding on behalf of Ms Black. The email continued:

> "Apologies, 12 noon was noted in the letter in error, it should have read 3pm.
>
> The hearing is planned for Thursday, this gives you 3 days to prepare for the hearing, take any advice and arrange for a representative to attend with you.
>
> Being signed off sick from work does not sign you off from attending hearings, in fact it is encouraged to help resolve any work related matters and so the hearing is currently scheduled to go ahead on Thursday.
>
> I have copied Angela in should you wish to discuss anything with her tomorrow."

94 Mr Gibbons had then sent the document at pages 331-333, which was in small, single line-spaced font. It contained a detailed response to the statements that had been sent to him containing allegations of misconduct generally rather than just on 4 June 2021 and ended with this passage, on page 333:

> "I do not know if I have answered all questions and the horrendous lies and accusations, but this whole witch hunt has knocked me sideways and made me question my many years of working at Snowbird Foods. I had always spoken with pride at working there. The lies have stripped all this from me and those I classed as not just working colleagues but also friends has been taken away through lies for whatever their reason of gain may be.
> I would like it put on record that I am not well as previously stated, on medication and under the doctor. I do not feel I am in a correct state to be defending myself and remembering dates, time etc at this moment in time. My health continues to deteriorate with the accusations and blatant lies that are being said about me.

> I would like to see clear evidence of all the accusations that have been thrown at me as I believe they do not stand strong as they are and that they will not stand up in a court of law. Also is it right to have statements with sections blackened out ?"

95 That document was not dated, and it was not clear under cover of what email it was sent, but the emails at pages 326 and 327 and the letter dated 22 July 2021 at page 330 showed that Ms Black gave Mr Gibbons an extension of time for responding. Initially, in the letter at page 330, she gave him an extension of time to 5pm on Friday 23 July 2021 and then, on request, she gave him a further extension to midday on Monday 26 July 2021.

96 Ms Black's decision that Mr Gibbons should be dismissed and the reasons given by her at that time for that decision were stated in the letter dated 27 July 2021 at pages 340-349.

The parties' submissions and the addition of a claim

97 Both parties put written submissions before us, and amplified them by oral submissions as we indicate in paragraph 50 above. During Mr Lansman's oral submissions, EJ Hyams suggested that the claimants' claims might be better advanced under section 44(1)(c) of the ERA 1996, which, so far as relevant, is in these terms:

> "(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that ... he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety."

98 We then asked Mr McDevitt whether the respondent would object to the addition of a claim of that sort, albeit after evidence had been given. EJ Hyams pointed out that it could be said to be no more than an additional label to be attached to the conduct of the respondent on which the claimants relied, so that the case law, most notably the decision of the Court of Appeal in *Abercrombie v Aga Rangemaster Ltd* [2014] ICR 209 and the decision of His Honour Judge James Tayler sitting in the Employment Appeal Tribunal in *Vaughan v Modality Partnership* [2021] ICR 535, pointed firmly in favour of permitting the amendment. However, after taking instructions, Mr McDevitt said that the respondent did not agree to the proposed amendment and objected to it on the basis that the respondent had not come to the hearing prepared to respond to claims made under section 44(1)(c).

99 In the end, because of our conclusions on the facts, we concluded that permission to amend should not be given to the claimants. That was because giving such permission would have served no purpose, since on the facts that

we found as explained in paragraph 101 below, a claim relying on section 44(1)(c) could not succeed.

Our conclusions on the claims

The claims of detrimental treatment within the meaning of section 44(1A)(b) of the ERA 1996 and related claims

100 Our factual conclusions stated in paragraphs 55-59 above were such that the claimants' claims of detrimental treatment within the meaning of section 44(1A)(b) of the ERA 1996 had to fail. That was because in the circumstances as we found them to be as stated in those paragraphs, there were not, we concluded, on 4 June 2021 "circumstances of danger which the [claimants] reasonably believed to be serious and imminent". We therefore dismissed the claimants' claims of detrimental treatment within the meaning of section 44(1A)(b) of the ERA 1996.

101 For the same reasons, i.e. given our factual conclusions stated in paragraphs 55-59 above, we concluded that there were not "circumstances connected with [the claimants'] work which [they] reasonably believed were harmful or potentially harmful to health or safety" within the meaning of section 44(1)(c) of the ERA 1996. For that reason alone, we declined to give the claimants permission to add a claim of detrimental treatment within the meaning of that paragraph.

102 Those conclusions meant that the claim of Mr Norman to have been dismissed unfairly within the meaning of section 100 of the ERA 1996 had to fail, which it did. We accordingly dismissed it.

The claims of unfair dismissal within the meaning of section 98 of the ERA 1996

(1) Was there a genuine belief that the claimants had committed (mis)conduct?

103 We approached the respondent's evidence of misconduct by the claimants otherwise than in relation to their refusals to participate in the production of Cumberland rings on 4 June 2021 with great caution. We could see that the allegations which came to light in the manner described by Mr McGovern in paragraph 78 above would, if the respondent had (through Mr Paul and/or Mr McGovern) wanted an excuse to dismiss the claimants, have been convenient for the respondent. However, after particularly careful consideration we came to the conclusion that Mr Paul and Ms Black genuinely believed that the claimants had committed the misconduct which was first indicated in the manner described in paragraph 78 above. In doing so, we took into account the evidence of Mr Paul to which we refer in paragraph 84 above as well as the oral evidence of Ms Black.

(2) What was the conduct for which the claimants were dismissed?

104 We concluded that both Mr Paul's reason or principal reason for deciding that Mr Norman should be dismissed and Ms Black's reason or principal reason for deciding that Mr Gibbons should be dismissed was the conduct which first came to light as described in paragraph 78 above, taken together with the claimants' admitted refusal to participate in the production of Cumberland rings on 4 June 2021.

(3) Was the investigation which the respondent carried out into the conduct for which the claimants were dismissed one which it was within the range of reasonable responses of a reasonable employer to carry out?

105 As with our initial consideration of the question of the real reason for the claimants' dismissals, we were initially hesitant when considering whether a fair procedure had been followed in deciding that the claimants had committed the misconduct for which they were dismissed. Ms Black's failure to do more than accept at face value the statements at pages 234-259 was, in our view, ill-judged. If we had been carrying out the investigation which she carried out, then we would have gone to the respondent's factory and interviewed at least a selection of the persons who had made those statements. However, what we would have done was not important. What was important was whether or not Ms Black's investigation into the conduct for which she decided that Mr Gibbons should be dismissed was within the range of reasonable responses of a reasonable employer. We came to the conclusion that it was within that range. That was for the following reasons.

106 Ms Black had before her much cogent evidence which was supported strongly by the statement of Ms Morton which we have set out in paragraph 46 above, about events which the claimants in part accepted as being accurately described in that statement. Those events were the refusal to participate in the production of Cumberland rings on 4 June 2021 for what we concluded were not good reasons, in circumstances which it was obvious would have been highly difficult for Ms Morton and her team to deal with. We say that because the claimants were senior managers of the respondent and they were on 4 June 2021 blatantly and for (in our judgment) no good reason refusing to do that which Mr McGovern was reasonably asking them to do and which Ms Morton and her team were quite reasonably seeking to do.

107 That conduct was notably consistent with the kind of conduct of which the claimants were accused in the statements at pages 234-259.

108 In fact, Ms Black had by then already interviewed Mr Gibbons by Teams, as we describe in paragraphs 48 and 69 above.

109 In those circumstances, we concluded that it was within the range of reasonable responses of a reasonable employer to do no more than give Mr

Gibbons an opportunity to respond in person to the allegations. Then, when he did not in terms ask for a delay to a later date so that he could respond in person but instead provided a written response to the allegations, it was in our judgment within the range of reasonable responses of a reasonable employer for Ms Black to make the decision that Mr Gibbons should be dismissed on the basis of that which was before her at that time.

110 As for the procedure followed by Mr Paul in relation to Mr Norman, that too was within the range of reasonable responses of a reasonable employer. That was because Mr Paul gave Mr Norman a proper opportunity to attend a meeting in person to discuss the allegations, and because in our judgment it was within the range of reasonable responses to conclude that Mr Norman could in practice have attended a hearing in person despite being anxious and/or depressed. In this regard, we took into account that there was (as we say in paragraph 67 above) no copy of a fit note before us, so that we were unable to conclude that the fit note stated that Mr Norman was not fit to attend a disciplinary hearing (that being different from being unable to work). Mr Norman then had a proper opportunity to respond to the allegations in writing.

(4) Were there reasonable grounds for concluding that the claimants had committed the misconduct for which they were dismissed?

111 Given the factors to which we refer in paragraphs 78, 79 and 105-110 above, we concluded (again, after very careful consideration) that there were reasonable grounds for concluding that the claimants had committed the misconduct for which they were in fact (that is, on our above findings of fact) dismissed.

112 We pause to reiterate that we made no finding of fact on the allegations: whether they were true or not was not determined by us. We merely concluded that there were reasonable grounds for concluding that they were true.

(5) Were the claimants' dismissals within the range of reasonable responses of a reasonable employer?

113 In all of the circumstances, we found that the claimants' dismissals were within the range of reasonable responses of a reasonable employer.

Conclusion on the claims of unfair dismissal

114 For all of the above reasons, the claimants' claims of unfair dismissal had to be, and were, dismissed.

Our overall conclusions

115 For all of the reasons stated above, none of the claimants' claims succeeded. They were accordingly all dismissed.

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Employment Judge Hyams

Date: 27 February 2023

Sent to the parties on:

2/3/2023

NG

For Secretary of the Tribunals